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Notes for contributors

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Foreword

This is the second edition of the International Journal of Clinical Legal Education and its contents reflect the wide and enthusiastic response we had to the first edition. Wide both in terms of geographical input and also in the variety of initiatives being developed within clinical legal education.

As a result of this and the Journal's commitment to developing communication between clinical programmes, I felt it would be useful to use the second edition to inform readers of some of the interesting developments occurring in clinical programmes and to encourage a truly international base to the journal. The Clinical Practice Profile section describes a number of clinical projects in Central Europe, Kenya and the Australian Bush. All these projects are relatively new, fast developing and the contributions contain some frank analysis of the trials and tribulations, as well as the rewards, arising from such innovative moves. As I read them I was struck by the huge range of possibilities for developing clinical legal education into all sorts of specialist areas and specialist formats largely driven by unmet need. Jeff Giddings and Barbara Hook's article describes one such unique method of delivery of legal services through the use of audio-graphic technology; unknown territory both in terms of provision of legal services and provision of legal education. As Jeff Giddings says in his article 'there has been little written about non face to face interviewing, even telephone interviewing in the lawyering skills literature'.

The specialist clinic is also the subject of our main article by Ray Watterson, Robert Cavanagh and John Boersig whose Public Interest Clinic is clearly having a significant impact not only on provision of legal services but also on the provision of justice in the state of New South Wales. The clinic handles high profile cases, utilising large teams of students to sift through immense amounts of legal and factual information. It is perhaps not surprising therefore that one of his recurring themes is the importance of 'taking the facts more seriously'. Clinical legal education remains one of the few areas in legal education which focuses on the importance of fact finding and fact evaluation.

As a common theme it seems to me that all the interesting and innovative projects described in this edition sought to develop or had already developed close working relationships with a whole range of interested and implicated people or bodies. In many cases the success of the project was very closely affected by the strength or weakness of such links. Indeed, Stephen Anagnost in his article sees the further development of clinical work in Europe as being closely linked to finding the 'right partner' for each new clinic. With this in mind I hope you will use the journal to build the links and exchange ideas.

I hope you enjoy this edition. Please let me know your views and any proposals for contributions for future editions.

Cath Sylvester
Editor

Law School Based Public Interest Advocacy: An Australian Story

Ray Watterson, Robert Cavanagh and John Boersig[1]

INTRODUCTION

This article presents a case for law schools to undertake public interest advocacy. It argues that incorporating public interest advocacy into curricula and research enhances clinical legal education and enables law schools to make a distinctive and valuable contribution to justice and law reform. The article outlines an integrated model for law school based public interest advocacy based on the experience of one of Australia's newest law schools at Newcastle in the Hunter region of New South Wales. The article then describes a recent public interest case undertaken by academics, clinicians and students at Newcastle law school, explaining their participation in the case and exploring the contributions made by the case to legal education, the correction of injustice and reform of the law.

The case, one of Australia's most controversial deaths in custody, concerned the fatal shooting on Bondi Beach in Sydney in June 1997 of French photographer Roni Levi. The article examines the shooting, its investigation by police, a coroner and an independent commission of inquiry. It analyses the flaws in these legal investigations, considers their justice implications, and outlines the legal and policing reforms achieved through the case.

The article concludes with the suggestion that changes in law school culture as well as curriculum are needed to ensure that law schools embrace public interest advocacy and other forms of clinical legal education for the future benefit of the law and its students.

1 *Ray Watterson is Associate Professor of Law in the Faculty of Law at the University of Newcastle, New South Wales, Australia. Robert Cavanagh is a trial advocate and a Senior Lecturer in the same Faculty. John Boersig is a legal practitioner, Director of the University of Newcastle Legal Centre, and also a Senior Lecturer in the Faculty. Since 1995, at the University of Newcastle Legal Centre assisted by their law students, the authors have undertaken a number of public interest cases aimed at exposing flawed investigation, correcting injustice and achieving reform. This article draws on what the authors learned, with their students, from these cases.*

WHAT SHOULD LAW SCHOOLS DO?

Late last century William Twining imagined an ideal law school, one which would provide:

> *… not only basic education and training, but also specialist training, continuing education, basic and applied research and high level consultancy and information service. The nearest analogy is the medical school attached to a teaching hospital which, inter alia, gives a high priority to clinical experience with live patients as part of an integrated process of professional formation and development.*[2]

Twining observed, somewhat ruefully, that this ideal had not been realised in any Western country. The failure to realise the ideal of law schools which integrate the study and practice of law is partly an institutional legacy. Traditionally, legal education in English speaking countries has been segmented into discrete stages, involving academic instruction at a university followed by practical legal training after law school. Education at law school has consequently often omitted or marginalised legal ethics and practical legal skills such as client interviewing and counselling, the discovery, management and proof of facts, advocacy and negotiation[4].

2 *Blackstone's Tower: The English Law School The Hamlyn Lectures, 1994, Sweet and Maxwell, p.52*

3 *According to the Australian Law Reform Commission, "since the 1960's, legal education in English speaking countries generally has been described as being 'divided into three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institutional and in-service components and (3) continuing education." Australian Law Reform Commission Managing Justice: A review of the federal civil justice system, Report No. 89, Sydney, 2000 (ALRC Managing Justice) para. 2.7 quoting a description in Weisbrot, D. Australian Lawyers Longman Cheshire Melbourne 1990, p. 124.*

4 *Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para 3.9. In this context the Commission observed that, 'properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility'. ALRC Managing Justice para. 2.85.*

Recent reports on legal education in the United States[5], the United Kingdom[6] and Australia[7] have encouraged a narrowing of the gap between what is taught in law schools and the knowledge, skills and ethics associated with legal practice. There is an increasing acknowledgment amongst legal educators and practitioners that the traditional separation of theory from practice in legal education is inadequate to the task of law, impoverishing both the education of lawyers and the delivery of legal services.[8] Increasingly also, many legal educators incorporate the study, appreciation and practice of ethics and justice, as well as the development of basic skills into their curricula.[9]

5 *The American Bar Association Task Force on Legal Education and Professional Development ('The MacCrate Report') identified core skills and 'fundamental values' for lawyers and called upon law schools to address them. The skills identified were: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counselling; negotiation; litigation and alternative dispute resolution; resolution of ethical dilemmas and administrative skills necessary to organise and manage legal work effectively. The 'fundamental values' were dedication to the service of clients; the promotion of justice, fairness, and morality, striving to improving the profession and professional self-development. Legal Education and Professional Development-An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) American Bar Association, Chicago,1992 (MacCrate Report) p.66.*

6 *The First Report on Legal Education and Training, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 ('ACLEC Report') maintained that lawyers should internalise personal and professional ethical values and standards from the earliest stages of their education and training. The Committee suggested that teaching in ethical values should extend beyond a familiarisation with professional codes of conduct and practitioner obligations to the client. In its view the legal profession owes wider social and political obligations to society as a whole, for example, in protecting the rights of minorities and promoting the welfare of the disadvantaged. The Committee believed that law students should be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the quality of life (ACLEC Report paras. 1.19-1.20). ACLEC urged that legal education and training should ensure that future lawyers fully appreciate 'the high professional and ethical standards on which our legal system and, indeed our democracy depend' and the 'essential link between law and legal practice and the preservation of fundamental democratic values' (ACLEC Report para. 1.15) . According to ACLEC, the objective of the education and training of lawyers up to the point of initial qualification should be depth of learning in areas of basic knowledge and generic skills and the development of common professional values (ACLEC Report para. 10). As an example of generic skills development, ACLEC suggested that legal research skills should extend beyond merely "finding the law". They should encompass training in taking 'a problem, often presented in non-legal terms, and through a process of investigation to provide a range of potential legal solutions, each accompanied by an analysis of its benefits and risks to the particular client". Such skills should lie at the heart of what it means to be a lawyer. para. 1.15.*

7 *The Australian Law Reform Commission has suggested that legal educators should consider the need to reorient the traditional approach to legal education which still dominates Australian legal education, of 'what lawyers need to know', around 'what lawyers need to be able to do'. The Commission has supported moves to diversify Australian legal education by the inclusion in law school curricula of practical skills such as 'training in fact finding, negotiation and facilitation skills, as well as the discrete skills, functions and ethics associated with decision making'. Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 paras 3.18 and 3.23.*

8 *For example, the reports on legal education in Canada, the United States and the United Kingdom. Respectively, Arthurs, H. Law and Learning, Report to the Social Sciences and Humanities Research Council Of Canada by the Consultative Group on Research and Education in Law, Ottawa, 1984 (the Arthurs Report); Legal Education and Professional Development-An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) American Bar Association, Chicago,1992 ('MacCrate Report'); First Report on Legal Education and Training, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 ('ACLEC').*

9 *On the jurisprudential, pedagogical and practical tendency to separate ethics and morality from law and the case for incorporating ethics into the modern law school curriculum, see Economides, K Ethical Challenges to Legal Education and Conduct, Hart Publishing, Oxford, 1998. On the positivist tendency to separate law from justice and the case for the modern law school to play a role in equipping future judges and lawyers to understand and deliver justice, see Cooper J & Trubek L. Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1997.*

Legal education has traditionally concentrated on law as rules. The study of legal reasoning at law school is confined almost entirely to reasoning about disputed questions of law, most often explored through appellate court rule making . However, as Twining has also observed, ''questions of fact deserve as much attention as questions of law'' in legal education, scholarship and legal discourse generally.[11]

Isolation of theory from practice and concentration on law as rules, limits lawyers' knowledge of law. Separation of theory from practice has contributed to the continuing failure of law teachers and legal practitioners to ''acknowledge that [they] are, in truth, members of a common profession of jurists'',[12] and to the frequent failure of legal scholars ''to see the common thread between the law of the law school and the law in its practical and social contexts''.[13] Legal realists were among the first to insist that legal theory, scholarship and teaching should move beyond exclusive attention to legal rules and doctrines.[14] Legal realism continues to provide theoretical support to bridge the gap between legal theory and practice. But it is not alone. Normative legal theorists appreciate that logical and semantic gaps in legal discourse render law uncertain both in concept and application.[15] Feminist scholars, legal sociologists and others agree that legal rules are

10 *Christopher Langdell, Dean of Harvard Law School at the end of the 19th century, is credited with devising the case method and convincing generations of law school academics that the proper subject matter of legal education and scholarship was the elucidation of legal doctrine through the study of decided cases. A snapshot of Langdell's view on legal education and scholarship is caught by the following two quotes from his Harvard Celebration Speech ((1887) 3 LQR 123-5). 'Everything you would wish to know can be obtained from printed books' and 'What qualifies a person, therefore, to teach Law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law'. As cited in Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) International Journal of Legal Education 17, 19.*

11 *Twining, W Rethinking Evidence: Exploratory Essays Basil Blackwell, Oxford, 1990.*

12 *Savage, N and Watt, G "A House of Intellect for the Profession" in Birks, P (ed) What Are Law Schools For? Pressing Problems in the Law Volume 2. Oxford University Press, 1996. p.47. In Australia in the late 80's, the Pearce Report described the relationship between the legal profession and the legal academy as 'uneasy' (Pearce, D et al Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, Australian Government Publishing Service, Canberra, 1987 ('PearceReport'). Australian Law Deans described the relationship as containing 'an element of tension' (Statement of the Australian Law Deans, Appendix 3 of the Pearce Report para 71.) At the start of a new millenium that relationship, according to the Australian Law Reform Commission, 'has not been advanced by this time, and a more consultative and respectful approach has not yet developed'. ALRC Managing Justice para 2.75. In order to advance collaboration amongst legal educators and practitioners the Commission has recommended, amongst other things, consideration of the establishment of an Australian Academy of Law. ALRC Managing Justice paras 2.115-2.128 and Recommendation 6.*

13 *Savage, N and Watt, G"A House of Intellect for the Profession" in Birks, Peter (ed) What Are*

Law Schools For? Pressing Problems in the Law Volume 2 Oxford University Press, 1996. p.47.

14 *Oliver Wendall Holmes, Justice of the United States Supreme Court and author of The Common Law Little, Brown, Boston, 1881 declared (in dogmatic counterpoint to Langdell's dogma about learning law from books) that 'the life of the Law has not been logic: it has been experience'. Oliver Wendall Holmes (1880) 16 American Law Review 253 (reviewing Langdell's casebook on contract). Holmes viewed law as predictions of what courts will decide rather than law as abstract logical deductions from general rules. Jerome Frank in Law and the Modern Mind, Anchor Books, New York, 1963 (first published 1930) and Courts on Trial, Princeton University Press, Princeton, 1949 insisted that legal teachers and scholars should pay attention to trial court decision making instead of exclusively studying appellate decisions. See also Karl Llewellyn The Bramble Bush, Ocean Publication, New York (first published 1930) , The Common Law Tradition, Little, Brown, Boston, 1960 and Jurisprudence: Realism in Theory and Practice University of Chicago Press, Chicago, 1962.*

15 *For example: Hart, HLA The Concept of Law, Oxford University Press, Oxford, 1994; Stone, Julius Precedent and Law, Butterworths, Sydney, 1985; MacCormick, N Legal Reasoning and Legal Theory, Clarendon Press, Oxford, 1994; Habermas, J Between Facts and Norms, Polity Press, Cambridge, 1996.*

inadequate to explain and predict how cases are decided.[16] Indeed, legal determinacy and indeterminacy, and the relations between law and facts are central concerns of modern jurisprudential discourse.[17] Developments in legal education and scholarship, such as those concerned to explore the theory and practice of fact investigation and adjudication in law and the working relationships between law, ethics and justice, have been especially retarded.[18]

Legal education is not only important to law students and their teachers. It plays an essential role in shaping 'legal culture', and in determining how well the legal system operates in practice.[19] Achieving systemic reform and maintaining high standards of performance in a legal system, relies on the development of a healthy professional culture that takes justice and ethical concerns seriously.[20] The development of a healthy professional culture should start at law school. Inadequate legal education is a sure foundation for inadequate legal service.[21] For example, inadequate education and training in advocacy produces poor advocates, and 'poor advocacy can prolong proceedings, reduce the quality of decision making and increase costs for clients and the courts and tribunals'.[22]

A concern identified in public inquiries and reports into legal services in Australia is that the legal profession "has not contributed as it should have to the practice of justice in Australian democracy".[23] Some commentators have argued that lawyers should take responsibility for creating institutions in which they address community concerns as a *quid pro quo* of professional

16 *For discussion of the role of legal theory in clinical legal education see Noone, MA "Australian Community Legal Centres-The University Connection' in Cooper, J and Trubek, L (es) Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1977 and Goldsmith, AJ 'An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education' (1993) 43 Journal of Legal Education 415.*

17 *Minda, G 'Jurisprudence at Century's End' (1993) 43 Journal of Legal Education 27.*

18 *Recent works which both reveal and attend to the long standing gaps in legal education and scholarship represented by the failure of law school texts and academic legal writing (including those on evidence and trial advocacy) to deal systematically with fact gathering and proof in legal process include: Binder, D A and Bergman, P Fact Investigation: From Hypothesis to Proof, West Publishing Co., St. Paul., Minn. 1984; Anderson, T & Twining, W Analysis of Evidence: How To Do Things With Facts, Weidenfeld and Nicholson, London,1991; Moore, A J, Bergman, P and Binder, Trial Advocacy: Inferences, Arguments and Trial Techniques West Publishing Co., St. Paul, Minn.,1996; Robertson, BA & Vignaux, GA Interpreting Evidence: Evaluating Forensic Science in the Courtroom John Wiley 1995; Roberts, Graham Evidence: Proof and Practice LBC Information Services, Sydney, 1998 (especially Chapters 1 &2 on evidence and proof of evidence); Burns, R P A Theory of the Trial Princeton University Press, New Jersey, 1999.*

19 *ALRC Managing Justice para 2.3. The Commission was asked to consider the significance of legal education and professional training to the legal process in the context of reform of the federal civil justice system. See ALRC Managing Justice Terms of Reference at pp. 3-6.*

20 *ALRC Managing Justice para 2.3.*

21 *As Mary McAlesse, now President of Ireland, but then, Professor of Law, Queens University, Belfast has observed: 'professional formation involves the lifelong honing of skills and deepening of knowledge. Those of us involved in professional formation know we are only putting in place a foundation stone which will be built on over a lifetime. But that foundation stone is quite different from every other stone in the edifice. Placed well it guarantees a solid structure. Placed badly it can support a structure which is not up to withstanding the pressures it will inevitably come under.' ACLEC First Report on Legal Education and Training Report of the Proceedings of the Conference, London, 8 July 1996 pp.27-34 at p. 33.*

22 *Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para 3.35.*

23 *Parker, Christine 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997) 2 Newc LR 1. Such reports include: Senate Standing Committee on Legal and Constitutional Affairs The Cost of Justice: Foundations for Reform, the Parliament of the Commonwealth of Australia, Canberra, 1993; Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System-Third Report Senate Printing Unit, Canberra 1998.*

self-regulation.[24] Others argue that improvements in the regulation and delivery of professional legal services will require 'nurturing an internal catalyst of change within the profession itself'.[25] Others have pointed to the need to encourage lawyers to undertake *pro bono* legal service and have suggested educational and other initiatives to foster the development of a *pro bono* culture in the legal profession to achieve this end.[26]

Notwithstanding the recommendations of many reports into legal education, the contentions of many academics and legal practitioners, and the teachings of many divergent schools of modern jurisprudence, many law schools continue to maintain their distance from the practice of law . Only recently have some Australian law schools become involved in the direct provision of practical legal training, mainly in the form of 'add-on' programs available after the completion of the LLB degree . Only a few have attempted to integrate practical legal skills and legal ethics within the basic law degree program .

Most Australian law schools have not only omitted practical skills from their curricula but have also failed to actively support and encourage their academic staff and students to participate directly in the legal process.[30] Many academics have made important contributions to law reform by way of submissions, and sometimes by membership of law reform agencies. Others have made significant contributions to test cases in appellate courts. Countless law school academics and students have supported community legal centres through their individual labour. Some law schools co-operate with community legal centres in the provision of client clinics that students may elect to participate in under supervision for academic credit.[31] However, most Australian law schools have not encouraged staff and student participation in legal practice as an integral part of their teaching and research programs.

24 *Parker, Stephen Islands of Civic Virtue? Lawyers and Civil Justice Reform, Inaugural Professional Lecture, Griffith University Brisbane 1996 p.42-25 and Parker, Stephen ' Competing Images of the Legal Profession: Competing Regulatory Strategies' (1997) 25 International Journal of the Sociology of Law 385-409.*

25 *Parker, Christine 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997) 2 Newc LR p.24.*

26 *The Centre for Legal Process, Law Foundation of New South Wales Future Directions for Pro Bono Legal Services in New South Wales 1998. Initiatives suggested by the Centre included, 'visible participation in pro bono work by law academics and prominent members of the legal profession, in order to provide role models for law students and junior members of the profession, ...[including] involvement in...major cases or projects', and 'the introduction of the subject of pro bono work at an early point in the law school curriculum, including the opportunity to participate in pro bono services'. Principle 9*

27 *In Australia 'practical legal training has largely been the preserve of the professions, whether delivered directly through articled clerkships (for solicitors) or pupillage programs (for barristers), or through specially designed institutional courses of instruction' ALRC Managing Justice para. 2.9 On the history of the division between academic and professional legal education see Hepple, B A 'The Renewal of the Liberal Law Degree (1996) 55 Cambridge Law Journal 470.*

28 *ALRC Managing Justice para. 2.9 providing the examples of such 'add-on' programs at Wollongong University, UTS, Queensland University of Technology, Bond University and Monash University.*

29 *Newcastle Law School is the pioneer of such integration in Australia. Flinders University has also recently integrated practical legal training courses into its undergraduate law program. The stated rational for the Flinder's step is contained in ALRC Managing Justice para. 2.112 note 142- A Stewart Submission 327.*

30 *Likewise, as Hugh Brayne has observed in relation to the United Kingdom, 'engaging students in the experience of law has not been a mainstream tradition in our law schools'. Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) International Journal of Legal Education 17.*

31 *Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para. 3.10. Examples of such co-operation are: the University of New South Wales with the Kingsford Legal Centre in Sydney; Monash University with the Springvale Legal Service in Melbourne. Murdoch University operates the Rockingham Legal Centre in Western Australia. See ALRC Managing Justice para. 5.203. See also Giddings, J 'A Circle Game: Clinical Legal Education in Australia' (1999) 10 (1) Legal Education Review 33.*

By contrast, Newcastle law school, one of Australia's most recently established law schools, 'completely integrates classroom and clinical training at the undergraduate level, effectively merging the first two stages of traditional education and obviating the need for subsequent practical legal training'.[32] Newcastle also provides for staff and student participation in legal process, including public interest advocacy.

NARROWING THE GAP BETWEEN LAW SCHOOL AND PRACTICE: THE NEWCASTLE ENDEAVOUR

> *For some years, Australian law schools have accepted that their dual mission was to provide (or contribute to, in the case of combined degrees) a broad liberal education,[33] as well as to provide a basic grounding for those entering the profession... In the United States, 'live client' clinical programs, usually focusing on community legal centre/poverty law type practice, have been widely used by law schools to supplement classroom instruction on substantive law, and to provide students with an appreciation of the nature of 'law as it is actually practised' -- including the social dimension and the ethical dilemmas which may arise. Virtually every accredited American law school operates a substantial clinical practice program, and some have a range of programs which cater for specialist interests (such as environmental law, criminal appeals, civil liberties, children, and so on).*[34] *.... In Australia, the much lower level of resources available to law schools has meant that only a handful of law schools run clinical programs -- and only the University of Newcastle allows students to undertake a fully integrated clinical degree program rather than simply an elective unit.*[35]

As 'a clinical law school', Newcastle seeks to integrate learning of the theory and practice of law.[36] Curriculum and research, people and partnerships, are the keys to integration.[37]

The critical aspects of integration at Newcastle are: the inclusion of generic skills, ethical ideals and jurisprudence in the core undergraduate law program; the creation of the University of Newcastle Legal Centre, the development of its partnerships with other legal service providers and the

32 *Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para. 3.12*

33 *ALRC Managing Justice para. 2.17 and see the Statement of Australian Law Deans, attached as Appendix 3 to the Pearce report.*

34 *ALRC Managing Justice para. 2.18*

35 *ALRC Managing Justice para. 2.19. According to the Australian Law Reform Commission 'the other law schools with elective clinical programs which involve operation of a community legal centre (and receive substantial Commonwealth funding) are the Universities of New South Wales, Monash, Murdoch and Griffith. The University of Western Australia is currently operating an experimental program, with the encouragement of the WA Supreme Court, which involves law students assisting (under supervision) with criminal appeals in cases in which legal aid is not available or insufficient. Other law schools, for resource and pedagogical reasons, have chosen to develop placement programs rather than clinical programs; for example, Wollongong and Sydney. Many law students also are volunteers with community legal centres.' ALRC Managing Justice Para 2.19 endnote 30.*

36 *The founding Dean of Newcastle Law School described its program in the following terms: 'in the past the three traditional; methods of professional legal training-theoretical learning, skills training and experiential learning-have been undertaken sequentially. In our LLB course theory and skills are taught at the same time. We have a clinical law school. Constant exposure to simulated exercises and legal practice permits students to test and extend their legal knowledge whilst developing skills ranging from legal research to negotiation and advocacy'. Rees, N 'A Clinical Law School', University of Newcastle Centre for Advancement of Learning and Teaching Newsletter, February, 1990 No. 6 p.2*

37 *The Australian Law Reform Commission recently commended Newcastle=s approach to legal education, commenting that it represented a, " good example of.... properly conceived and executed professional skills training….[which] should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety" Managing Justice: A review of the federal civil justice system, Report No. 89, Sydney, 2000, Australian Law Reform Commission para. 2.85*

integral role of the Centre and its partners in the delivery of the law school's teaching and research program; the availability of a 'professional program' as a course of study, skills development and clinical placement to law students in the undergraduate law program; the provision of opportunities for voluntary *(pro bono)* legal practice at the University of Newcastle Legal Centre for law students; and the inclusion in the elective program of applied legal subjects which emphasise skills development, including public interest advocacy.[38]

The Curriculum and Research Program

When the Faculty of Law at Newcastle was established a group of its founding academics encouraged the University to embark upon a clinical legal education program.[39] The Faculty offers two undergraduate LLB streams[40]- a degree stream (LLB) and a professional program stream (LLB/Diploma of Legal Practice). A core program is undertaken by students in both the degree and professional program streams.[41] The professional program, completed over the final two years of undergraduate study, earns students an LLB degree and a Diploma of Legal Practice and entitles them to apply for admission to legal practice without the need for further practical training. The program integrates legal learning, skills and clinical placement. Students who take this program undertake clinical placement at the University of Newcastle Legal Centre, the Legal Aid Commission or the Many Rivers Aboriginal Legal Service, and may undertake placement with a private legal firm or public law office. The professional program at Newcastle is currently the only fully integrated clinical degree program available in Australia.

Legal research at Newcastle includes clinical research involved in public interest cases. Clinical research, evolving out of academic, practitioner and student planning for and reflection upon individual cases, is a critical part of the dynamic of public interest advocacy.[42] Research enhances not only the quality of the advocacy of an individual case but also the prospects of achieving more general reform outcomes, and takes many forms.[43]

38 *For example, the subjects Forensic Analysis and Legal Practice, Public Interest Advocacy, Law Review and Advanced Legal Research and Writing.*

39 *The Faculty of Law at Newcastle, established in 1992, admitted its first students in 1993, and undertook its first public interest case in 1995 (the Leigh Leigh case, as to which see later). The school's foundation Dean, Professor Neil Rees, came with a background in clinical legal education and the development of legal centres associated with law schools and with experience as a solicitor in public interest practice. Dean Rees and his founding colleagues were instrumental in the establishment of Newcastle as 'a clinical law school'.*

40 *The Faculty offers its LLB degrees to undergraduates as part of a combined degree (at the time of writing there were six combined degrees: Arts, Science, Economics, Commerce, Business and Science (Forensic). Graduates may undertake an LLB as a stand-alone degree.*

41 *The core program, commencing with legal system and method, a 'building block' skills and techniques subject, and containing other foundation law subjects (criminal law and procedure, torts, contracts, and property law), has several related aims. These include, imparting substantive legal content, providing an introduction to essential legal concepts, principles, ethical ideals, techniques, approaches, and generic problem solving methods and techniques. Inculcating an interest in the functions of law in its various contexts and enhancing student appreciation of law through a study of jurisprudence.*

42 *As Simon Rice has observed, from an educational standpoint, clinical case research requires students to consider the impact of legal rules and provides an opportunity to consider values in law and law in society issues. Because it derives from but is not limited to legal action taken on behalf of an individual client, clinical project work can demonstrate for students the extent to which law can serve broader interests than those of the individual and its political and social impact. Rice, S A Guide to Implementing Clinical Teaching Method in the Law School Curriculum Centre for Legal Education, Sydney, 1996 pp.28-29.*

43 *These forms include written submissions to courts, tribunals, law reform agencies and other public bodies. Books and chapters in books. Research papers and theses. Articles and case-notes in law journals, including clinical law journals. Community legal education, including article and feature writing in newspapers, and participation in television documentaries and radio current affairs programs.*

Staff and Students

Upon the foundation of its law school Newcastle University formulated a recruitment profile for the school's academic staff that would support the delivery of an integrated clinical program. Staff were chosen from a mixture of academic and practical backgrounds. Some staff came from pure academic backgrounds; others had a combination of academic and practice backgrounds; others had purely legal practice backgrounds. Staff with a background of practice were encouraged to continue to practice in order to enhance the Faculty's teaching and research programs. Pure academic staff were encouraged to collaborate with those working in the clinical teaching and research programs. The inclusion of practising lawyers, both solicitors and barristers, as academic members of the law school, was an essential step in providing Newcastle's clinical program.[44] Their proven ability to practice, their skills and experience, and their knowledge of and connection to 'law jobs'[45] were essential to support the clinical program. The Faculty was founded on the policy that clinical staff of the Centre should be members of the academic staff of the law school and their distinctive teaching and research efforts should be recognised equally with those of mainstream academic staff.[46] The Faculty's core of full time teachers was complemented by part-time clinical teachers drawn from the judiciary and the profession.

Law schools are often depicted as training schools for anti-social, or at least self- interested, legal practice. They are often seen as training grounds for an elite who go on to earn enormous salaries serving commercial interests rather than engage their skills in the pursuit of justice and the public interest.[47]

44 *Those recruited to Newcastle's 'clinical law school' include former and current members of federal and state courts or tribunals, a senior criminal trial barrister, partners and solicitors in private and public law firms and government law offices such as the Director of Public Prosecutions.*

45 *In the sense employed by Karl Llewellyn and other legal realists. Llewellyn saw law as consisting not just of rules but of institutions and people carrying out 'law jobs', in which techniques and methods engaged in the application of rules are as important to the understanding and operation of law as the rules themselves. And in which values and ideals are at work, often undetected by the uninitiated, in the creation or buttressing of rules. In this context those 'uninitiated' into 'law jobs' included not just law students but the traditional academic teachers who taught them. See, for example, Llewellyn, K The Bramble Bush (1930) (1951), and The Common Law Tradition (1960).*

46 *However, equal recognition of the value of the work of clinical legal staff, in terms, for example, of tenure and promotion, remains problematic.*

47 *See Economides, K 'Cynical Legal Studies' in Cooper, J and Trubek, L (eds) Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1997. Some scholars like Harvard's Duncan Kennedy argue polemically that law schools serve as 'ideological training for willing service in the hierarchies of the corporate welfare state', Kennedy, D 'Legal Education and the Reproduction of Hierarchy' 1982 Journal of Legal Education 32. Others like Louise Trubek lament that mainstream and traditional law schools are insufficiently concerned with ethics, justice, and public interest and are dominated by a 'myopic cynical positivism' which encourages law students to focus almost exclusively on their own subjective careers. See Cooper, J and Trubek , L 'Social Values from Law School to Practice: An Introductory Essay' in Cooper J and Trubek L (eds) Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1997.*

There is a considerable body of legal educational literature and empirical research that suggests that the overall effect of law school is to inculcate cynicism about legal ideals and even to reorient students' personal values and commitment.[48] The literature contains many reports of students who come to law school with ideals of doing justice but who fail to follow their ideals through in their course choices, career choices, and, ultimately, in the attitudes and approaches they bring to their chosen legal work.[49]

Public interest advocacy at Newcastle developed, in part, in response to traditional law school practices that impart or compound legal cynicism. It engages law students to provide access to justice and encourages their deeper consideration of the relationship between law and justice. Student interest in and commitment to public interest case work at Newcastle is generous and sustained.

Partnerships with the Profession

The University of Newcastle Legal Centre has grown from seeds sown by community legal centres.[50] It shares many of the aspirations and methods of these centres. However, the Newcastle Centre holds a distinctive place in both the public interest practice of law and legal education in Australia. Established as a centerpiece of the University's undertaking to provide integrated teaching and research programs in law and practice, it is truly a law school based legal centre.

Newcastle Law School has extended and consolidated its clinical program through collaboration with the Legal Aid Commission of New South Wales and the Many Rivers Aboriginal Legal Service. Lawyers employed by the Commission and Many Rivers work alongside lawyers from the Centre to provide legal aid services to the community and act as clinical supervisors to law students who assist them with their cases.[51] Many people come to the Centre with complaints of injustice.

48 *Some of this literature is reviewed by Adrienne Stone in 'Women, Law School and Student Commitment to the Public Interest' in Cooper, J and Trubek, L (eds) Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1997 pp. 58-61. The literature includes the following: Rathjen, G `The impact of legal education on the beliefs, attitudes and values of law students' [1976] 44 Tennessee Law Review 85; Stover, R. V Making It and Breaking It. The Fate of Public Interest Commitment During Law School, Univ. of Illinois Press, Urbana, 1989; Kubey, C ' Three Years of Adjustment: Where do Your Ideals Go?' Juris Doctor December 1976 p. 34; Erlanger, H. and Klegon, D. (1978), 'Socialising Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns' (1978) 13 Law and Society Review 11; Erlanger, H, Epp, C, Cahill, M. and Haines, K. 'Law Student Idealism and Job Choice: Some New Data on an Old Question', (1996) 30A Law and Society Review, 85; Reidel, C 'Public Interest Law: A Growing Commitment: A Shrinking Market National (1996) Jurist 38; Gunier, L et al (1994) 'Becoming Gentlemen: Women's Experience at One Ivy League Law School" (1994) 143 University of Pennsylvania Law Review 1; Homer, S and Schwartz, L (1990) "Admitted but not Accepted: Outsiders Take An Inside Look at Law School" (1990) 5(1) Berkeley Women's Law Journal 31; Granfield The Making of Elite Lawyers: Visions of Law School at Harvard and Beyond Routledge, New York, 1992.*

49 *For example, the predominant answer to the question about how law school had influenced their values, in the Pearce Report's survey of Australian law graduates ,was that it made them `more cynical' (54%). This was followed by `more practical' (52%), and `more politically aware' (39%). Only 10% of graduates reported that legal education made them `more idealistic'. Pearce, D et al Australian law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission AGPS Canberra 1987, Appendix 5,195, Table 5.19 (Pearce report). As noted in ALRC Managing Justice para 2.3 note 6.*

50 *Including legal centres attached to or associated with law schools (like Fitzroy, Kingsford, Springvale) and independent centres (like, the Public Interest Advocacy Centre (PIAC), based in Sydney). See, Basten, J, Graycar, R and Neal, D 'Legal Centres in Australia (1985) 7 Law and Policy 113; Chesterman, J Poverty Law and Social Change: The Story of the Fitzroy Legal Centre, Melbourne University Press, Melbourne, 1996.*

51 *The Commission and the indigenous legal service established a collaborative legal service, research and education effort with Newcastle law school in 1996.*

Many receive assistance. However, resources are limited and its educational objectives mean that only some cases can be undertaken as public interest advocacy cases.[52]

PUBLIC INTEREST ADVOCACY AT NEWCASTLE LAW SCHOOL

Public interest advocacy is taught and practised at Newcastle law school as a form of clinical legal education.[53] At the heart of clinical legal education is a real client. It is the presence of a real client that distinguishes clinical legal education both from traditional legal education, which may often be conducted without any reference to a 'client', and from practical legal skills training, which hypothesises or simulates client situations.[54] Clinical legal education exposes students to real, factual problems requiring real solutions. As Hugh Brayne has observed, 'good judges and good lawyers use a combination of legal knowledge, analytical powers, insights, experience, and understanding of human nature to make difficult decisions in a practical and wise way.'.[55] Law students engaged in public interest advocacy gain personal experience of the impact of law on individuals. Under the collaborative guidance and supervision of academics and practitioners, students who learn by assisting others construct a foundation for personal growth towards becoming 'good lawyers'.

Public interest advocacy at Newcastle brings together a team of academics, practitioners and law students to work on individual cases that raise fundamental concerns about the administration of justice. Given the educational and research missions of the University, public interest advocacy at the law school has a number of related objectives, including encouraging student learning, inspiring research and analysis, and promoting improvements in the law.

52 *At Newcastle, cases are assessed in the light of the justice and educational objectives and values discussed in this paper. By way of comparison, at Harvard Law School, Alan Dershowitz considers the following matters when deciding whether to accept a case: 'is the case likely to raise important issues of a general nature?'; 'whether I can make effective use of my students'; 'whether my academic skills will add a special dimension to the defense'. According to Dershowitz, the O J Simpson trial in which he was involved met all these criteria and provided one additional factor. Dershowitz surmised that the Simpson case 'would become the vehicle by which a generation of Americans would learn about the law'. Dershowitz's disavowal of other factors and his reasons are worth quoting in full. According to Dershowitz, in deciding whether or not to take on a case (including the Simpson case) he does not consider a potential client's 'popularity, unpopularity, or controversial nature; his wealth or poverty; and his prospects of winning or losing. Because I am a professor with tenure, I believe I have a special responsibility to take on cases and causes that may require me to confront the powers that be-the government, the police, prosecutors, the media, the bar, even the university. The lifetime guarantee of tenure entails the responsibilities to challenge the popular and defend the unpopular'. Dershowitz, A Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System at pp 25-26, Simon & Schuster, New York, 1996. See further Dershowitz, A The Genesis of Justice Warner Books, New York, 2000 at pp. 89-92.*

53 *Important accounts of clinical legal education include: Jerome Frank 'Why Not a Clinical Lawyer School?' (1933) 81 University of Pennsylvania Law Review 907; Barnhizer, DR 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979) 30 Journal of Legal Education 67; Amsterdam, Clinical Legal Education--A 21st Century Perspective, (1984) 34 Journal of Legal Education 612 ; Campbell. S 'Blueprint for a Clinical Program' (1991) Journal of Professional Legal Education 121; Symposium 'The Many Voices of Clinical Legal Education' (1994) 1 (1) Clinical Law Review 1; Rice, S A Guide to Implementing Clinical Teaching Method in the Law School 1996 Centre for Legal Education ; Symposium 'Fifty Years of Clinical Legal Education' (1997) 64(4) Tennessee Law Review; Brayne, H, Duncan, N and Grimes, R Clinical Legal Education Blackstone Press 1998.*

54 *As Simon Rice has observed: 'it is the student participation in the complexity of the lawyer/client dynamic which offers opportunities for achieving the various clinical legal education goals and which gives the clinical method its unique character' Rice, S A Guide to Implementing Clinical Teaching Method in the Law School 1996 Centre for Legal Education p.10.*

55 *Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) International Journal of Legal Education 17, 26.*

The suitability of a case for public interest advocacy at Newcastle is assessed according to a matrix of considerations. Typically, supervisors ask whether a case is likely to: confront students with a real case of injustice which will challenge them to fashion effective legal responses; demonstrate the practical contribution which lawyers can make to fundamental democratic and legal values, including the protection of individuals and groups from the abuse of public and private power;[56] stimulate research and learning of substantive law , reinforce traditional student skills,[58] foster practical legal skills, and cultivate qualities required of 'good lawyers'[59]; and encourage students to reflect upon the moral and ethical dimensions of law and how law ought to be practised.

Students undertake public interest advocacy either as volunteers (pro bono), or on clinical placement with the Legal Centre as part of the professional program, or enrolled in "Public Interest Advocacy", an optional subject in the LLB program. Each student is engaged on an individual public interest case as part of a team, under the supervision and guidance of a clinician and an academic co-ordinator. Each student member of a public interest advocacy team engages, in different ways, with the client and with fact gathering and analysis, legal research, case-management, preparation of 'pre-trial' materials (including the formulation of case theories and issues and relevant and probative lines of examination and cross-examination), 'trial' presentation (including the formulation of opening and closing addresses and written submissions) and follow up. Some students instruct in court during a hearing, others are engaged in formulating questions as the hearing progresses, and reviewing the evidence at the end of each hearing day, and formulating final submissions.

The Cases

Public interest teams at Newcastle have undertaken a number of cases, including the Leigh Leigh case, the Eddie Murray case, the Eastman cases,[60] a justice program in East Timor,[61] and, most recently, the Roni Levi case.[62]

56 *First Report on Legal Education and Training, Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 (ACLEC Report) para 2.4*

57 *Brayne, H, Duncan, N and Grimes, R Clinical Legal Education Blackstone Press 1998 contains student feedback indicating improvement in understanding and performance in other legal subjects by students taking a clinical option.*

58 *Traditional legal teaching presents students with only hypothetical or decided cases, usually in discrete and pre-determined legal categories. By contrast, clinical method extends student knowledge and traditional skills, like extracting rules from cases, distinguishing precedents and interpreting statutes, by requiring a student 'to sift through a number of legal categories, testing knowledge of each, before being able to resolve a problem.' Rice, Simon A Guide to Implementing Clinical Teaching Method in the Law School 1996 Centre for Legal Education p.27*

59 *Including a capacity to handle conflict constructively, an ability to seek and use feedback from clients, an aptitude for clear-headed reasoning under pressure, an appreciation of other actor's standpoints, and a sense of responsibility Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) International Journal of Legal Education 17, 21-29. See also: Henderson, L 'The Dialogue of Heart and Head' (1988) 10 Cardozo Law Review 123; Watson A S 'Some Psychological Aspects of Teaching Professional Responsibility (1963) 16 Journal of Legal Education 1.*

60 *The Centre undertook two related High Court appeals on behalf of David Harold Eastman, convicted in 1995 for the murder in 1989 of the Australian Capital Territory Assistant Commissioner of Police Colin Stanley Winchester. See Re Governor, Goulburn Correctional Centre; Ex parte Eastman (1999) 73 ALJR; 165 ALR 171 (an unsuccessful High Court challenge to the legality of the trial based on a claim that the trial judge was not validly appointed); Eastman v the Queen [2000] HCA 29 (a claim, rejected 4/3 by the High Court, that the trial miscarried because Eastman was unfit to plead, instruct counsel and defend himself, because of mental illness).*

61 *The project in East Timor to train representatives of non-government organisations in war crimes investigation and evidence gathering was sponsored by the Catholic aid agency, Caritas Australia.*

62 *The work of the Centre on public interest cases has regularly drawn the attention of national, state and local media and featured in media such as, The Australian Higher Education Supplement, the Sydney Morning Herald Magazine Good Weekend, Insight (SBS Television), The 7.30 Report and Australian Story (ABC Television).*

The Centre represented Robyn and Jessie Leigh, mother and sister of Leigh Leigh, a fourteen year old Newcastle schoolgirl, sexually assaulted and murdered at a teenage beach party in November 1989. Acting upon a report prepared by the Centre on behalf of the Leigh family, the NSW Minister for Police announced in Parliament in October 1996 that the New South Wales Crime Commission would conduct a review of the police investigation into the Leigh Leigh case.[63] The Crime Commission and, subsequently, the New South Wales Police Integrity Commission, revealed significant investigative failures in the case, recommended disciplinary action in relation to the officers involved and the introduction of reforms in investigative procedures relating to serious crime.

The Centre also represented Arthur and Leila Murray, the parents of Eddie Murray, an aboriginal footballer. At the age of twenty one, Eddie was found dead, hanging in a police cell at Wee Waa, in June 1981. Eddie Murray's death was one of the cases reviewed by the Royal Commission into Aboriginal Deaths in Custody in 1987. Work over a number of years by a Newcastle public interest advocacy team resulted in the exhumation of Murray's body in 1997 by the New South Wales State Coroner. An additional autopsy revealed a previously unidentified and unexplained fracture to Murray's sternum. The Murray case was referred recently by the New South Wales government to the Police Integrity Commission and is currently under active investigation by the Commission.

The Centre is currently representing, amongst others, the families of five young women who went missing in the late 1970's and the family of a young unarmed Maori man fatally shot by police in Sydney in February 2000. The work of the Centre on missing persons lead to the establishment by the New South Wales Police Service in 1997 of its largest ever investigative strike force to re-investigate the disappearance of the young women. The disappearance of the young women is currently the subject of an inquiry by the New South Wales State Coroner.

A number of reports and submissions to courts, tribunals, government and government agencies have resulted from the work undertaken by the Centre in these public interest cases. These reports include those on: the murder of Leigh Leigh and its investigation by police;[64] the death in custody of Eddie Murray and its investigation by police and the Royal Commission into Aboriginal Deaths in Custody;[65] the unresolved disappearances of a number of missing persons in the Sydney and Hunter regions and their investigation by police ; and, most recently, the police shooting of Roni Levi and its investigation by police, the State Coroner and the Police Integrity Commission.[67] The reports have sought redress of individual injustice, exposed failures in legal fact gathering and analysis and laid the ground for more general reform.[68]

63 *The Minister told Parliament that, "Newcastle Legal Centre has worked tirelessly on this case and, for the last few months with the assistance of the NSW police, Mrs Leigh=s lawyers have painstakingly sorted the existing police evidence and the result is a 300 page report which raises some alarming questions."*

64 *Cavanagh, R, Boersig, J and Watterson, R The Murder of Leigh Leigh November 1989 - A Forensic Report (1996).*

65 *Cavanagh, R and Pitty, R Too Much Wrong - Report on the Death of Edward James Murray (1997).*

66 *Missing Persons in the Hunter Region a Submission to NSW Minister for Police (1997).*

67 *Watterson, R, Boersig, J, Cavanagh, R and Hughes, C A Very Public Death: The Police Shooting of Roni Levi Bondi Beach Saturday 28 June 1997 (1998).*

68 *The Leigh Leigh Report, the Eddie Murray Report and the Missing Persons Submission provided the bases for police, coronial and governmental reconsideration of unresolved disappearances and of deaths previously considered resolved. A Very Public Death and other submissions by the Centre relating to the shooting of Roni Levi have been the subject of public inquiry by the New South Wales Police Integrity Commission. The Levi case is discussed in detail later in this article.*

The common cause of injustice in the public interest cases conducted by the Centre is investigative failure. According to Jeremy Bentham, "the basis of justice is evidence".[69] Many cases of injustice occur because legal process fails to discover the full facts or because false facts are accepted by it as true. Justice can only be done when the facts are truly known. Correct application of the law to produce justice depends on sound and reliable fact gathering and evaluation. Not even the most rigorous examination of facts at trial, nor flawless legal analysis on appeal, can rectify flawed or inadequate pre-trial investigation of the facts.[70]

The contribution of law school based public interest advocacy to the exposure of flawed investigation, leading to systemic change in legal process is exemplified by the Levi case.

PUBLIC INTEREST ADVOCACY AND THE POLICE SHOOTING OF RONI LEVI

The Shooting and Its Investigation

French photographer Roni Levi was shot and killed on Bondi Beach by Constable Rodney Podesta and Senior Constable Anthony Dilorenzo, police officers stationed at Bondi police station, at approximately 7.30 am on Saturday morning 28 June 1997.

During the evening before his death, with the help of some friends, Levi presented at St Vincent's Public Hospital, Darlinghurst, in a confused state. Levi had no history of drug or alcohol abuse, violence or psychiatric illness.[71] He was diagnosed by doctors at St Vincent's as suffering from borderline delusional thought processes and admitted as a voluntary patient for neurological and psychiatric investigation. Before such investigation could be completed, and still apparently in a confused state, Levi left the hospital in the early hours of the Saturday morning. By some means, still unknown, Levi travelled from the hospital to his flat near Bondi beach.

Around six a.m, when his flatmate opened the front door to let him into the flat, Levi was swaying and unsteady on his feet. His flatmate asked Levi what was wrong but Levi did not respond. Instead he went to his own room, obtained a coat, and left the flat. About twenty minutes later, he returned. This time when his flatmate opened the door Levi walked into the kitchen and picked up

69 *Jeremy Bentham The Rationale of Judicial Evidence, Garland Publications, New York, 1978 (reprint of 1827 ed. published by Hunt and Clarke, London).*

70 *The Royal Commission into Aboriginal Deaths in Custody pointed out that 'in many respects the quality of coronial inquires is shaped by the quality of the initial police investigation', and made the powerful and telling observation that even rigorous examination at a coronial inquiry cannot rectify inadequate or flawed police investigation Royal Commission into Aboriginal Deaths in Custody, National Report Volume 1 para. 4.2.26.*

71 *The opening statement by Counsel Assisting the Coroner at the inquest into Levi's death contains the following description of Levi's background: 'The deceased died on 28 June 1997. He was born on 6 January 1964 at Ashcalon, Israel and was the eldest of five children. The evidence discloses that he was interested in fine arts, painting and photography when at school and that after leaving school, he went to a photographic college. He was a vegetarian, he didn't drink alcohol other than on special occasions, nor did he drink tea or coffee. He didn't smoke and he didn't, it is said, use illicit drugs. At the time of his death, he was not on any medication and he was a person who frequently meditated.'... [Those who knew him] describe Levi as, variously, 'health conscious, very energetic, gentle, quietly spoken, polite, quiet, subdued, calm, mild mannered, well mannered, caring, sensitive, someone who never was angry, never lost his temper, never raised his voice, not intimidating, nice, wouldn't have hurt a fly, not physically brave, wouldn't fight, not aggressive.'.... 'He's also described as having a sense of humour and lastly, the evidence discloses... that he was never violent nor was he known to be suicidal.' Inquest into the Death of Roni Levi, Transcript Monday 9.2.98 at pp.5-6.*

a kitchen knife. The flatmate ran outside, and shortly thereafter, to the nearby Bondi police station to alert police.[72]

A senior sergeant, Podesta, Dilorenzo and another other Bondi police officer set out to search for Levi in three separate vehicles. Podesta, Dilorenzo and the other officer spotted Levi near Bondi beach at about five past seven, and chased him down the beach and into the water. The senior sergeant did not join his men on the beach but set up a 'command post' to oversee the situation from the promenade, overlooking the beach. Not long after he set up his post, the senior sergeant was joined by a fifth Bondi officer and two officers from Paddington who had heard a call for assistance on the radio in their patrol van. These three officers joined Podesta, Dilorenzo and the other Bondi officer on the beach with Levi. At times Levi was fully immersed in the surf. At other times the police on the beach and the senior sergeant on the promenade could see that Levi was pointing the blade of the knife towards himself. When he saw that Levi might harm himself with the knife the senior sergeant on the promenade called for an ambulance. Police on the beach surrounding Levi later called for police negotiators.

After a time Levi emerged from the water on to the beach. He walked up and down the shoreline shadowed by police who at times had their pistols drawn.[73] Police repeatedly called upon Levi to drop the knife. According to police accounts they were positive but firm. According to civilian eyewitnesses they were much tougher and direct. 'Put down the knife you fucking dickhead'. And to a female jogger who inadvertently came near, 'Fuck off'.[74]

All the officers confronting Levi formed the impression that he was mentally unstable and not communicating rationally. One said that they thought that Levi 'might've lost the plot'.[75]

72 *No civilian claimed to have been threatened by Levi with the knife. The evidence of the police officers involved in the incident agreed that Levi did not directly and immediately threaten any civilian with the knife. Rather, the evidence of the police officers involved in the incident and some civilian eye witnesses is that Levi was regarded as posing a threat because he was carrying a knife which he sometimes waved, pointed or jabbed at police and which he failed to drop in face of police demands to do so.*

73 *The evidence of some of the incident police adduced at the inquest but not contained in their statements is that, after he emerged from the water, Levi's coat was at most times during the incident off his shoulders. The evidence of most civilians is to the same effect. The photographs of the incident taken by Jean Pierre Bratanoff-Firgoff support this (as to which see later).*

74 *The police evidence in this respect is directly contradicted by the testimony of one significant eye witness and thrown into doubt by the evidence of another. In a statement John William Durack SC, a civilian eye witness of the incident said that 'at one point [Levi] walked purposefully again towards the police, in a threatening fashion and I heard at least two of the police calling out in an aggressive fashion 'Drop the knife, drop the knife, you fucking deadshit' (or 'dickhead' or similar expression) as they backed away from him'. [Statement of John William Durack SC, Levi Inquest-Brief of Evidence Vol 3 at para 13.]. Durack's evidence in this respect was repeated at the inquest and was not challenged at the inquest. The evidence of Karen Anne Allison, a jogger who came close to the incident in its early stages is that one of the incident police officers told her to 'fuck off' [Statement of Karen Anne Allison, Levi Inquest- Brief of Evidence Vol 3 at para 12.] Ms. Allison's evidence on this was not seriously challenged or weakened at the inquest.*

75 *One of the officers on the beach, Constable Geoffrey Smith, gave evidence at the inquest that there was some sort of reference amongst police on the beach 'to the fact that he might've lost the plot' [Levi Inquest Transcript 4.3.98 p. 43].*

Another said he reminded him of a mentally ill patient he once had to deal with.[76] One officer called to Levi 'let's go up the beach and have a talk. No one is going to hurt you'.[77] Still Levi did not respond. Another officer attempted to strike Levi's arm to dislodge the knife with a baton. Levi started to move in a westerly direction towards the promenade. The police attempted to contain Levi by forming a semi-circle around him with their pistols drawn. The same officer again tried to strike Levi with a baton, and again missed. Levi kept advancing towards the promenade with the police surrounding him.

The police dealing with Levi were each equipped with guns. However, they had only two 'long' batons between them and they did not have capsicum spray. Police authorities had for some years been considering equipping officers with capsicum spray and replacing 'long' batons with extendable batons. Capsicum spray can be used to disable a person. 'Long' batons are cumbersome and carried in police vehicles, not as part of an officer's personal equipment. 'Long' batons were often left behind in the heat of the moment. For this reason extendable batons, lighter, portable, and designed to be worn alongside a gun on an officer's belt had been under consideration but were still not in use by the New South Wales Police Service at the time of the Bondi incident. All the officers on Bondi beach left their 'long' batons behind in their vehicles. During the incident, as an afterthought, one of the officers returned to the senior officer at the command post on the promenade and collected two batons from the five police vehicles parked there to take down on to the beach. This officer was the only officer who engaged a baton in an attempt to deal with Levi.

The senior sergeant on the promenade could communicate by radio with the officers on the beach to give advice or receive their requests for assistance and with command headquarters to obtain any additional assistance to deal with the situation. However, throughout the incident, the senior sergeant did not communicate with his officers on the beach. Police negotiators, especially trained to deal with difficult situations, were not called until 7.21 am, but were expected to arrive within minutes of that call.

Just as the officer with a baton was going in for a third attempt to dislodge the knife from Levi, Podesta and Dilorenzo fired four shots. It appears that Podesta, the most inexperienced officer facing Levi, fired first. His first shot hit Levi in the chest, his second shot hit Levi in the lower back, when Levi was facing away from him. Dilorenzo's shots hit Levi in the chest. When they fired their guns Podesta and Dilorenzo were facing Levi with their backs towards the promenade. Levi was shot about thirty metres from the promenade at about 7.30 am, some ten minutes after negotiators were first alerted by police central communications to go to Bondi beach. The whole incident lasted about thirty five to forty minutes.[78]

76 *One officer who observed Levi turn the knife on himself and squeeze it into his stomach also that Levi's eyes were 'extremely glazed and open' and commented that 'he appeared to me to be psychotic.' Statement of Senior Constable John Lewis Jones, Levi Inquest-Brief of Evidence, Vol. 4 para. 12. Another officer observed that Levi's eyes 'seemed glazed over', and commented that 'it was a similar look that I have seen in mentally ill persons I have detained previously.' Statement of Senior Constable Grant Russell Seddon, Levi Inquest-Brief of Evidence, Vol. 4 Statement para 11. Another officer gave evidence at the inquest that when dealing with Levi on the beach it had crossed his mind that Levi was suicidal [Constable Christopher John Goodman-Levi Inquest Transcript 4.3.98 p. 25]. In his statement Constable Geoffrey Smith described Levi as having 'opened his mouth, stuck his tongue out and made loud gargling noises.' [Statement of Constable Geoffrey Smith, Levi Inquest-Brief of Evidence, Vol. 4 para 8]. All officers agreed that Levi made only such 'gargling' noises and did not speak to them or utter a coherent word during the whole of the incident.*

77 *Statement of Senior Constable John Lewis Jones, Levi Inquest-Brief of Evidence, Vol. 4 para.12.*

78 *The duration of the incident measured from the time Levi's flatmate first alerted police (at some five to ten minutes before 7.00 am) until police discharged their fire arms at Levi (at about 7.30 am.)*

The police officers who witnessed Podesta and Dilorenzo fire at Levi gave estimates to the Coroner of the distance between the shooters and Levi ranging from two to three metres. Many of the thirty nine civilian eye witnesses estimated that distance to be three metres or more. A police crime scene examiner arrived on the beach within minutes of the incident. He determined the location of the shooters from discussions with one on the officers involved in the incident immediately after it had occurred and while that officer was still on the beach. He determined Levi's location from his observations of disturbed sand, Levi's blood stains in the disturbed sand and the nearby location of the knife which had been dislodged from Levi's hand after he was shot. He estimated that Podesta and Dilorenzo had been 5.2 metres from Levi when they discharged their firearms. But this estimate by the crime scene examiner was relegated to his notebook, and not included in his statement to the Coroner.

Only two of the thirty nine civilian eye witnesses described Levi as "lunging" or otherwise attacking the two officers when they shot him. But each of these witnesses had been interviewed by Bondi police officers who were close colleagues of the shooters and whose involvement in the investigation was in breach of police instructions designed to ensure the integrity of evidence collected in police investigations of police shootings.

According to Podesta and Dilorenzo, Levi lunged at them with the knife and tried to kill them. Podesta said that Levi was about one and a half to two metres away when he fired. Dilorenzo said that Levi was about a foot from his chest with the knife when he fired. Dilorenzo believed his back was, almost literally, against the wall. Both said they were concerned for the welfare of the spectators on the promenade. Both believed that Levi wanted to commit suicide by having police shoot him. These were their accounts, and the reasons they gave for firing their guns, when interviewed by police on the day of the shooting.

Unknown to police, Levi's presence on the beach attracted the attention of a photographer . The photographer took a series of still photographs of the incident, including the very moment of the fatal shooting. These photographs, published the next morning on the front page of a Sydney newspaper, were later provided to the police. However, the police involved in the shooting were unaware of the photographer's presence, and unaware that photographs of the incident had been taken when they made their statements about the shooting. The photographs were to play an important part in attracting public attention to the shooting and as evidence at the coronial inquest.

The Inquest

Robert Cavanagh, as counsel and John Boersig, as instructing solicitor, represented Roni Levi's widow, Ms Melinda Dundas, at the coronial inquiry into Levi's death in February and March 1998.[80] A student team, co-ordinated by Ray Watterson and guided and supervised by Cavanagh and Boersig, prepared material for the inquest and, subsequently, in compiling reports and submissions to the New South Wales Police Integrity Commission about the shooting and its investigation. Preparation included extensive student research into the powers, functions and procedures of the coroner and the commission.

79 *The photographer, Jean Pierre Bratanoff-Firgoff, a French professional photographer, was coincidentally taking photographs for a commercial assignment at Bondi beach at the time of the incident.*

80 *The New South Wales Legal Aid Commission provided funding and support for Ms. Dundas in relation to counsel's preparation and appearance, expert reports and some investigative work for the inquest.*

A coronial inquest serves several functions, including investigation of the cause of death, preliminary determination of any criminal responsibility, and prevention. It is the explicit preventative function, expressed through recommendations directed to reduce the likelihood of a similar death to that under inquiry, which gives the coronial inquest a unique place in the Australian legal system.[82] Preparation for the Levi inquest therefore included not only detailed analysis of the facts preceding and attending the shooting but also consideration of the implications of other inquests and inquiries into police shootings and police conduct.

The Royal Commission into the New South Wales Police Service handed down its final report six weeks before the Levi shooting.[83] The Royal Commission conducted hearings and made findings and observations in relation to the use and supply of illegal drugs by police officers stationed at Bondi police station.[84] In the light of these findings and observations, and as part of its preparation for the inquest, the Centre sought from the Crown, unsuccessfully, information relating to the backgrounds and activities of the Bondi police officers involved in the Levi shooting.[85]

The State Coroner, as required by law, and assisted by an investigation team of senior crime police, assumed responsibility for the investigation of the Levi case within hours of the shooting.[86] Significantly (and as discussed later), information uncovered subsequently by the Police Integrity Commission that Podesta and Dilorenzo were both under internal police investigation in relation to illicit drugs at the time of the shooting, was not provided to the investigating police, or to the State Coroner, when the investigation was commenced.

At the inquest, Cavanagh, as counsel for Ms Dundas, draw extensively on the preparatory work of students, to cross examine the shooting incident police, civilian witnesses, police commanders,[87] and police investigators. At the conclusion of the inquest, Cavanagh submitted that the coroner should recommend to government a number of reforms intended to improve hospital management of patients, avoid future deaths at the hands of police and improve the integrity and raise the standards of investigation of deaths in custody. The Coroner referred the shooting to the Director of Public Prosecutions,[88] and handed down a number of recommendations for reforms in the law and hospital and police procedures.[89]

81 *Coroners Act 1980 (NSW).*

82 *Waller, K Coronial Law and Practice in New South Wales, 3rd ed, 1994. pp. 7-8. See also Selby, H The Inquest Handbook, Federation Press, Sydney, 1998.*

83 *Royal Commission into the New South Wales Police Service, Final Report, May 1997.*

84 *Royal Commission into the New South Wales Police Service, Final Report, May 1997, Vol. 1 Chapter 4 para. 4.67.*

85 *At the inquest the Coroner ruled that the question of whether there was material on the police service personnel files of either officer involved in the shooting that would cause the senior investigating officer a concern in the course of his investigation was not relevant and questioning of the senior investigating police along these lines by Cavanagh was discontinued. Levi Inquest Transcript 12.2.98 pp.77-78. In his closing submissions Counsel Assisting the Coroner submitted, and the Coroner agreed that, there was 'no evidence that alcohol or drugs was involved in this matter at all.' Levi Inquest Transcript 6.3. 98 p.10.*

86 *The Coroners Act, 1980 (NSW) ss. 13A (1)(a) and 14B (1)(b) requires that a death in police custody be the subject of an inquest to be conducted by the State Coroner or a Deputy State Coroner.*

87 *Including those senior police officers responsible for the introduction of non-lethal methods of control, such as capsicum spray and extendable batons, and for police training in weapons handling*

88 *Findings of the Inquest into the Death of Roni Levi, D. W. Hand, State Coroner, Glebe, 6 March 1998.*

89 *Recommendations of the Inquest into the Death of Roni Levi, D.W. Hand, State Coroner, Glebe, 11 March, 1998.*

The Director of Public Prosecutions subsequently decided not to initiate prosecutions against the two police officers who shot Levi.[90]

The Police Integrity Commission

In part, because of concern that the decision of the Director of Public Prosecutions was undermined by the initial police investigative failure, the Centre submitted a detailed report to the Police Integrity Commission on the shooting and its subsequent investigation.[91] The report contended that important evidence and matters relating to the shooting were not considered or fully investigated by police prior to the inquest. It maintained that a series of investigative failures compromised the integrity of the shooting investigation and raised serious doubts about the thoroughness and reliability of the evidence obtained by police, produced at the inquest, and available to the Coroner and the Director of Public Prosecutions.

The report called upon the Commission to reinvestigate the shooting, investigate whether Podesta or Dilorenzo were using or involved in the supply of illicit drugs prior to the shooting, and whether they were affected by drugs or alcohol at the time of the shooting. The report also called upon the Commission to consider whether police corruption, serious misconduct or incompetence had tainted the investigation of the shooting and caused a miscarriage of justice. As the report pointed out, the officers who shot Levi would be guilty of a crime if they fired without lawful justification. Consequently, failures in the investigation of the shooting may have caused a miscarriage of justice. A miscarriage of justice may result from a failure to properly investigate or prosecute particular types of persons, whether through bias, political manipulation, corruption or incompetence.[92] Flawed police investigation, usually works against an accused person. As the report pointed out, however, in the case of a police shooting investigated by police, investigative flaws are likely to operate in favour of police shooters and to reduce their prospect of being found guilty of unlawful homicide.

Some time after the Centre provided its report to the Commission, the Commission conducted hearings into allegations that some members of the New South Wales Police service were associating with suppliers of prohibited drugs and were involved in the use and supply of prohibited drugs.[93] Senior Constable Anthony Dilorenzo and Rodney Podesta[94] were the subject of investigation and inquiry by the Commission at these hearings. At the hearings it was revealed that Podesta and Dilorenzo were the subjects of police Internal Affairs' drugs surveillance. One period of surveillance of Podesta coincided with the inquest.[95] A period of surveillance of Dilorenzo occurred shortly after the inquest.[96] The surveillance tapes, questions arising from them, and

90 *On 30 June, 1998 Mr Nicholas Cowdrey QC, the Director of Public Prosecutions ('DPP'), decided not to proceed with criminal charges against any person arising out of Roni Levi's death. He gave the following reasons. 'In my view on the evidence available the prosecution would not be able to prove beyond reasonable doubt that the officers did not act in self-defence when they fired at Mr Levi. Accordingly, in my view, there would be no reasonable prospect of conviction on any relevant charge'. Correspondence Director of Public Prosecutions to Newcastle Legal Centre, 30 June 1998.*

91 *A Very Public Death, Interim Report by the University of Newcastle Legal Centre to the NSW Police Integrity Commission relating to the Police Shooting of Roni Levi, Bondi Beach, 28 June, 1997, 23 September, 1998.*

92 *Walker, C and Starmer, K, ed. Miscarriages of Justice: A Review of Justice in Error Blackstone Press, Ltd , London, 1999 p. 36.*

93 *Police Integrity Commission Operation Saigon Phase 1, February 1999.*

94 *Rodney Podesta resigned from the New South Wales Police Service some time after the shooting and before the Commission's hearings.*

95 *Surveillance of Podesta during February 1998, included Saturday 28 February. This was a Saturday during the public sittings of the coronial inquest into the shooting.*

96 *In April 1998.*

questions arising from other aspects of police Internal Affairs Commission investigations were put to Podesta and Dilorenzo at these hearings.

Rodney Podesta confessed to drug use apparently revealed by police surveillance of him during the inquest[97] and to drug use not long before and around that time. Podesta confessed only to using and dealing in drugs in the period after the Levi shooting.[98] Podesta also confessed to participating in the supply of cocaine apparently revealed by the same police surveillance of him. Podesta was charged and convicted in relation to supplying a prohibited drug on this occasion[99] and was sentenced to four months periodic detention.[100]

At these hearings, and subsequently, Dilorenzo denied any involvement in the use or supply of illegal drugs or any other wrongdoing. However, Dilorenzo was removed from the police service pursuant to s. 181D of the Police Service Act 1900, NSW.[101] Such removal is not a dismissal from the service and has the same effect under the Act as resignation or retirement.[102]

Following a further submission by the Centre to the Commission,[103] the Commission announced[104] the commencement of further hearings into allegations concerning the involvement of Rodney Podesta and Anthony Dilorenzo in the use and supply of prohibited drugs, allegations that they were affected by drugs and/or alcohol when they shot Levi, and allegations of police corruption or misconduct in the investigation of the shooting.[105] The Commission conducted public hearings into these matters in November, 1999 and in February and March 2000 and tabled its report concerning its investigations and hearings in Parliament on 15 June, 2001.[106]

The Commission's report revealed details of the investigation of Podesta and Dilorenzo's association with illicit drug use and supply. In May 1996 the Internal Affairs Branch of the New South Wales Police Service had begun an investigation of Anthony Dilorenzo in relation to alleged improper association with drug dealers. In May 1997 Internal Affairs had commenced an investigation into Rodney Podesta's alleged use and supply of prohibited drugs and joined this investigation with that of its investigation into Anthony Dilorenzo. Both officers were still under investigation in relation to drug related allegations at the time of their shooting of Levi, however, as the Commission reported, neither officer was tested for drugs or alcohol following the incident.

97 *On Saturday 28 February 1998.*

98 *Podesta admitted to binge drinking, using a cocktail of ecstasy and cocaine and partying all night in inner city night clubs. But he insisted that 'most of the times I've taken drugs' was in the period after his father died of a protracted illness, late in 1997. He told the Commission that he no longer used illegal drugs. But he also told the Commission that, during the time that he now confessed to using drugs, he was acutely conscious of the need to conceal his involvement in drugs, especially from senior officers and other police. Transcript Police Integrity Commission Hearing Operation Saigon 23.2.99.*

99 *On Saturday 28 February 1998.*

100 *Podesta admitted obtaining 3.5 grams of cocaine on 28 February 1998 so that he could cut it, keep a gram for himself, and sell the remainder. In relation to this transaction to buy cocaine in order to supply, Podesta pleaded guilty to the charge of 'supply prohibited drug' and was sentenced to four months imprisonment to be served by way of periodic detention.*

101 *Sub-section 181D (1) of the Police Service Act 1900 (NSW) authorises the Commissioner, by order in writing, to remove a police officer from the Police Service if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct.*

102 *Sub-section 181D (8) of the Police Service Act 1900 (NSW).*

103 *Submission by the University of Newcastle Legal Centre on behalf of Ms. Melinda Dundas to the New South Wales Police Integrity Commission, 15 March 1999.*

104 *Notice of Police Integrity Commission Public Hearing and Terms of Reference, Sydney Morning Herald ,1 September, 1999.*

105 *On 29 October 1999 the Centre made a further submission to the Commission on behalf of Ms. Dundas in relation to the matters the subject of the Commission's public hearings.*

106 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001.*

The Commission found that Podesta: (i) used prohibited drugs, including cocaine and ecstasy, prior to his joining the police force; (ii) continued to regularly use cocaine and ecstasy whilst a serving police officer, between the time he joined the force in May 1995 until the time he left the force in March 1998, including the periods just prior to and after the shooting; (iii) supplied cocaine on several occasions whilst a serving police officer; and (iv) improperly associated with Mark Dilorenzo (the brother of Anthony Dilorenzo), a convicted drug supplier, whilst Podesta was a serving police officer, including in the period just prior to the shooting.[107] Based on evidence before it the Commission recommended that consideration be given to the prosecution of Podesta for suppling cocaine. The Commission added that, had Podesta not resigned from the police service, it would have recommended that consideration be given to his removal from the service, having regard to his use and supply of prohibited drugs whilst a serving police officer.

The Commission found that Anthony Dilorenzo used cocaine with Podesta on a number of occasions some months prior to the shooting and was involved in the use of prohibited drugs with another person at a time after the shooting. The Commission added that, had Dilorenzo not been dismissed from the police service because the Commissioner of Police had lost confidence in his suitability to continue as a police officer, it would have recommended that consideration be given to his removal from the service.

The Commission found that police had received information from a number of sources after the shooting alleging that Podesta and/or Dilorenzo were affected by drugs and/or alcohol the evening before the shooting. It found that some of this information had been inadequately investigated and some of it had been "effectively lost" by police investigators.[108] The Commission acknowledged that these lost investigatory opportunities supported "legitimate concerns that a proper investigation of the shooting had not been undertaken".[109]

The Commission's investigations uncovered a number of individuals able to give evidence about Podesta and Dilorenzo's activities on the evening before the shooting. However, two witnesses who may have been able to provide relevant evidence died after the shooting and before the Commission's hearings. In the result, only one witness testified to seeing Podesta apparently under the influence of drugs on the evening before the shooting.

A former girlfriend of Podesta's testified that Podesta had visited her home late that evening, that he appeared to be "high on cocaine", and that he had told her that he had been using cocaine.[110] However, Podesta's claim that he was with friends and relatives on that evening was supported by the evidence of two long standing friends and his mother. The Commission was "not comfortably satisfied that the account [of the former girlfriend of Podesta] is correct".[111]

The Commission concluded that the information that it had been able to recover or obtain, almost four years after the shooting, could not support a finding that either Podesta or Dilorenzo were affected by alcohol and/or drugs at the time of the incident.

The Commission criticised many other aspects of the investigation of the shooting. It found, for example, that no "orderly or structured control was taken of the shooting immediately after it

107 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 56.

108 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.

109 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 61.

110 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p.58.

111 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 62.

occurred [and] that there was a systemic failure to comply with the then procedures [for the investigation of a police shooting], and there was a real risk that such an important investigation may have been carried out by officers who might be perceived as not being at arm's length from Podesta and Dilorenzo".[112] The Commission concluded, however, that the deficiencies in the investigation, while serious, were not "due to corruption or misconduct, merely confusion and misunderstanding".[113]

The Commission observed that the Levi case was "a powerful example of the necessity for an effective system of drug and alcohol testing of police officers involved in critical incidents…. if both officers had been drug tested after the incident, there would be no doubts as to whether they were affected by drugs and alcohol at the time".[114] A statutory power to conduct random or targeted drug and alcohol tests of police officers had existed since January 1997, but there was no statutory power at the time of the Levi shooting requiring officers involved in critical incidents to provide samples for drug and alcohol tests and random drug testing had not been implemented.[115]

The Commission maintained that the law should allow for, and require the obtaining of, the best evidence for the purpose of drug and alcohol testing of a police officer following a critical incident. It therefore recommended that blood testing of a police officer following a critical incident be introduced. The Commission also recommended the immediate commencement of random drug testing for the New South Wales Police Service.[116] On the same day these recommendations were tabled in Parliament, the government announced that it accepted them and would introduce legislation to give effect to them.[117]

Investigative Failure in the Levi Case

The investigative failures in the Levi case, detailed in the Centre's reports and submissions to the Police Integrity Commission or revealed by the Commission's report, include the following:

- No independent government agency investigated the shooting: the investigation of the circumstances leading to and involved in the shooting was carried out by the police.
- Contrary to the Police Commissioner's instructions for the investigation of a police shooting, the investigation team included a number of police officers who were close working colleagues of the police involved in the shooting.
- The methods employed by police to gather evidence, particularly the obtaining of statements, cast serious doubt upon the reliability of that evidence. For example, contrary to standard practice for the investigation of a fatal shooting, key eye witnesses to the shooting were not interviewed. Instead, police eye witnesses were allowed to

112 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.

113 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.

114 Press Release PIC releases report on drug use in NSW Police Service, 15 June 2001.

115 The Police Legislation Further Amendment Act 1996 (NSW) amended the Police Service Act 1990 (NSW) by inserting s. 211IA, providing for random and targeted alcohol and drug testing of police

116 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. vii.

117 For a more detailed account of the Levi case see Goodsir, D Death at Bondi: Cops, Cocaine and Corruption and the Killing of Roni Levi, Pan Macmillan, Sydney, 2001.

prepare their own statements. They did this after talking to each other and to the two officers who shot Levi.[118]

– The manner in which police investigators obtained statements from civilian eye witnesses may have adversely affected the reliability of some civilian evidence. For example, some civilian eye witnesses were interviewed by Bondi police officers contrary to the Police Commissioner's Instructions.
– Media statements about the shooting made by senior police shortly after the shooting may also have affected the reliability of some of the civilian evidence.

Levi and Justice

The resources available to the State, the investigating police and the police under investigation in any inquiry into a death in custody dwarf those available to the victim.[119] Law school based public interest advocacy on behalf of Levi's widow helped to alleviate the disparity in the Levi case. Exposure of the flaws in the investigation of the shooting commenced with the initial examination and analysis of the police brief of evidence by the Newcastle public interest advocacy team. More flaws in the police investigation were exposed when police investigators were cross-examined at the inquest by Cavanagh, assisted by his student team. Deeper problems arising from the drug associations of the officers who shot Levi came to light only after the Police Integrity Commission conducted independent investigations, assisted by the information, analysis and research of the submissions made to it by the Newcastle team.

The Centre's reports and submissions and the Commission's report reveal how a flawed police investigation may compromise an inquest and the exercise of a prosecutor's discretion. As the Commission observed, the pattern of police investigative failure in the Levi case, kindled "legitimate concerns that a proper investigation of the shooting had not been undertaken".[120] However, as the Commission also observed, it did not address or was unable to satisfactorily resolve many of the questions arising from Levi's very public death in police custody.[121]

Despite the scrutiny by the Coroner, the Director of Public Prosecutions, the Commission, and the work of the public interest advocacy team on behalf of Ms Dundas, it remains the case that, as a result of the initial investigative failures on the part of the police, the truth about the Levi shooting may never be known and justice may never be done.

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118 Taylor, Jones, Seddon, Smith and Goodman were permitted to make their own statements and were not independently interviewed. Dilorenzo, Podesta, Taylor, Jones, Seddon, Smith and Goodman each had the opportunity to collude on their version of events and admitted at the inquest that they had in fact discussed the incident with each other in some way before making their statements or giving their interviews.

119 Walker, C and Starmer, K, ed. Miscarriages of Justice: A Review of Justice in Error Blackstone Press, Ltd, London, 1999 Chapter 7 Fitzpatrick, B 'Disclosure: Principles, Processes and Politics' at pp. 151-169

120 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 20001. p. 61

121 Those questions include those most fundamental to doing justice in this case. Like: why was Levi shot dead instead of being taken alive into protective custody: were the police telling the truth when they claimed that they had no choice but to take Levi's life: did they have to shoot because Levi threatened their lives; were the officers who fired the four fatal shots, one in the back, shielded by other police from the law and accountability; did the police who witnessed the shooting consciously or unconsciously mould their version of events to support their colleagues?

Law Student Participation in the Levi Case

Students contributed to the Levi case by carrying out essential investigative and legal research tasks and drew deep lessons from their contribution. Especially lessons about investigative failure and injustice which may result from it.

Over sixty Newcastle law students actively participated in the Levi case.[122] In preparation for the coronial inquest into Levi's death, students attended briefing sessions with the lawyers in charge of the case and undertook various supervised tasks of fact gathering, research and analysis. These tasks included: perusal and analysis of the police brief of evidence; analysis of media material relating to the shooting; background preparation of material for lines of cross-examination. They also included fact gathering, legal and policy research relating to, amongst other things: the jurisdiction, powers and functions of the coroner, especially the recommendations function; other inquests and inquiries into police shootings; police training and procedures in relation to the use of firearms; police training and procedures in relation to the mentally ill; hospital practices and protocols in relation to 'absconding' patients; drug and alcohol screening for police.

In preparing submissions for the Police Integrity Commission, students carried out analyses and prepared material covering a number of areas. Students carried out research and analyses into the nature of contemporary police corruption;[123] compliance by police investigators with the Police Commissioner's Instructions relating to the investigation of a death in custody and the implications of any non-compliance for the integrity of the investigation in the Levi case; the record of police investigative failure in the Levi case and its implications for coronial and prosecutorial decision making; the identification and analysis of the opportunities arising in the course of the investigation of the shooting for the police involved in the shooting to collude on their stories and the implications of any such opportunities for the reliability of the police evidence; the implications of the failure to test the officers involved in the shooting for drugs and alcohol; the record of police/media communications relating to the shooting and its implications for the proper administration of justice.[124]

A principal educational objective of student participation in the Levi case was to assist students to develop the kinds of cognitive skills necessary to undertake sound investigation and management of facts in law.[125] Much legal process is devoted to fact adjudication, where the law is clear and undisputed. Facts also underpin the exercise of discretionary judgements in law. Facts are also

122 *Some students were enrolled in the optional subject, Public Interest Advocacy, some were on clinical placement in the Professional Program, others were volunteers.*

123 *Students considered academic and official sources, including: the Report of Commissioner G E Fitzgerald of the 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct', Brisbane, Queensland, July, 1989; Report of the Inquiry into the Death of David John Gundy by Commissioner J H Wootten, Australian Government Publishing Service, 1991; and the Royal Commission into the New South Wales Police Service, Final Report, May, 1997.*

124 *Because of its sensitivity, staff, rather than students, dealt with certain confidential information relating to possible individual police drug activities.*

125 *The cognitive skills involved in fact investigation in law include those necessary to: examine facts in detail and to make all possible interpretations; identify gaps and ambiguities; place the information in context; identify and indicate priorities and relevance in factual issues; distinguish between fact and inference, and direct, circumstantial and hearsay evidence of fact; organise facts in a way which aids understanding and supports appropriate propositions of law. See First Report on Legal Education and Training, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996.*

critical in appellate rule-making. Consequently, contemporary legal educators have challenged academics in law schools to take facts more seriously.[126] 'New evidence' scholars have attempted to formulate theories and conceptual frameworks for understanding the nature, functions and practices of fact gathering and proof in legal process.[127] Despite these advances, the processes of fact-finding and evaluation remain neglected areas of legal discourse, education, and research.

Students involved in the Levi case were challenged to address and provide the most intellectually rigorous answers to a series of questions about facts and law that actually confronted the legal decision makers in the case. These decision makers included the Coroner, the Director of Public Prosecutions, the Police Integrity Commission, other lawyers and the police. Students were also encouraged to reflect on the nature and significance of these questions and the alternative answers available to them.[128]

Levi Reforms

At the conclusion of the inquest into Levi's death the coroner made a number of recommendations for reform of the law and police and hospital procedures.[129]

The Coroner recommended that all hospital policies and procedures manuals, including nursing manuals, should include a protocol dealing with all patient abscondments. He recommended that such a protocol should address, particularly, notification of the family, security and, in appropriate cases, notification of police, for abscondments which occur without any forewarning.[130] The coroner recommended a number of reforms in the law, protocols and policies relating to drug testing of police officers, the conduct of investigations of deaths in custody, and police training and resources.

The Coroner's recommendations relating to the investigation of deaths as a result of a police shooting and the background to them were as follows:[131]

126 *See, for example, Anderson, T & Twining, W Analysis of Evidence: How To Do Things With Facts Weidenfeld & Nicholson, London, 1991; Twining, W, Rethinking Evidence, Basil Blackwell, Oxford, 1990. See also Franklin, J The Science of Conjecture: Evidence and Probability Before Pascal, John Hopkins University Press (Franklin complains that law students are taught about subtle rules on the exclusion of evidence instead of how to evaluate the facts).*

127 *See, for example, Wigmore J The Science of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials, 1937; Tillers, P & Green, E D (eds) Probability and Inference in the Law of Evidence, Dordrecht, Kluwer Academic Publishers, 1988; Anderson, T & Twining, W Analysis of Evidence: How To Do Things With Facts, Weidenfeld and Nicholson, London,1991; Twining, W Rethinking Evidence: Exploratory Essays Blackwell 1990; Twining, W and Stein, A Evidence and Proof Dartmouth, Aldershot, 1992; Wells WAN Natural Logic: Judicial Proof and Objective Facts, Federation Press, Sydney, 1994; Roberts, Graham Evidence: Proof and Practice LBC Information Services, Sydney, 1998 (especially Chapters 1 &2 on evidence and proof of evidence).*

128 *Amongst other things, students were challenged to reflect upon: how is the strength of an inference to be determined; how is the net persuasive value of a mass of evidence to be assessed ; how are judgments about the probative force of different items of evidence to be combined; how does the lawyer or the trier of fact determine whether a mass of evidence, which logically supports the truth of the proposition ultimately to be proved, satisfies the applicable standard of proof; what do we mean when we say a proposition has to be proven to be more probable or not, proven by clear and convincing evidence or proven beyond reasonable doubt? Anderson, T & Twining, W Analysis of Evidence: How To Do Things With Facts, Weidenfeld and Nicholson, London,1991.*

129 *The recommendations were directed to the Minister for Health and the Minister for Police.*

130 *The coroner made this recommendation to the Minister for Health. He also recommended to the Minister for Police that the Police Service enter into discussions with the Department of Health with a view to formulating an appropriate protocol in dealing with mentally ill and disturbed persons.*

131 *Recommendations of the Inquest into the Death of Roni Levi, D.W. Hand, State Coroner, Glebe, 11 March, 1998.*

- The investigation of a police shooting should be monitored by an Assistant Commissioner or Chief Superintendent of Police.[132]
- The scene of a police shooting should be attended by an Assistant Commissioner of Police to ensure that proper investigative procedures are followed and necessary resources are provided for the investigation.[133]
- Investigators should take special care to ensure all police eyewitnesses are interviewed properly.[135]
- No police officer, other than the officer in charge of the investigation or his delegate, should make any statement to the media in relation to a police shooting resulting in a death.[135]
- Police investigators should be required to thoroughly check ERISP tapes before and after an interview.[136]

132 *According to the Police Commissioner's Instructions at the time of Levi's death investigations of deaths as a result of police shooting were to be carried out by police officers from outside the region where the incident occurred. This system sought to secure a degree of independence of the police conducting the investigation from those under investigation. The Coroner recommended that this system be maintained but strengthened by the additional requirement that such investigations be monitored by a police officer of at least the rank of Assistant Commissioner or Chief Superintendent.*

133 *In order to increase the independence of persons investigating a death resulting from a police shooting Counsel Assisting the Coroner, Mr David Cowan, advanced a recommendation that such investigation should be carried out by seconded interstate police officers in order to increase the independence of such investigators from the NSW Police Service. The Coroner declined to make this recommendation because of practical problems of implementation, which he considered might arise from its implementation. Instead, the Coroner recommended that an Officer of the rank of Assistant Commissioner or above attend the scene of any police shooting resulting in a death, to ensure that all procedures laid down in the Commissioner's Instructions are followed and that all necessary resources are immediately available to the Officer in Charge of the investigation.*

134 *The coroner recommended that special care should be taken by investigators to ensure that all key police eyewitnesses to any police shooting resulting in a death immediately be, and continue to be, separated and immediately be directed not to discuss the incident and that they be interviewed as soon as possible thereafter.*

135 *The coroner made this recommendation relating to police media relations as a safeguard against the public canvassing of what occurred in a police shooting in a manner which can affect the recollection of witnesses. Around midday on the day of the shooting the Commander of Bondi police called a press conference outside Bondi police station. The Bondi Commander told the media that Levi had lunged at police with a knife and they had to shoot him. This was the account of the shooting provided by Podesta and Dilorenzo. It was also the vital question the police had only just commenced to investigate and which was for the Coroner to decide. At the time of the press conference and its broadcast, the other police and civilian witnesses who saw the shooting had not yet provided their version of events to the investigating police. The Bondi Commander's account was widely publicised that night on television news and on the Sunday and during the following week in the print media. It was an immediate and forceful public account of the shooting by a senior police officer. It operated to publicly 'confirm' or at least reinforce Podesta's and Dilorenzo's version of events. It was capable of influencing the other police and civilian witnesses who saw it and who were yet to come forward to provide their version of events. Indeed of the thirty nine civilian eye witnesses who provided statements about the shooting to investigators only two supported the accounts of Podesta and Dilorenzo that Levi had 'lunged' at them when they fired. Each of these witnesses were interviewed by Bondi police, contrary to the Police Commissioner's Instructions. In an interview for television conducted about an hour after the shooting but not broadcast, one of these eyewitnesses, Leo Hamlin, was unable to say whether or not Levi lunged at police when they shot him. However, in his statement taken by a Bondi police officer at Bondi Police Station some days after the incident Hamlin stated that Levi had lunged at police just before they shot. Hamlin was found by the Coroner to have been influenced in his statement and evidence by the Bondi Commander's televised press conference on the day of the shooting. See Recommendations of the Inquest into the Death of Roni Levi, D.W. Hand, State Coroner, Glebe, 11 March, 1998.*

136 *The coroner made this recommendation because of his finding that in this case a problem had arisen with the recording of both sound and vision respectively of the ERISP tapes of the interviews of Constable Podesta and Senior Constable Dilorenzo*

- The Coroner's recommendations relating to drug testing and police training and resources were as follows:
- Legislation should be amended to provide for police officers involved in a fatal shooting to be mandatorily alcohol/drug tested as soon as possible following such an incident.[137]
- Police training in dealing with mentally ill persons should be reviewed and constantly updated and reinforced with police officers.[138]
- Police service proposals to introduce capsicum spray and extendable batons be expedited.[139]

Many of the coronial recommendations in the Levi case have been implemented. Reforms have been introduced to the hospital and police management of situations involving people who may be mentally ill.[140] Legislation now provides for the mandatory drug and alcohol testing of police officers involved in fatal shootings.[141] The New South Wales Police Service now equips its officers with capsicum spray[142] and extendable batons.[143] New guidelines regulate the conduct of police investigations of deaths in custody.[144] As previously noted, the Police Integrity Commission, seeking to ensure that the law obtains the best evidence from the drug and alcohol testing of a

137 *The coroner described this as a 'strong' recommendation. In making this recommendation the Coroner commented that mandatory alcohol/drug testing following a police shooting would be an important form of protection for police officers in a situation where allegations concerning the use of drugs or alcohol are made.*

138 *The coroner made this recommendation after expressing the view that the events that occurred on Bondi Beach highlighted the need for police training in dealing with mentally ill persons to be reviewed and constantly updated and reinforced with police officers.*

139 *Having heard evidence that the Police Service had considered the introduction of capsicum sprays and extendable batons and proposed to do so, the coroner commended these proposals and recommended that their implementation be expedited.*

140 *A Memorandum of Understanding between the NSW Police Service and the NSW Department of Health, 11 August 1998, establishes a new framework for the management of situations involving police and health staff and persons who may have a mental illness.*

141 *On 23 June 1998 the Police Service Amendment (Alcohol and Drug Testing) Act 1998 No 40, NSW came into effect in New South Wales. The new legislation provides for mandatory alcohol and drug testing of police officers directly involved in an incident in which a person is killed or seriously injured as a result of the discharge of a firearm by a police officer.*

142 *At the inquest in March 1998 the then Head of School of Operational Safety and Tactics at the NSW Police Academy, Chief Inspector Thomas William Lupton, gave evidence that the use of capsicum spray had been under consideration by the NSW Police Service for some three years prior to 1998. [Levi Inquest Transcript 5.3.98 p. 28].*

143 *At the Police Integrity Commission, Chief Inspector Lupton gave evidence that since June 1997 extendable batons had been incrementally introduced into the service at a local level. According to Lupton ,the reason the extendable baton was given 'very real consideration' by the Service for it introduction was based on what occurred in the Levi shooting. [Transcript of Evidence Police Integrity Commission Hearing Operation Saigon Phase 3 1.3.2000 p.479] From this incident where several officers had confronted a person with a knife the Service had come to clearly appreciate the need for officers to be personally equipped with batons. If each of the officers in the Levi case had to hand, as part of their personal equipment supply, an extendable baton, their training would have prepared them to resolve the situation by the co-ordinated, multiple use of their batons as a real possibility. [Transcript of Evidence Police Integrity Commission Hearing Operation Saigon Phase 3 1.3.2000 p.479] According to Lupton, the advantage of the expandable baton in comparison to the baton in use at the time of the Levi incident was that, it collapses neatly, is comfortable to wear and is carried on the belt at all times. As Lupton explained to the Police Integrity Commission in the context of the Levi shooting the advantage of the extendable baton over the long baton was that 'on exit from the vehicle, in the heat of the moment, at least, the baton went with the Constable rather than be left in the vehicle.' Lupton added that in the Levi case "it may well have been a better option in this situation had there been more than one or two batons there". [Transcript of Police Integrity Commission Hearing Operation Saigon Phase 3 Wednesday 1.3.20000 p.498]*

144 *The New South Wales Commissioner of Police has issued new Guidelines for the Investigation and Review of Deaths/Serious Injuries in Custody for the New South Wales Police Service. The new guidelines incorporate and seek to give effect to the coroner's recommendations relating to the conduct of police investigations of police shootings.*

police officer following a critical incident recommended the introduction of blood testing of a police officers following a critical incident. The Commission also recommended the immediate commencement of random drug testing for the New South Wales Police Service. Each of these recommendations was accepted and acted upon by government.

However, the Levi case has highlighted the need for further and deeper structural and institutional reforms of the criminal and civil justice systems in New South Wales. These reforms are still outstanding. They include an overhaul of the State Coroner's Office and the substitution of an independent agency for the police in future investigations of deaths in custody.

The coronial system in New South Wales has been described as, "the proverbial poor relation in the administration of justice in NSW".[145] There have been many calls for a major overhaul of the coronial system; to upgrade the status and resources of the Coroner's office, to improve its fact finding capacity, to provide greater access to and assistance for relatives of victims, to reform the coroner's powers and procedures to give greater emphasis and efficacy to the preventative role of an inquest and improve monitoring and implementation of coronial recommendations.[146] At least one commentator has drawn attention to the absence from the coronial system of mechanisms for independent or public interest representation in cases raising issues of major public concern.[147]

The Levi case highlights the limitations of current coronial practice and underscores the need for a systemic overhaul of the New South Wales Coroner's Office. A modern coronial system needs to discharge its investigative, preventative and educative functions to the highest standards. This requires the assembly of an independent specialist team of legal, medical, police and scientific investigators under the guidance and direction of a State Coroner with the status of a Supreme Court judge. Only such a specialised and autonomous institution, properly resourced in terms of skills and infrastructure, is able to provide a fair and adequate, thorough and caring community response to questionable death. A response which will truly "speak for the dead to protect the living".[148]

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145 Hogan, M "Towards a New South Wales Coronial System for the Nineties" (1991) 2(3) Current Issues in Criminal Justice 75 at p. 77 and p.78. It may be, for example, that poor resources and support accounts, at least in part, for the lengthy delays that have attended a series of 'high profile' inquests in New South Wales, including the inquests in relation to Thredbo and the Sydney/ Hobart Yacht race.

146 Selby, H The Inquest Handbook, Federation Press, Sydney, 1998.

147 Hogan, M "Towards a New South Wales Coronial System for the Nineties" (1991) 2(3) Current Issues in Criminal Justice 75 at p. 79. Hogan argues that the imperative for those closely connected with death to deny culpability is strong. Positing the need for a form of amicus curiae procedure in inquests, Hogan argues that unravelling the unusual circumstances of death occurring in a public institution demands more than the choice offered by the competing versions advanced by those directly interested. 'The representation of the public interest is inadequate. Coroners come from a context that is not usually investigative or inquisitorial. The judicial role in local courts is a passive recipient and adjudicator of evidence presented by competing parties……In all cases, too much responsibility to represent interests other than those of the individuals or agencies involved in the death falls on the existence, willingness and resources of relatives of the deceased. This is too great a burden.'

148 The Ontario Law Reform Commission has expressed the view that an inquest should serve three primary functions: (i) as a means for public ascertainment of acts relating to deaths, (ii) as a means for formally focussing community attention and initiating community response to preventable deaths, and (iii) as a means for satisfying the community that the circumstances surrounding the death of no one of its members will be overlooked, concealed or ignored. See Bennett, RC Deputy Chief Coroner Ontario "The Changing Role of the Coroner" 1978 .

In routine coronial inquests, investigations are usually carried out by the police. The police also prepare the brief for the inquest, assist the coroner and secure the attendance of witnesses. In police custody and police shooting cases investigations are usually supervised by counsel assisting, instructed by the Crown Solicitors' office.

Roni Levi met a very public death at the hands of police, a death witnessed by the media and scores of civilians. The Levi case calls into question the professionalism and integrity of police investigative methods, and the effectiveness of coronial superintendence of police investigators attached to the police service. The police investigation of the Levi shooting, the recommendations made by the coroner relating to such investigations, and the report of the Police Integrity Commission, combine to emphasise the need for more fundamental reforms in the investigation of deaths in custody.

The Royal Commission into the New South Wales Police Service recommended the establishment of a new agency, external to and independent of the police service "with a specific focus upon the investigation of serious police misconduct and corruption"[149]

That agency has been established as the Police Integrity Commission.[150] The Royal Commission proposed that this new independent agency be responsible for the investigation of a special category of complaints about police matters, namely, 'serious misconduct and corruption',[151] which should include, "matters in which it is unlikely that there will be public confidence in an internal police investigation (for example, where the complaint relates to death or serious injury in police custody)."[152] The latter recommendation has not been implemented. The Levi case underscores the need for government to implement the Royal Commission's recommendation for the investigation of complaints about deaths in custody to be undertaken, not by police, but by an independent agency such as the Police Integrity Commission and to consider transferring the primary responsibility for the investigation of all future deaths in custody from the police to an independent agency such as the Police Integrity Commission.

CONCLUSION

The Levi case illustrates the educational, justice and reformist role and value of law school based public interest advocacy. However, law school based public interest advocacy is unlikely to develop and contribute to justice and learning about law unless it becomes a part of the teaching and research culture of law schools. Until accepted by the academic system, public interest advocacy will never effectively serve justice, produce legal change and contribute to a better understanding of law itself. The potential for collaboration between law students, academics and practitioners to contribute to the public good is enormous. The future of law school based public interest advocacy will depend, however, upon greater preparedness to take it on, greater recognition of its worth and greater support for its endeavour.

At the start of the 21st century, Newcastle Law School is the only clinical law school in Australia with an integrated approach to clinical legal education. Others are moving to include clinical legal

149 Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter 5 para 5.29.

150 The Police Integrity Commission Act, 1996 (NSW).

151 Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter 5 para 5.54

152 Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter para 5.58

education in their curriculum and there are signs that public interest advocacy and other forms of clinical legal education will move from being fringe dwellers and take a real place in the Antipodean law school of the twenty-first century.

Perhaps the clearest signpost to the future is that placed recently by the Australian Law Reform Commission. The Commission's recommendations included those aimed at encouraging an emphasis in Australian legal education upon legal ethics and high order professional skills (without derogating from the responsibility law schools have to provide students with a grounding in substantive law); a national discipline review and the establishment of an Australian Academy of Law. A national discipline review of legal education in Australia and the establishment of an Australian Academy of Law, as envisaged by the Commission, might be expected to provide foundation and support for the future of clinical legal education in Australia.

However, Australian law schools, like their counterparts throughout the world, will need to change their culture as well as their curriculum to ensure that public interest advocacy and other forms of clinical legal education develop for the public benefit and for that of the law and its students. William Twining imagined an ideal law school as one, which "gives a high priority to clinical experience".[156] Anthony Amsterdam[157] and, more recently, the Australian Law Reform Commission, have argued that the law school of the 21st century should move away from "a solitary preoccupation with the detailed content of numerous bodies of substantive law"[158] and more effectively integrate clinical legal education and other forms of "properly conceived and executed professional skills training" into their curricula.[159] To do so law schools will need to confine to history Langdell's 19th Century catechism for law students and their teachers that "everything you would wish to know can be obtained from printed books".[160] Law schools will need to take more seriously the 20th Century pedagogy of jurists like Twining and Amsterdam, in order to find a proper place for "learning from the experience of practising law"[161] in the new millennium.

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153 *ALRC Managing Justice Chapter 2 pp. 113-202, especially para 2.77.*

154 *A national discipline review of legal education which the commission envisaged should consider matters like: the balance in law school curricula between liberal and professional education; the teaching of professional skills (including legal ethics and professional responsibility), and the mounting of clinical programs (including fostering pro bono partnerships and other collaborations between law schools and legal practitioners); the location of practical legal training programs in law schools; and the resource base for law schools and law libraries.*

155 *The Commission suggested the establishment of an Academy of Law to promote a more active collegial relationship among judges, lawyers, legal academics and law students, and 'to facilitate effective intellectual interchange of discussion and research of issues of concern, and nurture coalitions of interest' Including a coalition of those academics, judges, practitioners, and law students who wish to encourage active and systematic participation of jurists and law students in community legal services and clinical legal education programs'. ALRC Managing Justice paras. 2.115-2.128.*

156 *Blackstone's Tower: The English Law School The Hamlyn Lectures, 1994, Sweet and Maxwell, p.52*

157 *Amsterdam, A 'Clinical Legal Education--A 21st Century Perspective', (1984) 34 J. Legal Educ. 612.*

158 *ALRC Managing Justice para.2.82. As the ALRC notes this is essentially the position taken by the `Priestley 11' requirements.*

159 *To explain the notion of 'properly conceived and executed professional skills training' in the context of undergraduate law school education we adopt the following description of the ALRC. '[P]roperly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility. ALRC Managing Justice para. 2.85*

160 *Christopher Langdell, Harvard Celebration speech (1887) 3 LQR 123-5 and see before at footnote 14.*

161 *Amsterdam, A 'Clinical Legal Education--A 21st Century Perspective', (1984) 34 J. Legal Educ. 612/613.*

Clinical Practice Profile

It is intended that the journal will provide a channel for communication between those involved and interested in clinical legal education across the world. Given the huge diversity of clinical projects the aim of this section is to provide a place for descriptive pieces concentrating on the development and practice of law clinics in different countries, areas or institutions.

The first edition of the journal generated interest from many different countries and the following pieces reflect this range of interest. We welcome descriptive pieces from other institutions for future editions.

Promoting Refugee Law as a Means of Challenging the Status Quo at University Level Education In Europe: The Role of the Refugee Law Clinic

Stephan Anagnost[1]

The purpose of this paper is to provide a look into the state of the art of clinical legal education at select European universities, using refugee law clinics as a model.

In addition, this article will look into the work to date at refugee law clinics in the Central European and Baltic States (CEBS) and Western Europe and their prospects for the future.

Finally, it is the purpose of this article to explore a number of the trans-Atlantic initiatives between legal-aid and legal clinic programs.

1 *The author , Director of Legal Aid – Legal Clinics (developing human rights, migration and asylum related training tools, legal aid and protection solutions: www.la-lc.org), is a lecturer on human rights and protection issues. He currently serves as the Human Rights Co-ordinator of the Organisation for Security and Co-operation in Europe Mission in Kosovo (OSCEMIK) and has served as the United Nations High Commissioner for Refugees Project manager of the Phare Horizontal Program towards Asylum System development (PHA). The opinions in this article do not necessarily reflect those of the OSCE or the United Nations.*

1. THE CONTEXT: LEGAL AID FOR ASYLUM SEEKERS AND REFUGEES IN EUROPE TODAY

Legal aid for asylum seekers and refugees remains a major challenge in the CEBS and Western Europe. Affordable legal aid that is both accessible and of high quality is being provided by a select few inter-, non- and governmental agencies, but it is often not enough.[2] Resources for the protection of refugees such as capacity, funds and time are scarce commodities throughout the region and they are often expended without being replenished.

Accession to the EU,[3] in particular the implementation of the EU's 1995 Resolution on Minimum Guarantees for Asylum Procedures,[4] has brought the question of legal aid for asylum seekers and refugees to the forefront of the discussion.[5] The development of high quality, low cost legal aid structures remains a low priority.

1.1 Developing protection systems

The majority of CEBS are currently "transit countries"; states that are normally traveled through by asylum seekers towards their intended country of asylum. Asylum applications remain below that of the average for European Union Member States, for example, in some CEBS over 40% of all asylum applicants leave the asylum procedure. In others there are no recognized refugees. These are trends that are expected to change as the CEBS move closer towards membership of the European Union.

States are obligated to provide forms of legal aid to asylum seekers and refugees but in most States the form of legal aid is not specified nor is the level of qualification of the aid provider. In many cases funding for legal aid is not guaranteed by the State. These issues will be discussed in more detail below.

1.2 Protection providers

In the CEBS therefore, the responsibility for providing this legal aid ultimately falls on the shoulders of the primary care giver; the asylum and refugee attorney. It is the asylum and refugee attorney who spends the extra hours researching each case and reviewing the country of origin information and the rationale behind a negative decision. This is a time-consuming process undertaken by someone who normally has an additional caseload. Furthermore, the typical asylum and refugee attorney in the CEBS faces sometimes severe earnings discrepancies compared with attorneys in other fields. The current economic situation in the CEBS dictates a number of seemingly contradictory priorities.

Funding such a necessary process has been taken on in part by a number of CEBS governments, but again, economic realities have placed limits on the extent to which a State can effectively provide such legal aid. Non governmental organisations (NGOs) have filled this gap, taking on elements of legal aid and social support for asylum seekers and refugees.

2 *Funding for legal aid in the CEBS comes mainly from UNHCR.*

3 *Which includes the implementation of the elements of the EU acquis on asylum.*

4 *Paragraph 13.2 of the EU MG stipulates the right of an asylum seeker to legal aid during the procedure.*

5 *The 1999-2000 Phare Horizontal Program Asylum (PHA), one of the many accession tools, has as a focus the improvement of legal aid structures and capacities in the CEBS. During the course of the PHA the legal aid structures were analyzed and it became clear that many State were unaware of their obligations to provide legal aid.*

NGOs, with UNHCR support, shoulder the bulk of the protection work. A number of networks exist to provide additional support[6] but funding remains the greatest barrier to the continued provision of quality legal aid.[7]

1.3 Scarce protection resources and limited capacities

The largest contributor of "protection resources" towards legal aid is UNHCR, whose offices in the CEBS provide the majority of the direct or indirect financial and/or other support.[8] UNHCR, however, will not maintain this level of support indefinitely, so other protection sources need to be found.[9]

The EU and EU Member States have only begun to recognize the need for increased investment in legal aid structures for the CEBS[10]. Current resource providers are shifting their focus and at the present moment the budgets of the CEBS do not provide substantial support for legal aid.[11] An interim solution will need to be found until additional resources can be found and States' budgets effectively reflect their obligation to provide legal aid.

Different measures have been undertaken by a number of actors in order to increase the capacity of the CEBS regarding the provision of legal aid for asylum seekers and refugees. One such approach, following the model offered by a number of North American universities, utilizes a bountiful resource that largely remains overlooked and untapped in the CEBS: university law students.

2. THE ROLE OF REFUGEE LAW CLINICS

Refugee law clinics (or simply "clinics" as they are known) represent a cost effective way to provide high quality legal aid to asylum seekers and refugees.[12] They are based on the model offered in many North American universities where law students study the theoretical elements of domestic and international refugee law and apply this theory in practice through protection work as a legal aid assistants/ex-terns under the supervision of an attorney or lawyer working with "live clients": asylum seekers and refugees. This allows students to provide direct legal aid to asylum seekers and refugees or support services to NGOs, attorneys and lawyers who provide legal aid and increases the capacity and efficiency of domestic protection resources.[13]

6 *The Asylum Rights Support Initiative (ARSI) is a legal aid network including Austrian, Bulgarian, Czech, Hungarian, Lithuanian, Romanian, Slovak and Slovene NGOs. The European Council for Refugees and Exiles (ECRE), and umbrella organization made up of EU NGOs, began a CEBS forum known as CEFRAN which has been dormant since 1998. ECRE also provides occasional training through its legal network (ELENA).*

7 *State support is also not forthcoming, see below.*

8 *UNHCR maintains offices in each CEBS.*

9 *Since 1997 UNHCR has encouraged legal aid providers to begin to diversify their funding base, sending joint proposals to the EU Odysseus, EIDHR and ERF programs for consideration.*

10 *In contrast the EU and EU Member States combined have invested over 20 million Euro towards the development of border regimes.*

11 *Individual State legal aid providers and ARSI partners have submitted applications for funding to the Odysseus and EIDHR programs respectively.*

12 *For a more comprehensive look at clinical legal education see Aubrey McCutcheon, "University Legal Aid Clinics: A Growing International Presence with Manifold Benefits," Journal of Legal Education 58 (1998).*

13 *In addition to providing free legal assistance, many clinics monitor conditions at refugee centers and detention centers, report on the living conditions of Roma communities, and provide a year-long training in human rights to secondary school students. Others have been active in organizing conferences on legal education for universities in the CEBS.*

2.1 Clinics as protection and education

Working side-by-side with a practicing asylum lawyers also exposes the student to the day-to-day difficulties which the average attorney faces, consequently sharing with the attorney the satisfaction one receives by providing basic and more sophisticated humanitarian protection. The support provided to the asylum seeker or refugee by the student also shows a certain degree of respect and dignity towards a human being whose life has been threatened, who has been forced to flee his or her country and who is faced with the daunting task of accepting these experiences and starting over. Such support is priceless, such an opportunity unique.

After an intensive and comprehensive theoretical course on national and international aspects of refugee and asylum law, students, supervised by a qualified and recognized attorney, are introduced to an asylum seeker, "client", and the specifics of his or her case. Students may be expected to interview the client, research the facts of the case including the relevant country of origin information and the preliminary decision of the first instance, find an interpreter, prepare the briefing notes and case file, or perform any number of other tasks which go into the preparation of an asylum application or appeal. In many clinics the student assists the asylum and refugee attorney either directly or indirectly as he or she prepares the case.

In addition to encouraging good humanitarian attitudes,[14] enhancing the student's protection interest and strengthening necessary lawyering skills, this combination of theory and practice gives the participating student a complete overview of the national protection scheme and domestic asylum system[15] (legislation, actors, practice) and further provides insight into the complex and demanding field of refugee law.

2.2 Some benchmarks

Clinics need to be fully associated with a university, its law faculty and board of study and should strive to provide high quality, low cost legal aid to asylum seekers and refugees. In addition a clinic should be run by a manager, supervising lawyer and university professor who take ownership for the clinic. There should be active student support and enrollment. The clinic should be a fixed element in the law school curricula, it should have reasonable access to a client base, identified sources of funding and receive active support from NGOs, law firms and other protection organizations.

2.3 Comparisons…

Clinics in North America supplement or complement domestic protection and legal aid structures (the oldest is over twenty years old). They are supported by active and well endowed university structures, established NGOs, well trained professors, lawyers with decades of refugee law experience and active, dedicated students. They are also properly organized and managed in a similar way to a law office. It is no wonder that UNHCR conserves its protection resources in North America and plays more the role of monitor in these States. The quality of service provided has not been questioned to date.

14 *For example during the humanitarian evacuation of Kosovar refugees to Poland, the Jagiellonian University human rights clinic assisted by briefing Kosovars wishing to voluntarily return concerning the situation in Kosovo, as well as the legal ramifications should they choose to remain in Poland.*

15 *In fact, during 1998, a clinic in Poland was responsible for successfully supporting two precedence-setting cases related to asylum seekers.*

In the CEBS and CIS clinics are new actors on the scene (Jagiellonian University human rights clinic in Cracow at three years is the oldest). Since 1997 Cracow has been joined by Warsaw as the only other refugee law clinic in Poland, Budapest (with two ELTE & KLTE), Györ and Debrecen have developed in Hungary, Prague (Charles University) in the Czech Republic, Latvia University in Riga, Concordia International University in Tallinn Estonia, Moldova State University in Chisinau and a number of other developing legal aid and refugee law programs in the region, too young to be yet determined as clinics.

These clinics lack the well endowed university structures, established NGOs and professors and lawyers with decades of refugee law experience that their North American counterparts have.[16] As mentioned above standards for legal aid do not exist. In general clinics are not poorly managed but they simply lack skilled, well trained managers. They do have committed and dedicated professors, students and lawyers.

Clinics have been praised by national decision takers and UNHCR offices for their attention to detail and high quality.[17] One remaining concern is that without basic standards unguided clinics run the risk of taking cases which fall out of the scope of the clinic, thus bringing non-refugees into the asylum procedure.

2.4 …and cooperation

An interesting fusion of North American and CEBS legal aid providers has developed.[18] Concerned with the state of affairs regarding legal aid in the CEBS, legal aid and university representatives from both regions met in two refugee law clinic working seminars.[20] The seminars have focused on developing a set of legal aid provision and management standards as well as to draft a model refugee law course curriculum and resource package.[21] The result of these developments will be introduced in the second half of 2000[22] and further clinic development is planned for early 2001 in the EU and CIS.

2.5 Maintaining the protection interest

UNHCR's protection interest is its core and lifeblood. Regarding legal aid for asylum seekers it would be difficult to find a national context worldwide where UNHCR does not play some role, be it as an element of the national status determination procedure, training of officials and/or legal aid providers, or as a monitor of the quality of aid and decisions taken.

Quality is a concern, cost is an issue. An overcrowded national legal aid structure reduces quality and raises costs, therefore streamlining is important. Low quality legal aid will lead to poor decision taking, asylum seekers may be sent back to situations of persecution, remain in detention

16 *For an overview of the refugee law clinic experience in North America see Richard Wilson, "Clinical Legal Education for Human Rights Advocates," Human Rights Education in the Twenty-First Century (1997).*

17 *The high quality of the appeals drafted by students in Hungary and Poland has done much to dispel the initial skepticism exhibited by the Ministry of Interior toward the students.*

18 *These meetings have been sponsored by UNHCR and the Constitutional and Legal Policy Institute (COLPI), a member of the Soros network.*

19 *Western European actors were also invited but did not attend.*

20 *Both seminars took place in Cracow, hosted in part by the Jagiellonian clinic, COLPI and UNHCR.*

21 *The Hungarian Helsinki Committee, the Czech NGO OPU, the Lawyers Committee for Human Rights, Catholic Charities and UNHCR are working on the set of standards.*

or otherwise be placed in situations where the dignity of the individual is compromised. Unguided legal aid, from any provider, is a grave mistake. Therefore, as a protection solution, clinics fall within the direct protection interest of UNHCR to guarantee high quality, low cost legal aid.

The future development of the protection interest of States and other actors will depend on the extent to which they have been effectively exposed to refugee law and asylum culture. Poorly structured this will have negative ramifications in the decision taking process, the provision of legal aid and integration of refugees.

As a means of advancing refugee law and asylum culture, clinics place refugee law courses in the yearly course selection and curricula of the host university. This provides an opportunity to reach a large audience with minimal investment. Furthermore, in keeping with UNHCR's advancement of refugee law and asylum culture policy, clinics fall within the scope of UNHCR's Executive Committee Conclusions number 51 "…underlining the need to develop practical applications of refugee law and principles and the importance of training courses in refugee law and protection…".[23]

2.6 Complimentarity of the clinics

As a legal aid solution the clinics are an inexpensive complement to existing legal aid structures. Clinics provide their service for free or for a minimal fee and have only the fixed costs that are common in most NGOs and law offices. As a long term legal aid solution, clinics train and integrate the next generation of asylum system practitioners[24] at a fraction of the price were this training to take place at the workforce level.[25]

The activities of the refugee law clinics have shown that with relatively little money, a credible legal assistance program can be developed, which can serve to provide a boost to badly needed legal assistance in the short-term, and at the same time, ensure that there is a systematic development of skills and competencies of potential actors in their respective asylum systems on a long term basis.

3. POINTS TO CONSIDER

Clinical legal education, while not completely foreign in Europe, is clearly a new frontier. In some universities the concept of the clinic has been accepted, in others there is an active effort to stall its progress. There are a number of reasons for the current state of affairs and this paper will address them below.

3.1 Resistance to clinics

That some solid refugee law clinic models exist points to a certain degree of focussed success stories. The concept has on the whole been resisted by universities, professors and the legal aid community that clinics seek to support. This resistance developed for a number of reasons:

22 *In the form of a Regional Seminar hosted by the Hungarian Helsinki Committee, COLPI and UNHCR.*

23 *1988 Executive Committee 39th Session No. 51 "Promotion and Dissemination of Refugee Law"*

24 *The students who took part in the clinics have gone on to intern inter alia at the Council of Europe's Directorate of Legal Affairs Ad Hoc Committee on Asylum, Refugees, and Stateless Persons; Foreign Ministries; UNDP; and UNHCR.*

25 *At the current rate every dollar invested in training one decision taker on the basics of the refugee definition would be equal to training three clinic students in the same topic.*

- **Timing:** Clinics arrived on the shores of Europe as a North American product at a moment when Europe was interested in creating a sense of cultural as well as political independence. Concepts that appear to have North American roots are often rejected out of hand.
- **Poorly packaged, poorly sold:** Clinics in general and refugee law clinics in particular did not receive the proper cultural filter at first. Clinical legal education lacked a coherent guiding agency that could support developing programs and help to dispel myths.
- **Bad development plans:** In two cases, one at Charles University in Prague, the other in Bucharest in Romania, a rather sophomoric strategy was initiated by a proponent of the clinic model that resulted in a complete rejection of clinical legal education by the deans of both schools.[26]
- **Competition:** Bar Associations have seen clinics as potential rival rather than a complement.
- **Tradition:** Many law schools pride themselves on their "straight lecture" style of teaching.
- **Existence of practice opportunities:** A number of universities already have externship opportunities.
- **Limited incentives:** Most law schools are State funded.
- **'Ivory tower' syndrome:** Professors see their role and the role of the university as one of provider of theoretical knowledge. They therefore ignore the growing client base for human rights and poverty clinics.[27]

The lack of well endowed universities in Europe leads to an additional argument against certain clinics and clinical models. With refugee law clinics there are a number of organizations and the UNHCR that might step in to support the development of existing clinics. Other human rights and poverty oriented clinics do not have such "engines" or motors behind them. This is a crucial argument and one that is most convincing.

3.2 Arguments in favor

There are a number of points that make clinical education development difficult. These are well countered with a number of arguments in favor of clinical development:

- **Perfect timing:** European universities are coming under pressure to become more self sufficient.[28] While this current development will probably not lead to tuition driven universities, it does mean that European universities will undergo major changes in the years to come. Law programs will need to be streamlined and made more attractive to potential students. A clinical program would certainly add weight to any university program.
- **Failure of existing extern-ships:** Both Austrian and German law schools provide a practical period for all junior lawyers wanting to join the bar. As these opportunities arise only after the main course of study has been completed, externships hosts (law firms, judges, ministries, etc.) are forced to retrain the junior lawyers. This costs time and money.

26 *In the case of Charles University, the Public Interest Law Initiative (PILI) recommended to a NGO partner interested in establishing a clinic, to take a strong stand and pressure the law school, one with over 400 years of history, to adopt the clinic model. The deans rejected the concept following a number of discussions with the NGO.*

27 *This includes refugee law as well as housing, access to justice, womens' rights, etc.*

28 *Universities in Austria instituted a minimal tuition of $750 for the first time in 2000. Other European universities are considering similar measures.*

- **Need expressed from certain sectors:** Though the average European social system provides good general care and coverage to its citizens, there remains a large need for lawyers with human rights and poverty oriented legal experience. Clinics fit in nicely.

3.3 Creating the necessary environment

Resistance to clinical legal education can be broken down through better co-ordination of efforts to promote, develop and sustain different models. This may come in the form of partnerships with existing clinical programs in North America.[29] But this will only cover a small number of clinical programs and will require a huge investment of time to create awareness on both sides of the Atlantic.

The strategies developed in these partnerships regarding refugee law clinics might be applicable to other clinical programs:

- An external support partner with clear interest in the success of the clinics was identified. In this case it was UNHCR supported by the Legal Aid-Legal Clinics network.
- Responsible professors with time and energy to commit to the establishment and development of the clinics were identified and supported.
- National NGOs with mission statements that included legal aid for asylum seekers ad refugee were approached.
- Strategies were developed between this team as to how to best approach the university and the availability of resources.
- Outreach was done in the form of open house seminars for students.

This process was monitored in a number of universities and lessons were shared for feedback.

3.4 Existing stumbling blocks

The argument raised above regarding the need to identify the proper long term support partner for a clinic in the absence of a well endowed university program needs to be discussed further. Currently, there is an absence of credible partners to help support the general establishment and further development of any university based clinical program.[30]

There is clearly a need for labour law clinics throughout Europe as legal services for the average blue collar worker or immigrant are too expensive. Trade unions and/or the International Labour Organization (ILO) would be the logical long term partners for such clinics. Neither have been approached nor are they active.

Amnesty International Human Rights Watch and/or the International Helsinki Federation would be the appropriate partners for human rights oriented clinics. These organisations do not have the capacity or the expertise to do so, at least not at the present stage.[31]

29 *In the field of refugee law clinics this comes in the form of the "Sister's Program", linking refugee law clinical programs in North America and Central Europe.*

30 *Refugee law clinics receive support from UNHCR but this is done on a clinic by clinic basis and is not UNHCR policy.*

31 *National Helsinki Committees are active in the refugee law clinic field. As with the case of UNHCR, this is not a central policy but a national preference. A complete review of existing refugee law clinic support partners was done by the author in 1999 and updated in 2000. The review analyzed current and future capacity and interest.*

Again, the approach taken by the refugee law clinics regarding support partners might yield some valuable lessons learned. This would require that there be organizations ready to take on the task of promoting and developing clinical legal education programs. A credible organization, at the time of the writing of this paper, does not exist.

3.5 Two helpful case studies

The Hungarian Case: The work of the Hungarian Helsinki Committee (HHC) and ELTE University in Budapest is an excellent example of the right clinic formula. HHC provides legal aid for a number of target groups in Hungary including asylum seekers and refugees. Working in partnership with ELTE law school since 1997, the HHC model has been adapted to other cities in Hungary where legal aid is needed.

Lawyers and private law firms are fully integrated into a clinic program that provides refugee law, theory and lawyering skills combined with a year of externship with HHC supported lawyers. Though the project is in its development stage, effort has been made to integrate modern case and office management practices from other programs and the clinic team is engaged in a number of skills development partnerships with North American universities.[32]

This overall development is part of a larger strategy developed between HHC and Legal Aid-Legal Clinics in 1999. This partnership has included a number of seminars for refugee law clinics in the region. HHC will play a large role in the overall development of refugee law clinics in the CEBS through to 2004.

The Austrian Case: The Hungarian Case is somewhat unique as there was strong support from ELTE law school and HHC from the outset. Developments in Austria are following the normal pattern of doubt and resistance.

Two Austrian universities were identified in 2000 as potential clinical education standard bearers; Graz and Salzburg. Both universities have an ancient legal education tradition dating back to the 16th century. Neither experiments with clinical legal education.

In 2000 the author met with two professors from both universities to assess the interest and the potential stumbling blocks towards the development of refugee law clinics. The professors showed a great deal of interest and admitted to experimenting with case studies and simulations in their courses to provide students with some additional skills. Development plans were drawn up with each team that included future meetings with responsible deans and other faculty, as well as student open houses, etc.

In 2001 the author revisited both universities to assess development. The Salzburg team got as far as discussing the concept with local NGOs and was able to organize a partnership meeting for June 2001. The Graz clinic, operating through the new European Training Academy at the university, began to hold weekly courses on refugee law complemented with skills development sessions for students. A practical element was due to follow in autumn 2001.

Though the professors are not trained in clinical legal education, they incorporate a number of non-traditional teaching methods that allow students to move closer to practical knowledge of the law. Neither has reached the stage that involves externships.

32 *Management support has come in the form of working seminars for the HHC team with lawyers from the Catholic Charities Legal Aid Network and the Georgetown University Clinic program.*

Careful planning and development was present at both universities and the stumbling blocks mentioned above were largely avoided as a result.

4. SUMMARY AND PRELIMINARY CONCLUSIONS

To say that clinical legal education is revolutionizing European legal studies is an exaggeration. The changes and developments should be noted, in particular in the field of refugee law development. There are valuable lessons learned that other clinical programs may want to filter into their own scenarios.

Protection issues are different throughout Europe. The CEBS, as both transit countries and countries of asylum, have more or less newly developed legislative frameworks and practices. It has been recognized that the CEBS currently face certain economic constraints and a shortage of well trained refugee lawyers who are able to function within these systems as providers of legal aid or as decision takers. This may be the reason why clinics have developed more rapidly in the CEBS. In addition, the pending entry into the EU of many of the CEBS adds another level of complexity to their asylum systems. Therefore, clinics in the CEBS are ideally poised to provide the next generation of lawyers with the training they need to operate in a more sophisticated asylum system.

The countries of the CIS are transit countries and/or recipients of mass influxes of asylum seekers. In addition, their asylum systems are in the first stage of development. Legislative framework and practice, if any, are in their infancy. Needs are more short-term and stop-gap regarding strengthening the current protection capacity and more long-term regarding the creation of well trained refugee lawyers. Therefore clinics could be used to train a large number of decision takers to handle the current need with an overall goal of providing the developing asylum systems with the necessary practitioners.

Western European/EU States have more sophisticated asylum systems with long standing traditions of refugee protection and practice. Legal aid is normally provided by State authorities and supplemented by NGO support. According to some, the quality of decision taking and legal aid is sometimes in question in a number of States. In addition, legal aid in Western Europe is expensive. Clinics have the opportunity to complement the current legal aid structures and provide a pool of well trained refugee lawyers and/or decision takers.

As high quality, low cost legal aid for asylum seekers and refugees remains a universal challenge the clinic concept remains one such way to meet the growing protection needs in countries around the globe. Careful research and analysis of the protection needs of each country will be the key to determine whether a refugee law clinic has a place in the national protection scheme.

4.1 Needs

There is a clear lack of experienced clinical teachers in Europe. The programs that do exist manage because there is a professor with a great deal of dedication who keeps the program alive. Educational tools and resources are being developed but financial resources are scarce. This inhibits development over the long term and invites burn out on the part of the professors who invest not just their time but their money as well.

General clinical programs desperately need an organization that can support the varied levels of the clinic including skills for professors and lawyers, training tools and resources and exchange possibilities. Support at this stage is piecemeal and without a strategic outlook for the future.

4.2 Existing resources

Interest has been raised in the clinical concept over the past two years and a number of professors have actively sought support and information. This is probably the most telling sign. The human resources are available but they need to be informed and reassured that the time they invest in developing clinical legal programs will receive support from outside.[33]

It is worth mentioning again that there are more than enough clients in Europe who would benefit from the clinical programs.

4.3 Where to go from here?

First and foremost, clinicians who want to take an active role towards the development of clinical programs elsewhere need to make themselves known. The resources that are currently available should be compiled and circulated. Professors from outside of North America need to be provided with a clear set of guidelines and contact persons so that the first steps, such as putting together a clinic team and a resource assessment, can move forward in parallel.

Once a strategy has been developed, organizations such as Amnesty International and ILO should be approached for support and guidance. Developing programs will find it easier to convince their universities if they know that they can count on outside support.

Lessons learned from the refugee law clinic development might prove useful in this regard.

33 *It is interesting to note that clinical legal education has become a rallying cry of a number of organizations now working in China.*

Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya

T. O. Ojienda & M. Oduor***

INTRODUCTION

Clinical legal education has been defined simply as learning law by doing law.[1] It is a method of instruction in which students engage in varying degrees in the actual practice of the law. Students get the opportunity to apply the theoretical aspects of their training to real life or simulated situations.[2]

In Kenya, legal education has over the years been imparted by way of the traditional lecture method. This has mainly been theoretical with little or no attention being paid to the practical aspects of the law and the legal profession. It is only recently that the importance of incorporating practical skills began to be recognised. This recognition can be traced back to the year 1994 following the establishment of the Moi University Faculty of Law (the faculty).

In this work the author intends to examine the challenges faced by the faculty in its quest to incorporate the clinical based approach into its curriculum. In doing so, the author will have to examine the basis upon which the faculty's CLE is grounded and the method used by the faculty implementing it. An assessment will be made of the specific successes and challenges faced by the faculty in implementing the programme and lastly recommendations to improve its operation will be made. Though references will be drawn from other jurisdictions in certain instances, the author will confine himself within the subject of this work, i.e, CLE in Moi University, Kenya.

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1 *Grimes, R., (2000) "Learning Law by Doing Law in the UK" in International Journal of Clinical Legal Education p.54.*

2 *See Iya, P.F., (2000) "Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century "in International Journal of Clinical Legal Education p 16 and also, Gold, N., (2000) "Why not an International Journal of Clinical Legal Education?" in International Journal of Clinical Legal Education. p.7*

BACKGROUND

Kenya inherited much of her institutions from her colonial masters, Britain.[3] Consequently, even the system of education became patterned along British lines. The method of training lawyers was adopted from that of the colonial powers. It took principally the form of classroom discussion-cum-lecture; which form has been prevalent up to now.

Under this mode of instruction, students undergo lecture sessions in which notes are either dictated to them or topics are assigned to them for discussion in class (tutorials). There is normally a written examination at the end of each course according to which students are graded.

In Kenya generally, it takes four years to acquire an undergraduate degree in law. Upon graduation, students proceed for an apprenticeship stint (known as pupilage) for a period of one year. During this period, students are assigned to an advocate's chambers where they are expected to learn the practical skills of advocacy from the advocate (called a master) under whom they work.

The expectation is that at the end of the one year of pupilage, students will have learnt the relevant, practical skills that will enable them make an entry into the practice of law. Statute specifically provides that students are to receive instruction in the proper business practice and employment of an advocate.[4] Students may be required to undergo further vocational training in institutions established for that purpose.[5] In addition, students will usually have spent about six weeks on attachment at a magistrate's chambers.[6]

The approach embraced in Kenya has laid much emphasis on theoretical abstraction of ideas. Students under the guidance of their teachers, engage in merely academic exposition of refined legal issues far removed from the practical settings underlying them. Consequently, students do not get the opportunity to assess the effect of legal theory on the legal system and on the lives of those it affects.

As earlier on mentioned, it is only recently that legal training in Kenya began to be tailored in such a way as to incorporate the clinical approach. This approach lays much emphasis on practical solutions to real life or simulated legal problems.[7] In real life situations, students get to deal with people with legal problems usually under the supervision of qualified practitioners. Students are able to put into practice the theoretical aspects of advocacy that they have learnt in classroom situations.[8] They are often called upon to apply their own standards in making decisions about the legal issues facing them. They also learn about standards of practice and how to follow them and also how the same are enforced on practicing advocates.[9] Importantly also, the clinical approach gives students a chance to experiment with the theoretical knowledge they have as they can discuss what they are learning and experiencing with other students, advocates or members of the bench before attempting to put them into practice.[10]

3 *See generally Abuor C. O., (1971), White Highlands no More: A Modern Political History of Kenya, Vol. 1 Nairobi: Pan African Researchers; Flint, J.E., (1963), "The Wider Background to Partition and Colonial Occupation", in R. Oliver and G. Mathews (eds) History of East Africa, Vol. 1 Oxford and Ghai, Y. P. and M C Auslan J.P.W.B., (1970), Public Law and Political Change in Kenya; A Study of the Legal Framework of Government from Colonial Time to the Present. Nairobi: OUP.*

4 *The Advocates Act Cap 16 and The Advocate (Admission) Regulations made thereunder*

5 *Regulation 3 of the Advocate (Admission) Regulations requires students to undertake a course of legal education at an institution established for the purpose e.g. the current institution is the Kenya School of Law where students learn practical courses.*

6 *At the faculty this occurs after the second year of study and takes a period of about 6 weeks.*

7 *See Iya P.F. supra at note 2*

8 *ibid at p.16. See also Stuckey, R.T., (2000) "Ensuring Basic Quality in Clinical Courses" in International Journal of Clinical Legal Education p.47*

9 *ibid*

10 *ibid*

The traditional lecture method differs from the clinical approach in the time and place which students are expected to learn the practical aspects of law. In the former, it is usually after graduation from university and mainly in an advocate's office. In the latter, it takes place in the course of learning, before graduation and within the curriculum set-up (albeit in a wide variety of places not limited to an advocate's office only). There are certain poignant aspects of this distinction. For example the traditional lecture method divides the learning process into stages such as academic, practical and vocational, without a conscious effort to bridge the gaps in between. The academic stage takes place in the law school (university) and is purely theoretical. The practical training stage takes the form of pupilage during time students are expected to summon all that has been learnt (in the academic stage) and apply it in practice. The vocational stage takes place in an institution established for that purpose (the Kenya School of Law) although the content is also mainly theoretical. No attempt has been made to link these stages together so that they flow naturally from one to the other.

Each of these stages also has its own unique problems. For example, doubts have been expressed whether the pupilage programme achieves its stated objectives owing to several militating factors. For example, practicing lawyers being mainly pre-occupied with their work may not be in a position to give much thought to the education and monitoring of students. The law office or the court house may not be the proper place for the instruction of students as they were not designed to perform such a function.[11]

The clinical approach is important in at least one other important aspect. This has to do with the role of the law and lawyers in contributing towards the ideal of social justice.[12] In Kenya for example, there are rising numbers of people who, because of their penury, cannot secure access to the legal system for purposes of protecting their rights. Though lawyers may be acutely aware of that problem, they are usually constrained by the need to serve their clients for their own good and to provide assistance to poor litigants for the sake of justice. Hence Kenyan lawyers have been unable to respond appropriately and satisfactorily to the unmet legal needs of the Kenyan society.[13] It is at this point that the clinical approach with its positive inclination towards legal assistance to the poor comes in.

The clinical approach is therefore two-pronged in its goals; first to provide students with the opportunity to learn from their encounter with real life legal problems and secondly to provide free legal services to the disadvantaged members of the society. This approach becomes even more relevant in the circumstances of a developing country like Kenya where unmet legal needs are continually on the rise.

11 *Gold, N., supra note 2 at p.11*

12 *See for example the curriculum for the Faculty of Law Degree of Moi University (the curriculum) which is premised on the ideal of promoting social justice*

13 *Efforts at providing legal aid services have been half –hearted and rather disjointed. Lawyers have not shown any enthusiasm towards this end. Much of the effort has come from non-governmental organisations including for example Moi University Legal Aid Clinic (MULAC), People Against Torture (PAT), Public Law Institute (PLI), Rift Valley Law Society Legal Aid Scheme (RVLS) Federation of International Women Lawyers (FIDA) – Kenya Chapter. For a detailed analysis of the efforts of various organisations in providing legal aid see Consultant's Report on Kenya Civil Society Programme. Review of Access to Justice Projects, 2001*

ORIGIN AND EVOLUTION OF CLE

Scholars have traced the origin of CLE in the United States of America.[14] The main reason given for the development of this approach to legal education is that it was primarily a response to an obvious lack of legal services for the poor.[15] Law schools were resorted to as a source of such services when it became clear that neither practitioners nor indeed even state institutions could be relied upon. Certainly in the United States, judicial activism seems to have played an important role in promoting CLE and there was of course material support from donors for the programmes run by law schools.[16]

The CLE approach then spread over to other jurisdictions apart from the United States. The early 1970's saw the CLE approach being embraced in jurisdictions such as the United Kingdom and Australia.[17]

Law schools in Africa have also taken discernable efforts to incorporate the CLE approach in their curricula.[18] In East Africa, Uganda's Makerere University has been at the forefront followed by Dar es Salaam University and lately University of Nairobi and Moi University in Kenya. Of all the CLE programmes established by these universities perhaps the one that stands out is that of Moi University, because in it, student participation is compulsory and the programme is structured in such a way that participation contributes towards the assessment of students towards their degree requirements.[19]

Various other African Universities have come up with CLE programmes of varying descriptions with varying degrees of success.[20]

In the next section, the author intends to describe those aspects of the Moi University faculty of law's curriculum that qualify it as a clinical oriented curriculum.

IMPLEMENTATION OF CLE IN THE FACULTY

In the first part of this section the author analyses the principles upon which the faculty is premised and how they seek to advance its clinical approach to legal education. In the second part, the author undertakes an examination of the aspects of the faculty's curriculum that emphasize its clinical nature.

14 *For example Iya P. F. supra note 2, Dickson J., (200) "Clinical Legal Education in the 21st Century: Still Educating for Service?" in International Journal of Clinical Legal Education p.37*

15 *This need was also recognised by the U.S Supreme Court in the cases of Gideon v. Wainright 372 US 335 (1963) and later on in Argersinger v. Hamlin 404 US 25 (1972)*

16 *Dickson, J. supra note 16. at p.38*

17 *Dickson traces the spread of clinical legal education from the United States to the United Kingdom and Australia. A clinical programme was established in 1975 at Monash University in Melbourne*

18 *Iya, P.F. s upra at note 3 p.18*

19 *See the curriculum*

20 *Iya P.F. op.cit. p.18*

1. Foundations of the Curriculum

Universities across Africa need to develop curricula that fit well with the overall goal of promoting social transformation in a way that meets the needs of the people.[21] In that light law faculties also need to be structured in such a way as to enable them become a useful tool in the achievement of this goal.

The faculty with its strong orientation towards social service was established so as to meet this kind of challenge. In 1981, a presidential working party submitted a report which called upon institutions of higher learning to promote social justice and expand educational opportunities for Kenyan citizens. Taking up the gauntlet, the faculty's curriculum states that the faculty was established:

> *"[To] provide qualified students with a course of study designed to engage and challenge their intellect while exposing them to experiences designed to develop competent advocates committed to the social aims of high quality legal representation, Kenyan national development, and public service".*[22]

In achieving this objective the faculty has taken an approach that emphasizes the clinical method in addition to (rather that with the exclusion of) the traditional classroom instruction method. The curriculum stipulates that the bachelor of laws course of study will provide instruction in fundamental legal doctrine, legal theory and advocacy skills by way of traditional classroom discussion, simulated lawyering experiences, law related externships and live client representation.[23] The curriculum emphasizes that the approach taken by the faculty will be social justice and public oriented. It recognises that there are many challenges facing the Kenyan people and accordingly sets out to prepare students who have the ability of identifying social phenomenon in need of change and generating solutions consistent with the Kenyan situation. Therefore, the faculty aims at producing lawyers with a keen interest in providing services beneficial to the public.[24]

Coupled with the social ideals that it seeks to imbue in students, the curriculum seeks also to inculcate practical skills of advocacy.[25] In its statement of educational goals, the faculty seeks to impart practical skills such as analogical reasoning, use of precedence, fact finding, research writing, persuasive speaking and effective listening. In the final analysis, graduands are expected to have the necessary analytical skills and ability to identify legal problems, the legal principles applicable to the problem, to use those principles to resolve the problems and to think critically about legal problems and the legal system.

It is therefore apparent that the faculty adopts an attitude that considers the study of law as going beyond the learning of legal rules and arguments. The entire curriculum is hence premised on the ideal that law is a process of human interaction which takes within its corpus moral, social and political issues.

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21 *This is perhaps in response to the criticism levelled against universities in Africa regarding their role in social transformation. According to Iya (op cit), there have always existed a concern as to what exactly should be the contribution of the university in meeting the needs of the ordinary citizens in their search for better life. This is a challenge posed not just to the universities alone but also to their different faculties, especially the law faculties*

22 *The faculty's curriculum proposal is said to be informed by the Report of the Presidential Working Party on the Second University of Kenya prepared by C. B. Mackay (Mackay Report)*

23 *ibid*

24 *ibid*

25 *ibid*

In the courses taught at the faculty three fundamental areas are emphasized throughout. These are stated to be crucial to students' learning and are:-

(i) *Legal theory*, which is intended to teach students that the doctrinal principles they are learning and evaluating do not arise out of logic or precedent but are embedded in a social and ethical context.

(ii) *Clinical education*, which teaches students to take the action and make the decisions that advocates actually face, hence emphasizing the practical aspect of the curriculum.

(iii) *Professional responsibility*, which teaches students that mastery of legal doctrine, theory and lawyering skills is not an end in itself but a means towards a legal practice that can reflect the professional person's choices, goals and values as well the broader social goals that underlie a university committed to practical problem solving and public service.

This section has described those aspects of the faculty's curriculum that form the basis for its clinical approach. In the next part, the author intends to discuss in a more or less descriptive manner the ways by which the general ideals of the faculty are put into practice.

2. Implementing the Curriculum's objectives

It seems necessary to state at the outset that the faculty views the clinical approach as being supplementary to, rather than replacing, traditional classroom lectures. Consequently, the subjects offered may be dealt with in three different classifications according to the mode of delivery:[26]

(a) Subjects taught mainly through lecture method

(b) Subjects taught through simulated legal problems

(c) Skills imparted through actual live-client representation.

Subjects taught mainly by Lecture Method:-[27]

This method is used to deliver instructions on these subjects which by their nature are highly theoretical and which can only be appropriately handled by emphasis on lecture and discussion notes. These subjects include:-

Social Foundations of Law

Contemporary Legal Issues and Practice

Law of Contracts

Principles of Tort Law

Legal systems

Criminal Law

Civil and Criminal Procedure

Law of Evidence

Constitutional Law

26 *The curriculum does not explicitly group these subjects as such*

27 *Or the traditional method*

Legal Problems and Client Counseling
Family Law
Professional Ethics and Responsibility
Sale of Goods and Agency
Legal Analysis and Alternative Dispute Resolution
Law of Succession
Customary Law
Property Law
Equity
Administrative law
Commercial Law
Banking Law
Islamic Law
Public International Law
Disability Law
Information and Law
Proprietary Rights and Transactions
Environmental and Natural Resources Law
Law of Business Associations
Fundamental Rights and Freedoms
Law of Co-operatives and Partnerships
Law of Insurance
Gender and the Law
Tax Law
Labour Law
White Collar and Corporate Crime
Law of the Sea
Comparative Legal Systems of East Africa
Jurisprudence
International Commercial Transactions
Children and the Law
Bankruptcy Law and Practice
International Commercial Transactions
Conflicts of Laws (Private International Law)
Health Law

Subjects taught through simulation

Ideally, subjects falling under this head are mainly theoretical although students deal with legal problems that may arise in real life. The problems are posed within the context of simulations whose content is associated with recent or current areas of study. The following are the subjects falling under this head:

(i) Legal problems and Client Counseling

This subject is intended to:- develop skill in legal problem solving (which involves the analysis of facts within the context of relevant legal provisions), refine the student's legal writing skills, address issues of professional responsibility and of the advocate/ client relationship and engage students in analysis and resolution of simulated legal problems.

(ii) Professional Ethics and Professional Responsibility

This subject imparts to the students the fundamental principles and basic assumptions related to the conduct of members of the legal profession but more importantly, students are exposed to real and perceived problems of client representation which they are required to resolve.

(iii) Legal Analysis and Alternative Dispute Resolution

In this subject, students are imbued with reasoning and analytical skills, techniques and methods of alternative dispute resolution, theoretical and practical understanding of non-litigative mechanisms for the resolution of disputes and analysis of legal problems posed within the context of simulations.

(iv) Trial Advocacy

In this subject, students are trained on the basic principles of trial procedure, the fundamentals of litigation at the trial level, the use and abuse of pretrial motions, advanced case theory development and preparing witnesses for trial. Of significance however is the fact that participants engage in mock trials at the end of the semester.

(v) Concentration or Clinical Substantive Law Seminar

This subject is intended to impart skills of legislative drafting, legal writing, communication skills and research. Largely, it is a subject based on simulated legal problems and active class participation is highly encouraged.

(vi) Advanced Legal Writing and Advocacy

To a large extent, simulated legal problems are used to introduce students to the art of appellate advocacy, appellate argument, strategies and skills for complex fact organization and persuasive writing. Just like in trial advocacy, students engage in an end of the semester mock trial albeit at an appellate level.

Subjects Taught Through Live – Client Representation

In the author's view this method is very significant in emphasizing the clinical aspect of the faculty. The relevant subjects under this head are practical and usually stimulate students to call upon the knowledge and skills learned in the other subjects.

The faculty has a Concentration and Clinicals Department whose purpose is to co-ordinate the subjects failing under this head. In general there are two broad subjects which utilize the live-client representation approach, namely:- (a) Concentration or Clinical Seminar and (b) Concentration or Clinical Externship. In the former, students are encouraged to undertake in-depth learning and practise in chosen areas of study and at the same time participate in an externship programme, usually attendance in a court. In the latter case, students work directly with qualified practitioners with real clients and real legal problems. Strictly speaking this subject directly gives effect to the

clinical nature of the faculty in the sense that students learn from their experiences with live clients and from instructions received from their supervising practitioners.

If the first two modes of instruction form the foundation of the curriculum then the live client representation method provides the material with which the walls are constructed. The method allows students an opportunity to enrich and broaden the doctrinal, theoretical and practical understanding obtained from the essential foundation curriculum. Students receive a detailed understanding of particular areas of law and of real dilemmas faced by practising advocates.

The Clinical and Concentration Programme has set out to achieve several goals all of which emphasize the clinical nature of the faculty. The significant ones may however be summarised into four:-

(i) To provide students with opportunities for applying and expanding skills acquired through prior simulated experiences especially interviewing, counseling, case planning and litigation.

(ii) To provide students with opportunities for learning the substantive law of the field of practice.

(iii) To provide students with opportunities to develop their ability as problem solvers and

(iv) To provide students with opportunities to provide legal assistance either through the faculty's own projects or in co-ordination with external projects.

To accomplish these goals students engage in a wide range of activities including representing clients (albeit in non-litigation matters), working on simulations, attending relevant seminars, workshops and conferences organized by other organizations and working on other relevant projects. The goals enumerated are particularly relevant in promoting clinical legal education as students are expected to work in real-life situations and learn while in the process of doing so.

To make the achievement of these goals a reality, it became necessary to establish a forum where students and clients would be able to encounter one another and interact. Thus, the Moi University Legal Aid Clinic (MULAC) was established with the aim of providing students with a forum through which they could offer legal assistance to indigent Kenyans while at the same time enriching their practical knowledge and skills.

It is author's view the faculty's clinical approach is most appropriate for achieving the objectives of any CLE programme i.e. practical training of students and the provision of legal services.

Having described the foundations of CLE in the faculty it seems logical to ask whether there have been any successes in implementation and what have been the constraints.

THE CONSTRAINTS OF IMPLEMENTATION

The faculty's mission and goals in establishing a CLE programme are very noble and realistic. However, having a blue print for CLE and succesfully implementing it are two different things. Although it is important to examine the faculty's CLE programme in terms of its mission and goals, it serves more purpose to also assess it against other extrinsic criteria that are of relevance. For the purpose of this work, some of the criteria laid down by Kenneth S. Gallant would be considered as pointing some minimum requirements of a successful CLE programme.[28] In doing so however, the author does not lose sight of the importance of restricting himself to situation specific criteria. Reference to Gallant's work is made for purposes of enabling a more concise comparative analysis of the faculty's CLE programme.

28 *Gallant, K.S., (1996) "Implementing Clinical Legal Education : A Checklist for Programme Design" (unpublished)*

Successful implementation of CLE programme does not end with the integration of the clinical approach into the overall curriculum of the law school but also calls for integration of and co-operation with other relevant institutions, such as and especially the legal and judicial community in which they operate.[29]

Far apart from this general consideration, Gallant identifies a number of questions that must be addressed by the developers and implementers of any CLE programme. These questions may fall into two contexts; i.e the academic and the legal and professional contexts.[30]

1. The Academic Context

The clinical approach to the teaching of law ought to be regarded as supplementing rather than replacing the academic and largely theoretical legal training. With this general statement in mind, a number of relevant issues need to be considered. They include:-

Goals of the Programme

The goals set down by the developers of a CLE programme would have to revolve around issues like; the skills to be taught to students (e.g. legal research, analysis and problem solving etc); ethical consideration and values; ability of students to analyse their practical experiences in terms of the social economic and political role of law and lawyers in society.

Teaching Methods and Materials

Should they include: simulations and case study work?; legal aid clinics in law school?; field placements?; or combination and integration of clinical methods?

Achieving the Goals of the Programme

This would involve questions as to whether to create clinical courses (live client, simulation or field placement); to integrate the clinical base for the entire curriculum; to give credits to students for clinical work.

Academic Administration

Will it be necessary to employ external staff or incorporate present teaching staff in implementation and what would be their status vis-a-vis the law faculty; what would be the position of the programme within the law faculty and the university; how to evaluate and control quality of instruction.

Student Opportunities and Concerns

It would be important to consider questions regarding the effect that the programme would have on students e.g time constraints on students from other classes, travel considerations, costs to students and professional benefits to students such as opportunities to meet lawyers and potential employers.

2. Legal and Professional Contexts

Gallant postulates that once a clinical programme involves much more than classroom simulation and begins to touch on live client representation other wider non-academic concerns come to the fore. An important issue is the attitude exhibited by lawyers to the student practice of law. It may be felt that students are infringing on lawyers' livelihoods or that they are compromising standards.

29 *ibid*

30 *The criteria discussed subsequently are sourced mainly from Gallant's article above*

Consequently, it becomes necessary to design a clinical programme that takes into account these fears. It may be necessary to restrict students to those activities that they may engage in without any hindrance by the law – likewise, it may be relevant to seek the implementation of a rule or statute to allow student to practice in certain fields only. Either way there must be co-operation and a sound relationship between the faculty on the one hand and the bar and bench on the other.

There is also a need to address questions relating to the restrictions that may be imposed on clinical programmes, whether they are political or financial.

The author recognises that, though Gallant's criteria may not have been proposed with the faculty's clinical programme in mind, they do serve as an important (though not necessarily sufficient) benchmark for the faculty's clinical programme. In the following section it is intended to evaluate the strengths and the weaknesses of the clinical programme as implemented in the faculty of law, Moi University. This exercise is to be carried out against the background of the concerns raised by Gallant and of the goals laid down by the faculty in its attempt at a clinical oriented approach to legal education.

SUCCESSES AND FAILURES

Arguably an important achievement of the faculty's clinical programme is its revolutionary approach to the teaching of law in Kenya.[31] The Moi University Faculty of Law is the younger of the two faculties of law in Kenya having been preceded by the decades old Nairobi University Faculty of Law. Whereas the pedagogical approach in the latter consists mainly of theoretical classroom lectures, in the former there has been a conscious and positive attempt to incorporate practical aspects into the traditional, theoretical academic discourse.[32] This revolutionary aspect is also discernable in the fact that the faculty's clinical courses are compulsory and contribute to the assessment of students towards the acquisition of a degree. Admittedly the faculty has broken new ground in this regard.

Additionally, the faculty has succeeded in pioneering a public interest oriented curriculum for the teaching of law. It is committed to the ideals of delivering basic legal services to citizens, graduating resourceful and efficient legal professionals with a commitment to public interest advocacy and promoting social justice. The machinery through which these ideals are expected to be achieved is the Concentrations and Clinical Department. It is through this Department that students participate in the judicial attachment programme which takes place after their second year of study. Students are basically attached to a court where either a magistrate (or a judge) presides. They sit together with the magistrate (or judge) either in chambers or in court in the course of proceedings. They are ideally expected to learn by observing the way the court and lawyers conduct their business. But perhaps what is of more relevance to the development of practical skills for students is the Moi University Legal Aid Clinic (MULAC) through which students render legal advice and routine legal assistance to indigent clients. Apart from fulfilling the unmet legal needs of the society, students of course get the opportunity to learn from real life situations.

31 *The introduction of practical training at the under graduate level was a bold and distinct step by the Faculty in the legal education field as the previously existing faculty of law at Nairobi University did not embrace such an approach.*

32 *In Nairobi University, the Student Association of Legal Aid and Research (the equivalent of Moi University Legal Aid Clinic) is largely voluntary and has not been incorporated into the curriculum for law degree.*

Moreover, the faculty's clinical programme seeks to supplement traditional classroom teaching methods of legal education with those that capture most effectively the principles for which the faculty stands for, i.e practical learning and public service. It is for this reason that the traditional method has not been abandoned but is being used alternately with practical delivery. In the same way that students engage in critical exposition of theoretical legal issues, so too do they exercise skills of legal research, analysis and problem solving, legal writing, litigation skills, client counseling, negotiation, interviewing, mediation, arbitration and giving non-litigation advice to litigants.

Another pioneering aspect of the faculty's clinical programme is its attempt at incorporating the input of other non-lawyer participants in a collaborative effort at pedagogy. For instance the courses offered under the auspices of the Concentrations and Clinical Department emphasise close collaboration with several key players. In the Refugees and Human Rights Law Concentration, the faculty seeks to collaborate with the Moi University Centre for Refugee Studies to identify appropriate and mutual areas of concern for research purposes. Likewise in the Environmental Law Concentration, the faculty seeks to collaborate with the School of Environmental Studies in identifying law reform issues and areas of legislative initiative.

Also, it has been possible to bring students into contact with people having real legal problems. This has been not only challenging but also revealing to the students who often have been called upon to use their knowledge of the law as acquired in the classroom and apply it in the relevant situation. More importantly, however students have been able to discern the fundamental difference between the law as learnt in classroom situations and the law as applied in practical life. Students have come face to face with situations in which they have to make fundamental decisions, at times far removed from their own values and aspirations knowing all too well that the decisions made could have far reaching consequences for the lives of the people they advise. All this has been made possible through regular excursions to courts and jails where students meet people with various legal needs especially concerning criminal law.

Although, the clinical programme has set out to achieve important objectives a host of constraints have been encountered in the implementation. An important thrust of the clinical approach of the faculty is the provision of legal services to the poor. For this to materialise, it is necessary that members of the public be sensitised on the availability of free legal services. In the three years that the legal services arm of the programme (i.e the MULAC) has been operational, students handled only a handful of cases. There are hardly any new cases on any given day. It might as yet turn out to be premature to indict the programme's implementers for failing to publicise their services, as there have been a number of efforts to establish their presence. For example, the faculty maintains a stand at the annual Agricultural Society of Kenya Show during which time presentations are made to the public on the activities of the faculty. Clearly however this strategy cannot be said to have been completely successful.[33]

Although the faculty's mission recognises the necessity of an all inclusive approach, it can be reported that the implementation has failed to embrace this ideal. Specifically, there has been a failure to integrate members of the legal profession and the judicial community in the area in which the programme operates. According to Gallant, one of the concerns that needs to be

33 *It is worthy of note that the faculty was established in 1994 after the preparation of the Mackay Report. The time gap in between may reflect significant changes in public attitude. This ought to have been gauged again in the course of setting up the faculty. In any event, the Mackay Report was done with specific reference to the entire university rather the faculty of law itself.*

addressed by those who design and implement clinical programmes is the fear that student participation in the provision of legal services would interfere with the business of lawyers. Further it is necessary to enlist the support of local lawyers especially in circumstances where student practice of the law is not allowed since the lawyers may be requested to assist in litigating matters in a court of law. So far, no formal arrangement has been thrashed out between the faculty and the judicial community with the result that the magistrates in whose courts students are stationed are usually not aware of their presence.

The question of supervision has emerged as one of the problems affecting the faculty's programme. Only a handful of the supervising staff has shown active participation.[34] This militates against one of the requirements for setting up a clinical programme that is, that members of the faculty should share not only the same ideals but also level of commitment.[35] The lack of such commitment, may be explained by the fact that, most of the faculty's lecturers are also practicing advocates. Some practice within the precincts of the faculty whereas others have to travel a distance of about 200km for their class sessions.[36] Coupled with this is the fact that the faculty also runs an evening class programme alongside the regular one. Splitting their time so as to devote adequate attention to each of these concerns becomes a hard task to the lecturers. Their lethargy may also be explained by the fact that since their training as undergraduates did not incorporate a clinical component it may be difficult for them to appreciate the inherent advantages of the approach.[37]

The lack of active participation has also affected the operations of the legal aid clinic run by the faculty. Students do not receive adequate instructions on the activities they are expected to engage in and the objectives of the programme as a whole.[38] Usually, students are constrained to call upon their own personal intuition and skill when dealing with clients and managing cases and files. The disarray that results dampens the morale of the students who after some time at the legal aid clinic become disinterested and begin to question the rationale behind the whole idea. This has had a telling impact on attendance, which at best is erratic and at worst non-existent.[39]

The undefined status of the MULAC has not made the situation any better. As a matter of principle, the clinic is supposed to be an entity separated from the university administration. By this it is meant that major decisions are to be made by the administrators of the legal aid clinic without any undue interference from the university. If and when the clinic decides to pursue a matter in court, pressure ought not to be brought to bear on it if it turns out that the adversary is the university itself. The question of funding MULAC's activities is of even greater significance when one considers the issue of independence. The present status is that the MULAC can only seek its own funds through the machinery of the university administration.[40] It cannot do so

34 *A schedule is usually drawn according to which lecturers as supposed to attend the MULAC, to supervise students' work. Most lecturers ignored it and never made an appearance.*

35 *Gallant K. S. (op cit)*

36 *At least two of them have to commute for close to 800km every week, to and from the faculty.*

37 *Almost all the lecturers received their undergraduate degrees from Nairobi University. The degree however did not (and still does not) incorporate the clinical approach.*

38 *Before students take in prospective clients, they are required to perform a needs assessment to confirm their indigence. Apart from the student's subjective conclusions there does not seem to be any clear cut standard for assessing would-be clients.*

39 *Since lecturers go to great lengths to attend normal classes and show a contrary attitude to the clinical programme, it is inevitable that students should feel that it is a total waste of time to attend particularly when they have other pressing courses.*

40 *This view was reached by the author through his discussion with one faculty member who seemed to be the only one actively involved in the programme. This member's active participation could be explained from the fact that he does not maintain a legal practice having thought it necessary to direct his attention to the academic field only.*

independently since it is a policy of the university that all solicitation must be channeled through it. The lack of independence affects even the running of routine operations at the clinic.

Though the legal aid clinic envisions the provision of both litigation and non-litigation assistance, the former has not been made possible to date owing to some or a combination of the problems discussed above.[41]

Further, the lack of supervision has meant that students' rights and responsibilities are not clear. It is not exactly certain what sort of advice students can give and to what extent. It is therefore not clear whether and to what extent students will be liable for malpractice or neglect of clients' concerns.

The faculty's clinical programme has not been sensitive to concerns raised by students. It does not address issues relating to time constraints on students and the effect of adding clinical work to students' performance in other academic subjects. It ignores issues of travel considerations especially since the legal aid clinic is 36 Km away from campus. It does not address the additional financial burden posed on the students to cater for their meals at rates which are higher than the ones they are used to back in campus.

THE CHALLENGE FOR THE FACULTY'S CLINICAL PROGRAMME AND HORIZONS FOR CHANGE

It is not doubted that the faculty is desirous of implementing clinical legal education in its curriculum. The clinical approach has rightly been regarded as a crucial step in revolutionizing legal education in Kenya. The main challenge facing the faculty is how to strengthen the existing curriculum to ensure that it achieves the ideals for which it is set up. Many of the problems are without a doubt logistical ones though there are those that have everything to do with attitudes. Looking at the courses taught at the faculty, some are stated to incorporate the practical component. However, so far the approach by the lecturers has been theoretical.[42] Consequently, it needs to be impressed upon them that whereas they need to be flexible in their mode of teaching, the practical component as envisaged in the curriculum must be emphasised.

Further, there is need to address the concerns of the teaching staff so as to ensure their commitment to the whole idea. Since it appears that their major constraint is time, then there may be a need to have only a few permanent staff employed to administer the legal aid clinic so that the teaching staff are engaged in minor supervisory roles. The administrative staff would be responsible for operations at the clinic including supervising student participation.

Whereas, it is important that the legal aid clinic enjoys the support and goodwill of the university administration, it is also important for its operations that it be allowed to take its own initiative on issues such as solicitation of funding, running routine operations, deciding which cases to handle

41 *The inability of MULAC to institute court proceeding has been a source of frustration since its establishment. In the eyes of the public (whose understanding of justice is the one achieved through the courts only), the* MULAC *is so incapacitated as to be of no use to them at all. If they cannot have their day in court, then it is as good if one does not start the process at all. This may partly explain why attendance has been particularly low with only a few new clients coming in at any one moment.*

42 *For example Legal Analysis and Alternative Dispute Resolutions as well as Legal Problems and Client Counseling are said to constitute a practical component though the approach has been purely theoretical. The same can be said of procedural courses; Civil and Criminal Procedure, Evidence and Proprietary Rights and Transactions.*

and the like. In saying this, the author does not call for a permanent severance of ties with the university as this would defeat the logic of student participation.

There is need to undertake a publicity campaign with respect to the activities of the legal aid clinic. Such a campaign must be all-inclusive.

There may be need to seek a separate legal existence for the legal aid clinic. The present scenario is that the clinic cannot pursue a claim in court on behalf of a client as it is not recognised in law as a provider of legal services. The clinic resorts to instructing advocates who sue in their own capacity . However, there are no funds to make this a possibility.

There is need to come up with a clear policy on what is assessed and at what time so as to encourage serious participation by students.

There is need to sincerely address student concerns e.g. transport, cost and time constraints so that they are not inconvenienced.

Ultimately, any clinical programme must be all rounded and inclusive. It must receive the support and goodwill from all relevant sections of the society including students, academic staff, legal and judicial community, potential donors and most importantly, the public.

The Tyranny of Distance: Clinical Legal Education in 'The Bush'*

*Jeff Giddings** & Barbara Hook****

This paper analyses the challenges faced by clients, students and teachers involved in a clinical program which uses new technology to deliver legal services in remote areas of Southern Queensland, Australia. A range of novel issues were addressed by Griffith University Law School, Learning Network Queensland and Caxton Legal Centre in their partnership development and delivery of this clinical program which involves the use of audio-graphics conferencing to enable students to provide legal advice and assistance to people hundreds of kilometres away. The 'Advanced Family Law-Clinic' program commenced in July 1999 with financial support from the Federal Attorney-General's Department. The paper considers the range of issues which arose in development of the program.

Introduction

In 1998, the Australian Federal Government announced funding for the development of 4 clinical legal education (CLE) partnerships between law schools and community legal centres.[1] In applying for funding, Griffith Law School and Caxton Legal Centre sought to provide a proposal which met the political objectives of government as well as the community service objectives of the community legal centre and the teaching and community service objectives of the law school.

A common commitment to enhancing legal service delivery in rural areas was quickly identified. Queensland is the most decentralised state in Australia, with more than half the population living outside the state capital, Brisbane. The problem then faced was how to best involve students in the delivery of such services. Links were forged with the Queensland Open Learning Network (now known as Learning Network Queensland), a network of community centres generally used to deliver education services to regional areas. A tender was submitted boldly stating that audio-graphics technology would be used to enable students to interview clients in open learning centres hundreds of kilometres from Brisbane.

Griffith Law School and Caxton Legal Centre were ultimately successful in receiving one of the Federal CLE grants. The real work of developing and implementing a clinical program using new technology then began. Maintaining a clear sense of purpose was very important in addressing the

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1 *J. Giddings, 'The Commonwealth Discovers Clinical Legal Education' (1998) 23 (3) Alternative Law Journal 140*

various unanticipated issues which arose. We found that student involvement could be planned much more than could the involvement of remote communities and the use of new technology.

Three key factors have been imperative to the success of the Clinic:

1. Recognition of the need to balance the agendas of different interested parties, such as the funders, the Law School, students, the Caxton Legal Centre, remote communities, and Learning Network Queensland, was a crucial factor in planning, developing and implementing the clinical program;
2. Understanding and addressing the issues of geographical remoteness which prevent or limit the delivery of face-to-face legal services; and
3. Identifying the limits and possibilities of technology-based non-face-to-face interviewing.

This paper provides an overview of how the Clinic operates. It then contextualises the Clinic in terms of the political climate and the nature of CLE in Australia. The access of rural communities to legal services will then be analysed. Networking issues impacting on the Clinic are then considered, highlighting the need to develop trust within the remote communities being serviced. The particular challenges the Clinic has faced in relation to communication and service delivery issues are also explored. Finally, the paper considers the importance of co-ordination of new initiatives and the need for ongoing consultation.

Overview of the Clinic

Griffith University Law School is based in Brisbane, the state capital of Queensland. Griffith Law School's most recent CLE initiative focuses on providing family law advice and assistance to people in rural areas of Queensland. Queensland has the most decentralised population of all Australian states and access to legal services is a significant issue for many rural communities ("the bush"[2]). Covering an area of over 1.7 million square kilometres, Queensland accounts for nearly 25% of the total land area of the Australian continent. By way of an international comparison, Queensland covers seven times the area of the United Kingdom, is more than twice the size of Texas and five times larger than Japan.[3]

Since 1995 Griffith University Law School has developed a reputation as an Australian leader in the field of CLE. The enthusiasm of staff and students has meant that opportunities for innovation and growth in clinical program offerings have been grasped with great enthusiasm. Such is the case with the Advanced Family Law - Clinic, a specialist clinical program offered by the Law School in collaboration with the Learning Network Queensland and Caxton Legal Centre.

Aside from this specialist clinic, Griffith Law School also operates a general law clinic, and externship program and a specialist alternative dispute resolution clinic. The opportunity to obtain financial support from the Federal Government has consolidated the Griffith clinical program as a major part of the law school. Until this external funding source emerged, the ongoing sustainability of the range of clinics which had developed was always in question. The Federal Government's involvement also enabled us to (in part) address our growing concerns regarding the lack of legal services available to rural Queenslanders.

2 *Also affectionately known as "the outback."*

3 *http://www.qld.gov.au/html/about_qld.htm (accessed 1 June 2001)*

The Clinic aims to develop the students' critical understanding of family law, develop and refine the generic skills considered elsewhere in the Griffith law program and to provide a practice-based learning experience designed to encourage students to think reflectively. The educational objectives of the clinic are to assist students to:

- enhance and extend their knowledge of the substantive law relating to family law,
- refine the skills related to legal practice which have developed in their law studies at Griffith. In particular, students will further develop their skills in negotiation, interviewing and drafting,
- deal effectively with unstructured situations,
- learn how to learn from experience,
- develop the ability to work collaboratively,
- appreciate notions of professional responsibility, and
- subject the legal system to analysis and criticism.

The clinic involves students being rotated through two placement sites during the semester. Students complete clinic sessions during one half of the semester at Caxton Legal Centre and the other half at Learning Network Queensland. In the initial weeks of the program, the supervisors interview the clients while students observe the interviews, and do follow up work such as researching and preparing documents. After being in the program for about a month, students begin interviewing on their own and taking instructions from clients before checking with their supervisor. Then the students prepare a plan for advice, deliver the advice to the client, and provide written confirmation of the advice to the client.

Weekly Family Law Advice Service. Students interview clients and provide ongoing support and casework assistance in relation to family law issues. This service focuses on issues relevant to litigants in person and operates each Wednesday evening at Caxton Legal Centre. Students, in conjunction with their supervisor, may also run a family law forum at Caxton Legal Centre. Caxton Legal Centre is, in many ways, Queensland's flagship community legal centre. The 25-year-old centre, based in the Brisbane suburb of New Farm, sees 11,000 clients a year free-of-charge. It has a staff of 11 plus 300 volunteers, about half of whom are law students who are allowed to observe proceedings.

Services to Remote Communities. Audio-graphics conferencing is used to provide family law advice and other services to people in rural communities. The conferencing technology allows people to communicate by phone at the same time as having joint computer screen access to documents. This enables students to work with clients situated at a computer hundreds of miles away to prepare court-related documents. Letters can also be drafted 'on the spot' and discussed with the client who can see the document on screen. If there are web-based materials which can usefully be accessed, the technology also accommodates this. Further, fax facilities are also available where a client is seeking advice on other documents. Scanned photos of the students and their supervisor are shown on screen so as to give the client a sense of who they are dealing with.

This conferencing technology is accessed through the community-based Learning Network Queensland. Clinic students work from the South Brisbane office of Learning Network Queensland to assist clients at Open Learning Centres located in communities outside of the Brisbane metropolitan area, namely Tara ($4^1/_2$ hours drive from Brisbane) and Hervey Bay

(3½ hours from Brisbane). There are 50 Open Learning Centres throughout Queensland. Students undertake casework activities and provide ongoing support and assistance to clients in relation to family law issues. This service operates each Friday morning at the Brisbane office of Learning Network Queensland.

A unique aspect of the Clinic is that two students attend each interview and work collaboratively to provide the client with advice. This fosters the development of teamwork, enhances the efficacy of peer review and appropriate constructive criticism, and ultimately enables students to encourage each other. It also provides in situ support if one student cannot adequately address the concerns of the client, or in the event that the client becomes difficult, agitated or emotional.

In the development of the clinic, it was identified that students were likely to be dealing with complex family law matters involving litigants who did not have access to other legal representation. In our experience, the family law problems facing the clients who attend our clinical programs have become increasingly complex in recent years.[4] This led to us introducing a requirement that students complete the classroom-based elective subject, Family Law before enrolling in the clinic.

A maximum of 12 students can participate in the Clinic each semester. With the exception of one summer semester, the Clinic has operated continously since July 1999. In future it is envisaged that the Clinic will continue to be offered each summer to cover the increased demand for legal services related to family law this period sadly but invariably brings. This is particularly pertinent as many people travel to remote communities to visit their families during the Christmas/New Year period, and as such many of the issues facing bush communities, which prompted the Clinic initiative, are exacerbated at this time.

Although the challenges that arose in setting up the Clinic were primarily related to geographical remoteness, the uncertain political climate in which the Clinic developed also had a significant impact. Knowledge of the prevailing political environment is essential in understanding the institutional factors which have impacted on the Clinic, particularly to highlight the confluence of the different interested parties.

The Political Milieu

The Clinic initiative was primarily a response to the lack of access to legal services in Queensland's remote communities. In the last ten years there has been a steady trend away from the bush for professionals such as lawyers, doctors and teachers. This has been most evident in the legal sphere. While governments have directed considerable resources to encouraging medical practitioners to work in regional and remote Australia, the same has not happened for legal professionals.

The policy climate in which the Clinic developed was quite confusing with policy agendas pulling in very different directions. On the one hand, the Federal government had expressed a strong commitment to the provision of additional services in rural and regional Australia while at the same time significantly reducing spending on legal aid services. There was also a climate of change in relation to family law in Australia. As well as reduced legal aid funding, such change also manifested itself in dramatic increases in the number of litigants in person, greater militancy amongst men's rights groups, greater unbundling of legal services (where lawyers were willing to

4 *J. Giddings & M. Robertson, '"Informed litigants with nowhere to go": Self-help legal aid services in Australia' (2001) 26 (4) Alternative Law Journal 184,*

undertake distinct portions of legal work instead of a whole matter), do-it-yourself kits and restructuring of the court system.

Since the 1970s, Australia has developed a legal aid partnership arrangement with services provided by private lawyers, salaried lawyers in Legal Aid Commissions (LACs) and staff and volunteers in community legal centres. Cooperative funding arrangements between Commonwealth and state governments operated in the 1970s and 1980s through until the mid-1990s. This 'mixed model' of Australian legal aid service delivery was regarded very favourably, having been described as arguably the best model in the world and vital to ensuring that those Australians living outside metropolitan areas are able to receive services.[5]

The current Federal government, following its election in March 1996, dramatically changed the structure of legal aid in Australia.[6] The Commonwealth negotiated new legal aid funding agreements with each of the states and territories and announced in the August 1996 budget that a $100 million reduction in Commonwealth legal aid funding was to be achieved between 1997/98 and 2000/2001. Having implemented this reduction in Commonwealth legal aid funding of more than 20%, the Commonwealth has now belatedly acknowledged the inappropriateness of the cuts with the announcement in the 2000/2001 Federal Budget of a $45.6 million increase in legal aid funds over four years.[7]

The government also withdrew funding for many of the initiatives announced in 1995 by the former government. While funding announced in the Justice Statement for women's legal services, indigenous women's legal programs and rural women's outreach was maintained, the impact on the legal aid sector as a whole was very negative. In addition to losing promised extra funding for family and civil law cases, legal aid commissions suffered overall funding reductions.[8]

The Commonwealth government has also been concerned to play a more significant role in legal aid policy making. Greater direction has been provided in relation to the allocation of Commonwealth legal aid funds. Attorney-General Daryl Williams has sought to significantly increase the legal aid focus on family law, consistently arguing that the funding of most criminal prosecutions should come from state government funds. Attorney-General Williams has also supported the development of community-based legal centres, particularly in regional Australia. An $11.4 Million 'Rural and Regional Network Enhancement Initiative was announced in the 1998/1999 Federal Budget.[9] This initiative included the establishment of 6 new community legal centres in rural Australia[10] and the development of a national service to provide phone and internet advice on family law and child support matters.[11] Funds were also allocated for the development of

5 *J. Giddings (ed), Legal Aid in Victoria: At the Crossroads Once Again (1998) Fitzroy Legal Service, 11*

6 *The relevant chain of events is usefully summarised in Senate Legal and Constitutional References Committee, (March 1997) Inquiry into the Australian Legal Aid System: First Report, Ch. 1.*

7 *D. Williams, 9 May 2000, 'Legal Aid Funding Boost', accessed at http://law.gov.au/aghome/agnews/2000newsag/legalaid_00.htm. For an example of the politicised nature of the legal aid issue in Australia, see D. Williams, 11 May 2000, 'Labor and Democrats Mislead on Legal Aid', accessed at http://law.gov.au/aghome/agnews/1998newsag/508_98.htm*

8 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 58.*

9 *D. Williams, 17 December 1998, 'Making Community Legal Services More Accessible to South Australians', accessed at http://law.gov.au/aghome/agnews/1998newsag/508_98.htm*

10 *Kimberley and South West regions of Western Australia, the Iron Triangle region of South Australia, the Centre-West region of Queensland, the New South Wales South Coast and the cross-border region of New South Wales and Victoria centred in Albury-Wodonga.*

11 *D. Williams, 11 May 1999, 'National Family Law Telecommunication Advice and Information Service', accessed at http://law.gov.au/aghome/agnews/1999newsag/telephone_99.htm*

four Clinical Legal Education projects 'with the aim of maximising both legal service delivery to disadvantaged clients and cooperation with universities'.[12] A further five new community legal centres were announced in the 1999/2000 Federal Budget.[13]

These initiatives, designed to enhance regional access to legal services, probably owe much to the increasing political profile of regional Australia. Issues facing rural communities such as droughts, low prices for agricultural products, high interest rates, population loss and the withdrawal of services have clearly contributed to the view that Australia's politicians were neglecting the bush.[14] Traditionally conservative rural electorates have become increasingly marginal, sharpening the political focus on rural areas.

> … the fastest population decline has occurred in rural areas……Such population loss is associated with technological, social and economic changes in rural areas, and industry restructuring in local economies.[15]

Access to legal services is a vital aspect of any community but remoteness in a community can mean that there are associated difficulties of transport, cost, time and lack of information. Such difficulties are often exacerbated in family disputes.

Disenchantment with the level of social services and government support within rural and regional communities has brought new political forces to the fore.[16] Changes in voting patterns (or voter backlash) in rural and regional electorates have resulted in changes of government in a number of states.[17] These significant political changes have created a climate in which governments are seriously concerned to be seen to be improving the availability of services in rural Australia. Of recent interest is the fact that the Federal government in 1999/2000 confirmed its election promise to establish a family law telecommunications advice and information service with a focus on service to rural areas. The Law by Telecommunications initiative, in operation from mid-2001, has been allocated $3.1million over three years.

The Commonwealth's interest in CLE is twofold: a determination to deliver cheaper legal services to the community, particularly rural and remote communities; and a commitment to improving legal education. The question is the extent to which both community service and educational objectives can be achieved in the same program. The links with CLCs and the commitment to improving access to legal services, central to the establishment of most Australian CLE programs, have now resulted in some CLE programs receiving significant funding support from the

12 *D. Williams, 17 December 1998, 'Making Community Legal Services More Accessible to South Australians', accessed at http://law.gov.au/aghome/agnews/1998newsag/508_98.htm*

13 *Far West of New South Wales, Gippsland in Victoria, the Goldfields region of Western Australia and the South East and Riverland regions of South Australia. See D. Williams, 7 February 2000, 'Community Legal Services Boosted in Regional and Rural Australia', accessed at http://law.gov.au/aghome/agnews/2000newsag/689_00.htm*

14 *H. Jeffreys & P. Munn, 'Tumby Bay – through crisis to coping: An integrated community development approach for managing change' (1996) 6 (1) Rural Society 3.*

15 *Australia Now – A Statistical Profile, accessed at http://www.abs.gov.au/ausstats/*

16 *N. Economou, 'The Regions in Ferment? The Politics of regional and rural disenchantment' (2001) 26(2) Alternative Law Journal 69 at 69.*

17 *For example, the 1999 Victorian election resulted in Independent members in country electorates holding the balance of power and supporting the formation of a Labor government despite the fact that the outgoing government had gained widespread praise for implementing economic reform without seeming to alienate the community. N. Economou, 'The Regions in Ferment? The Politics of regional and rural disenchantment' (2001) 26(2) Alternative Law Journal 69 at 69 notes that this was due to "the disproportionate rate at which regional and rural voters had voted for Labor and independent candidates compared with metropolitan voters.*

Commonwealth. Importantly, the existing political framework underpins, and to an extent determines, the multi-faceted approach that we have taken with the Clinic.

Essentially, the political imperative encouraged the differing interested parties to come together in a cooperative manner. In planning, developing and implementing the Clinic, attention was given to the sensitivities of each party, with particular attention given to balancing the agendas of all involved. For example, the division of law-making responsibility between Federal and State governments dictated that the clinic needed to address family law, a Federal legal responsibility. On the other hand, Learning Network Queensland (LNQ) is a state-based community education provider, as education in Australia is primarily a state responsibility. The LNQ coordinators, as our coal-face contacts in remote communities, were always going to be an important factor in gaining trust in those communities. Taking account of and balancing the differing interests of the stakeholders has reinforced our coordinated and consultative approach to the Clinic, while drawing on the strengths and knowledge of individual organisations.

Clinical Legal Education (CLE) in Australia - Students Providing a Valuable Community Service

Australian CLE programs have tended to involve the real client model. Law schools have either established vehicles for such education themselves or have grafted CLE programs onto existing community organisations. At a time when Australia's legal aid system is being placed under increasing pressure, there are likely to be increased efforts to have law students contribute to the delivery of legal services. Australian clinical legal education programs are well placed to facilitate such contributions.

Historically, community service has been a very significant objective of Australian clinical programs.[18] The law teachers involved have had strong links Australia's community legal centre (CLC) movement. The first Australian CLCs developed in the early 1970s with Victoria taking the lead.[19] Australia's first clinical legal education developed in 1975 at Monash University with programs emerging at La Trobe University in 1977 and at the University of New South Wales in 1980. There are now clinical programs operated by 16 Australian law schools.[20] Some of these are quite small in size, involving only one staff member. Interestingly, a majority of the academics involved in Australian clinical programs have a background working extensively in CLCs.

The nature of the community service provided by Australian clinical programs continues to develop with an increasing emphasis on community participation. The notion of a charter with the local community has been adopted by several Australian clinical programs. Community development models have been adopted by programs, most notably the Monash and Griffith University Programs. Such models adopt a non-casework approach but are informed by the casework conducted by the clinical program.

18 *M. A. Noone, 'Australian Community Legal Centres - the University Connection' in J. Cooper & L. Trubek (eds) 1997, Educating for Justice: Social Values & Legal Education, Dartmouth, 12.*

19 *J. Chesterman, Poverty Law and Social Change: The Story of the Fitzroy Legal Service, (1996) Melbourne University Press*

20 *Kingsford Legal Centre, Guide to Clinical Legal Education Courses in Australian Universities (2000) University of New South Wales.*

Issues Facing Remote Communities & Rural Lawyers

It was important for the Law School to develop a strong understanding of the nature of rural and remote communities, including their diversity. It was helpful that we were able to employ a lawyer with extensive practice experience in a rural community (Barbara Hook). It was also essential to get a sense for the nature of legal needs in these communities and the demand for the sorts of services we had in mind. While the lack of legal services available in rural communities presented us with the opportunity to make a useful contribution, the nature of the communities meant that we could not assume that our services would be accepted or utilised. This section sets out some of the insights we have gained from the planning and delivery of the program.

Many people in remote communities face special issues regarding access to legal services beyond the legal needs they share with people living in metropolitan areas. Remote communities are attracting more specific attention as a group from government decision-makers, no doubt due to the increased significance of their votes in federal and state elections. Despite this, there has also developed a tendency to perceive those in bush communities as having uniform characteristics and therefore uniform needs.[21] For example, there is a general perception that bush communities have a lack of accessible and appropriate community support services and a lack of accessible court and tribunal services.

While there are some common needs and experiences, there are also marked differences between and within the communities, and there is a diverse range of issues facing individual members of these communities. This is of itself important in developing an understanding of the needs of bush communities. Just as city-based communities are not homogenous, so too bush communities are unique from one another and contain enormous diversity. This diversity is too often overlooked in the methods of policy makers and city-based service providers.

There is a range of challenges facing lawyers working in outback Australia. Generally, these practitioners experience inflated costs, limited opportunities for specialisation and limited access to legal information resources and services. Further challenges include geographical remoteness, community attitudes and expectations, difficulties in achieving economies of scale, a lack of infrastructure, and ethical issues - particularly with regard to confidentiality.[22] Of course, there are aspects of remote legal practice that some lawyers find very attractive. There is 'plenty of work in the bush' and 'far less difficulties with bad debts, the reason for this; the inherent honesty of country folk'. Few bush lawyers have difficulties finding administrative staff and most enjoy the casual country lifestyle.[23] Remote legal practice also presents significant opportunities for relatively inexperienced lawyers who can assume major practice responsibilities at a relatively early stage of their careers.[24]

21 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 58.*

22 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 60.*

23 *B Chestnutt 'A Country Practice' (1999) 26 (4) Brief, 5.*

24 *See J. Faine, Lawyers in the Alice: Aboriginals and Whitefellas' Law, (Federation Press 1993) which contains a series of interviews with lawyers who took responsibility for major cases in their work for clients of the Central Australian Aboriginal Legal Aid Service.*

Geographic Isolation

Distance and transport affect the ability of people to access face to face legal services. Lack of adequate and affordable public transport, the need to travel significant distances and the added expense involved all contribute to access difficulties.[25] In a family law context, our colleague Rosemary Hunter has noted that "Queensland country clients travelled the furthest distances on average to reach their lawyers. In all country areas, clients often travelled further afield than their own town or the closest large town to find a family lawyer."[26] Various extreme weather conditions, including floods and cyclones, may also hinder the ability of people to consult lawyers. For those clients with no choice other than to look outside their community for legal assistance due to conflicts of interest, lack of available expertise or other reasons, the geographical isolation is particularly problematic.[27]

Geographic isolation also creates professional isolation for practitioners, limiting their ability to network within the legal profession, to develop effective working relationships with specialist advocates, to access legal academics and to keep up with their professional training needs. The impact becomes more severe as the geographic position becomes more isolated.[28] Lack of opportunities to access personal and professional development not only hinders the development of quality legal practitioners but also restricts promotional opportunities. This exacerbates the difficulties in recruiting and retaining professional staff. In essence, there is a need for the establishment of networks within which bush lawyers working in similar circumstances can work collaboratively on a plethora of issues, including professional development and innovative practices.

Assumptions about rural communities

A significant factor precluding appropriate access to legal services by bush communities is the homogenisation of the bush identity. The cultural diversity of rural communities - in terms of ethnic and/or religious background, sexual orientation, ability, age, gender and so on - is not reflected in the range of services provided.[29] Women from all cultural backgrounds face local sub-cultures especially in the area of domestic violence.[30] Police and lawyers often socialise with the women's husbands and may respond to family violence issues in an offhand manner. Women face difficulties due to community antipathy towards 'domestics', the public shame of being part of 'a domestic' and the lack of ever feeling safe because police are often quite some distance away.[31] Even though it may be possible to contact legal services to complain about the discrimination and other treatment meted out to these 'special' groups, local sub-cultures may make these mechanisms unworkable.[32]

25 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 58.*

26 *R. Hunter, Family Law Case Profiles (Justice Research Centre, 1999) xiv.*

27 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 58.*

28 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 61.*

29 *See the Report of the Community Well-being and Lifestyle Working Group of the Regional Australia Summit, October 1999, especially Key Priority 2, accessed at http://www.dotrs.gov.au/regional/summit/outcomes/reports/theme4_report.htm*

30 *Domestic Violence in Regional Australia - A Literature Review, June 2000. Accessed at http://www.dotrs.gov.au/rural/women/index.htm*

31 *See J. Nielsen, (1995) Gender Bias in the Civil Litigation System and its impact on Women as Civil Litigants in NSW: Northern Rivers Region, Southern Cross University, Lismore.*

32 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 59.*

Access to free and reduced-fee legal services

Legal and related services are also difficult for bush communities to access because either city-based services do not extend to rural areas or, if they are present, are inadequately funded or not designed to meet an individual client's needs. While many rural practitioners provide significant free (pro bono) and reduced-fee services, such services may not reach those most in need. Access to free services is limited by the smaller nature of many bush legal practices. Despite the growing presence of Legal Aid Commissions, Aboriginal Legal Services and CLCs in non-metropolitan communities, these services remain under-funded with a consequent impact on their ability to truly meet community need.[33]

Many bush communities, especially those away from the coast, are characterised by economic disadvantage. Bush lawyers within such communities have to live, work, and deal with clients whose lives are made more precarious by events such as floods, droughts, bush fires and other natural disasters. Bush clients tend to have a lowered capacity to afford legal services, as compared to those in metropolitan areas.[34]

Community Attitudes and Expectations

Lawyers working in remote areas have to find the appropriate balance between conflicting professional goals: the service ideal versus the profit motive.[35] More importantly, while seeking to fulfill the service ideal, bush lawyers need to consider their personal needs including privacy and safety. It can be too easy for clients and others in a small community to underestimate the need for a lawyer to just be a member of the community and not a lawyer. The establishment and effecting of personal boundaries in such a way that encourages ongoing work whilst not leading to a 'burn-out' is integral to the work of bush lawyers. Safety for bush lawyers and their families can also be a real issue especially for those involved in acrimonious family law disputes or highly emotive criminal matters. On rare occasions community closeness may lead to the targeting of lawyers and their families by angry or disillusioned clients. Clients know where their lawyers live and where and with whom they socialise. Threats of violence may be more of a concern than would be the case in a more anonymous metropolitan area.[36]

Importance of Local Knowledge

Members of 'special' groups are too often expected to rely solely on metropolitan-based services to meet their particular needs. While this reliance is not inappropriate in itself, existing city-based services are currently unable to adequately meet the needs of such groups.[37] For instance, women

33 *See A. Pollard, 'In Briefs: Activism in Local Communities' (2001) 26(2) Alternative Law Journal 90 at 91.*

34 *See the Report of the Community Well-being and Lifestyle Working Group of the Regional Australia Summit, October 1999, especially Key Priority 1, accessed at http://www.dotrs.gov.au/regional/summit/outcomes/reports/theme4_report.htm*

35 *M Blacksell, K Econimides and C Watkins (1991) Justice Outside the City: Access to Legal Services in Rural Britain, Longman Scientific and Technical, 4.*

36 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 60.*

37 *Louis Schetzer, National Children's and Youth Law Centre, Submission to the Victorian Law Reform Committee, Inquiry into Legal Services in Regional and Rural Victoria, 13 June 2000, <http://www.parliament.vic.gov.au/lawreform/Legal-Services_Inquiry/default.htm>, (19 June 2001) notes that young people's needs were not being adequately met in remote areas through the lack of separate regional Children's Court facilities and the misunderstanding by local lawyers of the 'particular legal and social issues that affect children and young people coming before the courts.'*

from a remote region interviewed in 1995 who used city-based telephone advice services had found them difficult to access with some referrals to locally based community services being inappropriate.[38] For example, a woman was advised by a metropolitan-based service to see her local Chamber Magistrate, who was renowned for his rudeness to women, to apply for an Apprehended Violence Order.[39] Local knowledge and adequately funded community-based services, then, are crucial to ensure quality for bush clients.[40]

It may well be unrealistic to assume that the full range of specialist expertise required in a bush community can ever be present. The challenge then is to provide a scheme of legal services that appropriately meets the full range of needs within remote communities. Telecommunications is seen as part of the answer but it would not 'be fair for rural communities to have technological communication as their only source of service delivery.'[41] Technology will certainly play a part in overcoming the disadvantage of clients in bush areas but it must be used within a setting that also offers accessible and affordable face-to-face community-based legal services.[42]

Limited Choice of lawyers/courts/services

In many bush towns, there is no resident lawyer. In company towns, lawyers tend to be acting for company interests. There is also a limited choice of solicitors in many larger bush towns with conflicts of interest precluding many community members using them.[43] Accessing court and tribunal facilities can be made difficult because they either do not sit regularly enough or do so too far away. More often than not, urgent matters cannot be dealt with locally and metropolitan-based or regional registries must be used. Generally, alternative dispute resolution facilities are also not present or not affordable. Locally based government and community sector services tend to cover unrealistic geographical areas and are under-resourced with staff often stretched to the limit. Community based correction facilities tend to be limited or non-existent such that offenders are more likely to be imprisoned, thereby being further isolated from family and community.[44]

When courts and tribunals undertake circuit visits to a region, the case lists tend to be very full. Lawyers feel institutional pressure to utilise alternative dispute resolution mechanisms and substantial pressure can be exerted on lawyers and clients alike to settle cases with a view to ensuring the court or tribunal can get through the list. Often, only the cases with major issues in dispute which cannot be settled will go to a full hearing.

Many professional services are just not available in remote areas, such as a full range of accredited legal interpreters and specialist medical practitioners. There can also be issues regarding the

38 *J. Nielsen, (1995) Gender Bias in the Civil Litigation System and its impact on Women as Civil Litigants in NSW: Northern Rivers Region, Southern Cross University, Lismore, at 39.*

39 *J. Nielsen, (1995) Gender Bias in the Civil Litigation System and its impact on Women as Civil Litigants in NSW: Northern Rivers Region, Southern Cross University, Lismore, at 38.*

40 *ALRC, Managing Justice: A review of the federal civil justice system, Report No 89, 2000, <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>, Chapter 5, paras [5.76] - [5.80].*

41 *Margaret Camilleri, Central Highlands Community Legal Centre, Submission to the Victorian Law Reform Committee, 27 April2000, <http://www.parliament.vic.gov.au/lawreform/Legal_Services_Inquiry/default.htm> (19 June 2000).*

42 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 59.*

43 *See M. Lawler, 'There are Different Kinds of Isolation' (2001) 26(2) Alternative Law Journal 81.*

44 *See C. Pereira, 'The Tyranny of Distance: Disadvantage in Queensland's Regional Prisons' (2001) 26(2) Alternative Law Journal 74.*

coordination of visiting services. While a circuit court may be making its half-yearly visit to the region within a month, the visiting hospital psychiatrist may not be due for another six weeks. It is often difficult to access alternative dispute resolution processes because such services are either not available or are rendered unaffordable to clients because metropolitan services must be used. It seems inevitable that there will be further development in the area of on-line dispute resolution services in the future.[45]

Ethical Issues

Confidentiality is a key legal ethical issue within small communities. Client confidentiality is often of great concern to women given the likelihood of existing professional relationships between their male partners and the local lawyer.[46] Apart from ensuring that lawyers respects client confidentiality, clients may have serious concerns regarding non-professional staff meeting the same standards. Even if such concerns can be addressed, there may be issues of fear or embarrassment which inhibit people in obtaining legal advice.[47] Smaller population bases and consequent close connections between members increase the importance of sub-cultures and conformity to community values. People's personal affairs are more prone to public scrutiny because of the greater likelihood that people know one another or are a 'friend of a friend'. Relatively innocuous personal details may be more than enough to identify a person in casual conversation. The protection of confidentiality is both crucial and problematic.[48]

Confidentiality issues were important in planning for the Clinic. It was critical that students appreciated the particular sensitivity in bush communities regarding this issue. By being aware of the importance of confidentiality as the cornerstone of the lawyer-client relationship, and its importance to clients, particularly clients in small communities, students raise the issue of confidentiality at the first interview with the client. Students explain in plain English the meaning of confidentiality. This has the effect of establishing rapport and putting the client at ease. In many instances, bush clients are more likely to be willing to talk to someone not connected with their locale. Many just want to talk to someone from outside their own community where they feel they are in a fishbowl.

The use of local Learning Network Queensland centres as the venue for the interview has the effect of safeguarding client confidentiality. As Learning Network Queensland is a community education provider, attending their offices is likely to attract less attention than visiting a local solicitor. The discretion and attitude of Learning Network Queensland (LNQ) coordinators is also important, as they are the only local people to have knowledge that a client is seeking advice. It was important to ensure LNQ staff appreciated the importance of confidentiality in legal contexts.

It must be remembered that most of the issues discussed above are a double-edged sword in that they impact on both remote communities and bush practitioners, albeit in differing ways. Geographical remoteness, family isolation, high costs of transport, and a scarcity of appropriate support and counselling services are all pervasive in the area of family breakdown and separation

45 *S. Hardy, 'Online Mediation: Internet Dispute Resolution' (1998) 9 (3) Australian Dispute Resolution Journal 216.*

46 *R. Hunter, Family Law Case Profiles (Justice Research Centre, 1999), 71.*

47 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 59.*

48 *J. Giddings, B. Hook, and J. Neilsen, 'Legal Services in Rural Communities: Issues for Clients and Lawyers' (2001) 26(2) Alternative Law Journal 57 at 59-60.*

in many remote communities. Although these issues do not stand alone in the area of family law, they bring with them concerns which can touch the heart of a family and a community, for example, client confidentiality and the safety of women and children. The Clinic established a unique way of delivering legal services to remote communities in an attempt to address these particular issues. Audio-graphic technology and the existing infrastructure of the Learning Network Queensland is used to deliver family law advice, information and assistance to clients outside of the Brisbane metropolitan region. As far as the authors are aware, audio-graphic technology is not used for the delivery of legal services anywhere else in Australia, nor the world.

Institutional issues - balancing various interests

From July 1999 to February 2001, the number of full time positions in the Family Court of Australia has decreased from 784 to 617 (a reduction of 21%). Court counselling services were reduced by approximately 30% with further reductions envisaged in the 2001/2002 financial year.[49] The loss of these positions has been a direct result of a withdrawal of funding by the Federal government.

Such withdrawal of funding from the Family Court has placed increasing pressure on registry staff and services. Each Family Court registry is being expected to do more with less and this is one of the reasons why there is increasing pressure to utilise student programs.

The Brisbane registry of the Family Court is interested in having our program provide assistance to them in terms of dealing with Litigants in Person (increasingly becoming known as SRL's (self representing litigants)). This would effectively mean our students and supervisors being present at the court to assist those people appearing without representation (a program similar to the one presently being offered by Monash University, Melbourne). If we were to do what the court would like us to do, we would be overwhelmed by Brisbane-based casework and would not have the opportunity to do our work with rural communities.

The intensive nature of rural advice and casework activities has meant that less clients are currently being assisted than is the case with traditional face-to-face services. The complexities of the legal issues facing clients has also meant that we have been unable to assist as many individual clients as was originally estimated. We have identified the importance of developing a range of services to be provided to rural communities including student outreach visits to the regions and on-line information sessions for groups of clients.

It has been interesting to note the manner in which the Family Court has provided positive encouragement for other registries of the Family Court to adopt a Monash model without recognising the individual aspects of the Monash program. The enthusiasm of the Family Court Brisbane Registry for our clinic to take on this added role has been reinforced by the contents of an in-house evaluation of the Monash program which has recommended the adoption of their model elsewhere in Australia. We are concerned that such a recommendation fails to acknowledge the individual circumstances of each clinical program and each Family Court Registry.

There is also an issue for clinical programs in terms of the funders valuing us because of our cost-effectiveness in delivering community services whereas the law school is clearly seeking to meet both educational and community service objectives. For us, we have been careful not to

49 *Law Council of Australia, Family Law Section Report, 29 May 2001*

compromise our educational objectives. A balancing of competing interests means that increasing pressure to deliver more services in less resource intensive areas, ie; not rural, may be brought to bear by the funding body at some stage in the future. If that occurs we will seriously need to re-evaluate our position in relation to community service to ensure that we do not lessen the educational strength of our program.

Networking issues

We have found that the development of strong community partnerships in rural areas is an essential part of the success of the clinic. The issue of developing trust within these communities for services delivered from metropolitan centers, we believe, has been addressed by the use of local people (coordinators) assisting in the delivery of services in a non-threatening local environment (Learning Network Queensland centres).

The Learning Network Queensland coordinators have actively promoted our service by way of local advertising and word of mouth referrals and recommendations. The overwhelming enthusiasm of the coordinators for the program has contributed to the take up of the program in the communities and meant that on any clinic day that we are usually fully booked by way of appointments. Locally respected people, the coordinators have acted with complete integrity and professionalism in dealing with clients and their concerns. They have quickly understood issues such as confidentiality and conflict of interest and have assisted the supervisor to ascertain particular client needs, for example, a partially deaf client and a client without transport who each needed to be provided with specialist local, as well as legal information.

Early visits by the supervisors (from Griffith University and Caxton Legal Centre) to speak with local service providers also raised the profile and increased the likelihood of success of the program. Service providers, such as counselors and charity groups, have continued to support the program. Contact with these service providers outside of clinic times has meant that a number of referrals have been made to Caxton Legal Centre outside of clinic delivery times for legal advice on matters other than family law.

The closeness of rural communities, the older age of many people living on the land and an understandable suspicion about new, and especially IT-based, services meant we did not expect that our services would be immediately accepted or utilised. The use of local knowledge to enhance the appropriateness of local referrals and support has ensured client satisfaction with services provided.

Communication issues - a twist on maintaining a professional distance

While the access of rural communities to services was an obvious issue in our planning, there was the further question of access to the Clinic itself. A lesson learned early on in the Clinic was not to presume that clients could just 'pop in' to our service when it suited us. An appointment was made for a client to attend at a convenient time for the Clinic at 9.30 am on a Friday morning. It was subsequently discovered that the client had to walk two hours into the town to make the appointment. Obviously questions about access to transport should had been asked on making of the appointment. These types of issues are now addressed when appointments are made. Another important issue needing to be addressed is any barriers to the client attending the interview, such as language or a dominant and suspicious spouse or partner.

Although there are challenges inherent in using the telephone to interview clients, the main benefit of using audio-graphic technology is that it has a broad geographical reach, and it facilitates access to legal services to a larger number of clients in a shorter period of time, with travel cost to clients minimised. There is also the possibility that many people are less guarded and more open and honest when speaking on the telephone, in comparison to face-to-face interviewing. As people living in remote communities make use of the telephone regularly to communicate with neighbours, friends, family, and for business purposes, it is more likely that they are comfortable communicating via the telephone. Further, the interviewer is less likely or able to form biases based on things such as appearance, status, or ethnicity, thus increasing objectivity.[50]

As a graphical interface is also used, there is the opportunity to utilise visual cues so the client can be presented with diagrams, pictures, or forms if necessary. The major drawback of audio-graphic technology is that the interviewer cannot see the reaction, facial expressions or body language of the client. The use of Learning Network Queensland centres minimises the risk that a client may be under duress from a third party to answer questions, or may substitute someone else to answer questions for him or her.[51] Coordinators at Learning Network Queensland centres verify the identity of the client and any other attendees, which helps to ensure that the client is not being pressured by a third party to answer questions.

The use of audio-graphic technology to interview clients has been a challenge in itself for the students and teachers of the Clinic. There has been little written about non face-to-face interviewing, even telephone interviewing, in the lawyering skills literature about how to conduct such interviews. Most authors appear to assume that client interviews will be conducted face-to-face, and many do not even mention non face-to-face interviewing or interviewing using new technology.[52] Others only make mention of it in the context of using the telephone for a pre-interview conversation or follow-up meeting, and infer that such interviewing is to be avoided or kept to a minimum.[53] Helena Twist devotes two pages to telephone interviewing, but only the first three paragraphs provide specific guidance on how to conduct telephone interviews.[54]

Telephone interviews are essentially different from face to face interviews. Different skills are needed, for example, to build rapport and trust with a client on the telephone is likely to take longer than face to face. The techniques of voice modulation, clear instructions and ensuring that a client has understood any advice given are extremely important when you cannot see the client. However, one skill that is universal across differing methods of interviewing is that you must listen to the client.

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50 Schmidt, F & Rader, M. (1999), "Exploring the Boundary Conditions for Interview Validity: Meta-Analytic Validity Findings For a New Interview Type", Personnel Psychology, Personnel Psychology Inc., Durham at 451.

51 Schmidt, F & Rader, M. (1999), "Exploring the Boundary Conditions for Interview Validity: Meta-Analytic Validity Findings For a New Interview Type", Personnel Psychology, Personnel Psychology Inc., Durham at 463.

52 R. Bastress & J. Harbaugh, Interviewing, Counseling and Negotiating: Skills for Effective Representation, (1990), Little Brown, Boston; A. Sherr, Client Care for Lawyers: An Analysis and Guide, (1999), Sweet & Maxwell, London; R. Hyams, S. Campbell, & A. Evans, Practical Legal Skills, (1998), OUP, Melbourne; Chay, A. & J. Smith, Legal Interviewing in Practice, (1996) LBC Information Services, North Ryde; D. Keats, Skilled Interviewing (1993) Australian Council for Educational Research, Melbourne; K. Lauchland & M. Le Brun, Legal Interviewing: Theory, Tactics and Techniques, (1996), Butterworths, Sydney; and C. Maughan & J. Webb, Lawyering Skills and the Legal Process, (1995) Butterworths, London.

53 D. Binder, P. Bergman & S. Price, Lawyers as Counselors: A Client-Centered Approach, (1991), West, St.Paul, at 195 and 236; and D. Keats, Interviewing : A Practical Guide for Students and Professionals, (2000) UNSW Press, Sydney, at 123.

54 H. Twist, Effective Interviewing, (1992) Blackstone Press, London at 48.

Further strategies in dealing with access to services have been to work with students, through Learning Network Queensland sites using a detailed map of Queensland to reinforce the geographic isolation of many people in need of legal services. The tyranny of distance appears to be understood by students in a visual rather than descriptive way. Students may then also be challenged to locate various welfare and other support services within the community, information which is crucial to the success of the program.

Students are required to gain an understanding of the dynamics which may impact on clients and be able to work within and analyse the operation of law outside of metropolitan areas. For example, a woman may feel great shame in reporting her partner to the police on a domestic violence matter as the community and her supporters may stress the potential damage done to the family and its reputation if she does report. A strong sense of community may serve to minimise such individual actions.

Communication with clients from culturally and linguistically diverse backgrounds was factored into the planning of the Clinic, and interpreters are arranged when necessary. Physical disability does not preclude clients from attending Learning Network Queensland centres as there is wheelchair access. Similarly, issues have arisen during the Clinic with clients in relation to intellectual disabilities, and the use of audio-graphic technology has not adversely impacted on the interviewers ability to identify the relevant issues. In fact, on one occasion, the client made the interviewer aware of the intellectual disability issue early in the interview.

Service Delivery with New Technology

We should refer to the limitations of using new technologies to address legal service delivery needs. We need to refer to the importance of combining different processes, including face-to-face interviews and visits to the regions in question.

The use of information technology as a means of providing legal services is slowly building momentum. At this stage, such use has tended to be limited to government and not-for-profit services being delivered to rural or remote communities from a metropolitan base.[55] The Internet, email, video and audio-conferencing are slowly starting to challenge the traditional way that lawyers have delivered legal services. Acknowledging the work that has been done in the area by health and education professionals, lawyers are beginning to see non face-to-face services as an option.

The technology challenge itself is another significant factor in the delivery of such services. The challenges that the use of technology has engendered are often common to both lawyers and their clients. For clients, such technology is often unfamiliar and the delivery of non-face to face services may be seen as threatening and unsupportive. Use of audio-graphic technology, computers and the Internet is often not a way of life for rural clients and training, cost and ongoing support may be an issue. For lawyers, looking outside of their own communities for legal work may be unfamiliar and the clients wary of the technology. For city practitioners, such forays into bush

55 *The Womens Justice Network is a service operated by Legal Aid Queensland providing legal services to eighteen towns in South West Queensland using computer video conferencing. See http://www.wjn.legalaid.qld.gov.au/ The Western Queensland Justice Network (WQJN) is a Community Legal Service operated by Legal Aid Queensland connecting Rural and Indigenous Communities to legal information and Advice through Video Conferencing Technology. WQJN has video conferencing facilities in 9 community organisations throughout Central West Queensland. See http://www.wqjn.legalaid.qld.gov.au/.*

communities may raise legal issues they are not familiar with or are incapable of recognising. This has the potential to operate to the distinct disadvantage of clients. The Clinic has found that these issues have to be reconciled with the fact that students tend to be very accepting of and interested in technological innovation in the delivery of legal services.

Client confidentiality in the delivery of non face to face services is also extremely important. In remote communities, clients may not believe that confidentiality can be maintained. As mentioned above, for women, it has been observed that solicitors in rural communities are likely to have an ongoing solicitor - client relationship with her male partner.[56] Client confidentiality then is often of great concern to women in this position. Locating the service at a venue which clients could be attending for one of a number of reasons may best preserve legal confidentiality. Examples of such locations where technology is used to deliver various services are community centres, such as Learning Network Queensland, and health centres.

Community partnerships are also integral to the success of any such program. Regular meetings with service providers in rural or remote areas are crucial to ensure that the service is developing and responding as appropriate to the needs of the community. It would of course be ideal to be able to ascertain areas of need before commencing any such service to make the best use of resources. It has also been evident throughout the developmental process of this program that long time lines are needed to introduce a service of this nature and to have it gain community support. When face to face meetings do not happen regularly the level of trust from the community appears to be built up slowly.

The experience of the Women's Justice Network initiative, which began in 1998 and is operated by Legal Aid Queensland, reinforces the 'long time line' assertion. The Women's Justice Network provides legal services to women to eighteen communities in South West Queensland (an area of 433,810 square kilometres or 271,131 square miles with a total population of 22,500 people), using technological means. The project is made up of videoconferencing sites located in community agencies in each town, and a webpage with an electronic booking system and access to legal information.

Essentially, the Womens Justice Network combines electronic access to the Legal Aid database and audio and visual contact with lawyers in a range of distant but specialist services. However, the level of awareness of the Network in the serviced communities is quite low and the rate at which the service has been utilised has been disappointing. Evidence suggests that the attitudes of site coordinators are critical to the success of the project.[57] A change of name to "Rural Advice and Information Network" has been mooted as many women in these regions do not readily relate to the title "Woman's Justice Network."[58]

There has also been suggestions that a circuit lawyer is essential to reinforce the technological components of the Womens Justice Network project, particularly videoconferencing and the use of computers, as a high percentage of those in the community are not computer literate. Funding for the Network will end in June 2001 and the videoconferencing sites may then be used as community access points. Further, Legal Aid Queensland has now set up a telephone advice service which is targeted particularly at rural and remote areas. Considerable resources were directed into this new service in late 2000.

56 *R. Hunter, Family Law Case Profiles (Justice Research Centre, 1999) 71.*

57 *Grace, M. and J. Previte, 'Evaluation of the Women's Justice Network' 25 August 2000 accessed at www.wjn.legalaid.qld.gov.au/report/default.htm*

58 *Whitaker, L, 'The Women's Justice Network' (2001) 26(2) Alternative Law Journal 91 at 92.*

Another initiative is the Commonwealth Attorney General Department's Law By Telecommunications Project / Family Law Access Gateway (FLAG) which comprises a law and justice internet portal, a national database, and a call centre, with links to individual CLCs. This project has been extensively criticised for: making ill-conceived assumptions about client access to telephones and the internet; providing a referral service to already stretched CLCs without supporting funding; the provision of information, rather than advice or casework services; being culturally and socially inappropriate for people of linguistically diverse backgrounds; failing to address staffing and professional indemnity issues; and the lack of consultation with existing legal service providers.[59]

Due to the number of services which are now operating to assist rural and remote clients it has also been interesting to note that the role of the supervisor in the Clinic has been primarily to coordinate the service rather than to manage and develop it. This particular issue was not envisaged at the start of the program and in fact was not an issue until many of the current programs came into existence.

Co-ordination and co-operation

Given the range of experiences and varied needs of clients, communities and legal practitioners in remote areas, it is essential that new initiatives be properly coordinated and evaluated. In the past three years the Queensland experience has been that a number of services have been established to contribute to servicing the legal needs of remote communities but with limited overarching coordination or integration to ensure such needs are in fact met. The failure of lead agencies to effectively co-ordinate the various legal services provided is of major concern. It is imperative that new programs firstly acknowledge other work being undertaken in a community and then target unmet legal needs. The importance of consultation with local service providers and potential clients cannot be underestimated. It is such groups that will hopefully become the supporters of new initiatives and the driving force for acceptance within communities.

Initiatives also need to be developed on a sustainable basis with recurrent money and resources. Without continuity of service, the ongoing needs of communities are unlikely to be understood by service providers and will therefore be more difficult to meet. For non-face to face forms of legal advice and assistance to succeed, local community service providers will be crucial supporters. Such support will not be maintained if service arrangements change without good reason and explanation. Remote area initiatives need time for trust to develop so they can become part of the local landscape.

Experience suggests that there is a need for greater planning and coordination of the various legal services now being provided in remote areas. This need is increased where the services in question are making use of new technology given the rapidly developing nature of many communication technologies. Our programme has recognised the importance of linking closely with existing agencies and infrastructure and, to taking a well-planned approach which avoids the making of promises which cannot be delivered.

59 *See Rowsthorne, M, 'Law by Telecommunications; The Magic Solution for Rural Australians?' (2001) 26 (2) Alternative Law Journal 85 at 86-88.*

Conclusion

This paper has charted the range of issues which have been addressed in the development of a new technology clinical program. The program has successfully achieved various objectives. Students have gained a strong appreciation of the family law issues facing bush communities and have significantly developed their communication skills. Clients who would have had great difficulty accessing other lawyers have been able to receive comprehensive legal advice and information.

Our clinic work has identified the need for research in relation to rural legal service delivery. We have begun work to develop a research agenda on legal services in rural communities. As part of this, Jeff co-edited an issue of the Alternative Law Journal which was devoted to rural legal issues and which included an article written by Barbara, Jeff and a colleague from a regional university.

The service provided to the Hervey Bay region has been particularly well received. Various events, including the announcement of a major new prison in the area, resulted in the commissioning of a regional study of legal aid needs. The report of study highlighted that the Griffith-Caxton service had received very favourable support from community service providers and clients in Hervey Bay. We are now in the process of exploring possibilities to expand the services we offer in the Hervey Bay region. We are actively engaged in discussions with Legal Aid Queensland regarding development of a new clinical program which would combine the use of new technology with face-to-face interviews. This program is likely to involve a partnership between Griffith Law School, Legal Aid Queensland, Caxton Legal Centre, Learning Network Queensland and private law firms in the Hervey Bay region.

The program has received favourable media coverage in a recent review of Australian law schools in the Higher Education Supplement, published in the Australian, the leading national newspaper.[60] The article emphasised the novelty of the technology with students being able to 'beam their legal advice to a 'Country Women's Association hall or neighbourhood centre hundreds of kilometres away to a client sitting at a computer'.

The success of our clinic has relied on a well-planned and measured approach to engaging rural communities and service providers. We have successfully resisted the calls for us to take on additional areas of work despite pressure being applied by city-based services contending with resource shortfalls.

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60 *D. Illing, 'Clinical Approach to the Bush' The Australian, March 14, 2001, 43.*

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Student Contributions

We hope to encourage participation in the journal from those on the receiving end of clinical education as well as from providers. We invite and encourage contributions for future editions both directly from students and through providers.

The following article is written by two fourth year law students from La Trobe University, Melbourne, Australia. In it they reflect on their clinical experience in a 'live client' clinical legal education program run by the School of Law and Legal Studies. The program is based in the compulsory professional conduct subject Legal Practice and Conduct (although participation in the clinic is optional). The specific educational aims of the clinical program are the analysis of the lawyer-client relationship and the operation of the rules of ethical conduct. The clinic is situated in a regional office of Victoria Legal Aid, the statutory legal aid provider, and is within the neighbourhood of the university. An important consideration from the university's point of view is the way in which the program contributes to its local community. Students are supervised within the clinic by a member of academic staff of the School who is also a qualified legal practitioner. As part of performing their client service to a high standard, they are encouraged to take a critical approach to the legal system and the law in action and to reflect on the meaning of ethical practice.

Clinical Legal Education: Bridging the gap between study and legal practice

Jessica Kaczmarek and Jacquie Mangan[1]

For a law student, the academic study of the law and the actual practice of its principles seem worlds apart. With our desk piled high with books, case reports and legislation, the opportunity to experience and reflect upon the human interaction that underpins legal practice is notably lacking. While good lawyer client relationships are vital to successful legal practice, at present, a law student can obtain their law degree without ever interviewing a client or managing a case file. It was with this paradox in mind that during 2000 we embraced the opportunity to be a part of a clinical legal education program run by La Trobe University's School of Law and Legal Studies.

The program involved working voluntarily (but for academic credit) one day a week for ten weeks at Victoria Legal Aid's Preston office. As the program was part of the Legal Practice and Conduct course, the aim of the placement was to explore the legal practitioner's duty to the client, the courts, and fellow practitioners. This was primarily achieved through reflection upon our observation of legal practitioners and from our own personal experience of practising as 'student lawyers'.[2] Throughout the program we observed client interviews and court appearances conducted by experienced practitioners. This provided us with a firsthand perspective of the legal system and we were encouraged to study and critique each practitioner's different style of interviewing, advocacy and case management.

All students were then given the opportunity to develop their own skills through participation in a student clinic. We interviewed clients, researched matters, wrote letters of demand and advice and, if required, briefed counsel and prepared our clients for their court appearance. At the end of each day we wrote a journal entry about our experience. This encouraged us to reflect upon our own skills and ultimately assisted in our development both as individuals and aspiring lawyers.

The legal aid setting provided an incredibly intense but rewarding learning environment. During the course of the placement we came into contact with people from diverse backgrounds. Our clients included people who were homeless, people suffering from mental and physical disabilities, or drug addictions, and people who had been victims of sexual and physical assault. For the first time, we observed that legal problems were not just a collection of isolated facts, but

1 *Fourth Year, Law Arts Undergraduate Students at La Trobe University, Melbourne, Australia.*

2 *In recognition of the formal requirements for legal practice in the Legal Practice Act (Vic) 1996, all people we dealt with in our capacity as 'student lawyers' were informed that we were law students not qualified legal practitioners. Our clients were assured that legal practitioners holding current practising certificates would approve all advice given and work undertaken on their behalf.*

stemmed from a long and complex history of social problems. Through experiencing the lawyer client relationship we became aware of the inherent contradictions which underpin our legal system. On many instances we had to explain to clients how the limited scope of legal aid meant that we could not help them. While, in other instances, we were obliged to help those whom we felt would not derive any benefit from our efforts or would quickly be returned to the court system.

We often found ourselves in personally confronting situations. We witnessed first hand the inhuman conditions of some suburban police cells. We were reminded of how legal decisions impact on people's lives through seeing a distraught child watch their mother being lead away following a failed bail application. This was a timely reminder of the consequences which stem from legal decisions and the responsibility upon practitioners to give their best efforts. For the first time, when engaging in research we knew that more than just law school marks were at stake. However, we found that our efforts were rewarded when our work helped to resolve a problem in our client's life.

Our months at Preston Legal Aid also showed us the more colorful aspects of practising law. One young student lawyer had to jump out of the way of flying chairs as a client attempted to escape from custody while at court. In our inexperience we found ourselves taking pleasure from the smallest of achievements, our first file, first interview, the first letter personally addressed to us, or our first phone message. Our excitement at each of these 'firsts' was often looked upon with bemusement by our more experienced colleagues and was coupled with the warning that the joy of these things would quickly wear off!

The structure of the program allowed us to experience the full spectrum of work done by a legal aid lawyer. We would spend one week assisting the duty solicitor at the local Magistrates' Court and the next week we would interview clients. This was an ideal situation because it allowed us to observe the duty solicitor for one week and then attempt to put those lessons into practice with our own clients the next week. Our student clinic was a very safe learning environment as we always had the support of our supervisor and other solicitors within the office. The clients were usually very patient with us and one client even remarked that the student lawyers often made more sense that the real lawyers.

The amount we learnt in ten weeks was quite amazing. Through dealing with clients and running client files we developed communication and organizational skills of universal application. We also developed an insight into the duties of the legal practitioner that can only be achieved through practical participation in the process of giving clients legal advice. Our clinical legal education experience challenged us in ways that traditional learning methods do not. It required us to not only know the law, but to learn how to communicate it to others in a meaningful way. It pushed us to look outside of the legal problem and examine the more personal reasons behind the client's troubles.

In essence, an understanding of the law is worth very little unless that understanding can be used to respond to people's needs. A common criticism directed towards the legal profession is that lawyers are good at dealing with other lawyers but not with the wider population. This is a systemic problem which can only be addressed from the ground up. Equipping law students with interpersonal skills is as valuable to their education as learning contract law. Clinical legal education programs do have financial and personal costs. They are more difficult for the law school to run and can place additional pressures upon the student. However, from our experience, participation in a well-structured clinical legal education program is immensely rewarding as it encourages personal and legal development that simply cannot be achieved from lectures and books.

Announcements

Developments in Professionalism from the University of South Carolina:

Conference notice:

'Enhancing the Accountability of Lawyers'

27-29th September 2002

Charleston, South Carolina.

This conference aims to devise practical strategies for various constituent groups to use to increase the accountability of lawyers. The conference is co sponsored by the Nelson Mullins Riley and Scarborough Center on Professionalism at the University of South Carolina, School of Law and the Keck Center on Legal Ethics and the Profession at Stanford Law School.

Contact Professor Roy Stuckey, School of Law, University of South Carolina, Columbia, South Carolina 29208 USA. E mail roy@law.law.sc.edu

In March 2002 a new professionalism web site went on line:

www. //professionalism.law.sc.edu. The site provides information and resources to help lawyers and judges improve the conduct of legal professionals. The web site was developed by Nelson Mullins Riley and Scarborough Center on Professionalism at the University of South Carolina, School of Law