Editorial

Now with Added Technology: change and continuity for the IJCLE

Elaine Hall

Northumbria University, UK

Welcome to the first online edition of the *International Journal of Clinical Legal Education.* The *IJCLE* archive, which is gradually building up on this site, demonstrates the strength and breadth of the work done in clinic around the world and in the online edition we intend to make this work easier to access, more interlinked and with a greater impact on research, theory and practice. One of the ways in which we will be helping readers to navigate is by grouping papers in strands[1].

- *Clinic, the University and Society*: this strand addresses the role of clinic as an instrument for civic engagement, access to justice and societal change.
- *Teaching and Learning in Clinic*: this strand investigates the curriculum, pedagogy and assessment used to prepare students for and support students during their clinical experience.
- *Research and Impact*: this strand will focus on the evidence base for clinical education and will explore the weight of evidence and the knowledge claims.

[1] More details of the strands, instructions for authors and review policy can be found on the website under *About The Journal*

> The papers will develop our conception of the impact of clinic by giving the rigorous presentation of a range of empirical data a strong critical and epistemological frame. Papers in this strand may therefore have a topic focus from another strand but the balance of the paper will be weighted towards an exploration of the research methods used (in a report of a particular empirical study) or of the balance of approaches to research in CLE (in a review of existing studies).

The articles in this journal are freely available in a form of Open Access that is often referred to as Platinum, since it has the immediate availability of Gold Access, without the Author Processing Charges sometimes associated with that model. This approach allows us to spread the word about clinical education as efficiently as possible and continues the long tradition of the *IJCLE* of inclusion and dialogue. We welcome submissions from practitioners from all legal and educational jurisdictions and from allied fields.

The *IJCLE* will appear three times a year in Summer, Autumn and Spring editions, containing as before a mixture of *Reviewed Articles* and *Practice Reports* and in a new feature, *From the Field*: discussions about the role of clinic and development news. In this edition Maxim Tomoszek from the Czech Republic reflects on the underlying beliefs and assumptions of clinical education and how this has impacted upon the development of clinic in Olomouc. He makes a particularly telling comparison drawn from the adoption of judicial councils in Europe and raises some interesting

questions about the advantages and disadvantages of both innovation and conservatism.

Richard Owen presents the innovative use of technology to encourage reflective dialogue with and about young offenders in his article in the *Clinic, the University and Society* strand. However, the technology is perhaps merely the vehicle for the truly innovative element in this work, which is a form of advocacy that foregrounds voices rarely heard in the criminal law process. Young offenders in this study reflect on the impact of their crimes and on what place they can now claim in society whilst members of the public interact with the text messages and contribute reflective interviews on the same topics. As society's conceptualisation of 'lawyers' work' moves beyond advice and representation in court, projects like this prepare us and our students for a wider role in civic society.

In the *Teaching and Learning in Clinic* strand we have two papers that pick up on this theme in very different ways. Shaun McCarthy takes as his focus the increasing use of tribunals and argues for a specific skill-set for this less adversarial arena. The development of these skills through an experiential pedagogy within the specific context of mental health raises important issues for students not just about tailoring their argumentation and presentation but more deeply about their role in co-constructing situations where vulnerable people's voices can be heard.

Liz Curran and Tony Foley engage with the thorny issue of quality and how this relates to our assessment of students' performance in clinic. In their paper they

draw our focus to one of the key tensions of clinic between a manageable educational experience and the provision of a high quality legal service. Their case studies highlight the importance of a range of feedback opportunities and structures so as to provide for ourselves, our students and the clients in clinic a more nuanced understanding of quality.

We hope that you find much to stimulate thought and discussion in this issue, that this will prompt you to respond with your own ideas as future articles, that you will suggest improvements and additions to the journal and website and of course, that you will forward the link to the website to colleagues everywhere! A final, personal note: it is also my first edition as Managing Editor and I would like to thank Jonny Hall for his stewardship of the journal and also to thank Maureen Cooke for helping to manage the editorial transition. A dedicated and very patient team of technicians and library staff have made this online journal a reality and our heartfelt thanks go to them.

Reviewed Article – Clinic, the University and Society

Gathering the Excluded Voice: The TXT Inside/TXT Outside Project

Richard Owen

University of Essex, UK

rowenb@essex.ac.uk

INTRODUCTION

The TXT Inside/TXT Outside Project was an interdisciplinary community legal education project.[1] It was a collaboration between a legal academic, computing and social scientists, and a conceptual artist. The project involved young offenders held under secure conditions in a Young Offender Institution using text art to reflect on their experiences of law, life and the legal system.

The aim of the project was to engage the young offenders and the general public in a discussion about the treatment of young offenders using narrative techniques. The voices of young people held in custody (Inside) were 'gathered' and 'released', to be seen, heard and responded to by the public at large (Outside). The focal point of the

[1] I would like to thank Helen Power, Reader in Law, University of South Wales for commenting on a draft of this article. Any mistakes are, of course, my own.
The project was funded by Beacon for Wales a community engagement fund for universities in Wales funded by the Higher Education Councils, Research Councils UK and Wellcome Trust. It was formed from a partnership between Cardiff University, the University of Glamorgan, Amgueddfa Cymru-National Museum Wales, Techniquest, and BBC Cymru Wales. The project team consisted of members of staff from Artstation (Glenn Davidson); the School of Social Sciences (Michael Shepherd) and School of Computer Science & Infomatics, (Ian Grinstead) Cardiff University; and University of Glamorgan Law School (Richard Owen). The University of Glamorgan ceased to exist in April 2013 when it merged with University of Wales, Newport to form the University of South Wales.

action was a 'stage event' in the centre of Cardiff, where the text messages of a small group of young people in custody were displayed on a large screen, with the public being invited to respond by texting their own messages. A documentary film from the event, which included the projections and interviews with the public, was subsequently shown to and discussed with participating young people in custody.[2]

THEORETICAL BACKGROUND

1. Community Legal Education

There are four broad goals for community legal education as distilled from Gandhi, Freire, hooks, and Lopez:

(i) empowerment with legal knowledge to enable the community to advocate for its own self-interests;

(ii) collaborating with the community to facilitate community legal education;

(iii) teaching and learning in context;

(iv) teaching multi-dimensional lawyering skills and instilling a commitment to social justice.[3]

The aim was to create a discussion about the experiences of young offenders with members of the public to provide a space so that they could reflect on their views.

[2] An abridged version of the film can be viewed at <http://www.artstation.org.uk/TXToutside/video.htm> accessed 25 January 2014.

[3] MM Barry and others, 'Teaching Social Justice Lawyering: Systematically including Community Legal Education in Law School Clinics' [2012] 18 Clinical Law Review 401, 424

This was intended to empower both the young offender community, on the one hand, to allow their unmediated voice to be heard and the community of the public at large, on the other hand, by allowing them to form their own opinions about the treatment of young offenders based on the direct testimony of offenders themselves, as opposed to information obtained indirectly via the press.

In a sense it was advocating on behalf of young offenders, but rather than advocating in a particular cause, which is what has traditionally been meant by community legal education, it wanted to extend this goal by having the more general aim of seeking to ensure that members of the public had a considered view of the treatment of young offenders. It was a collaboration to create a work of performance art on the part of both the young offenders and the public; the project creating the space for this to occur. It contextualises learning for students by giving them an insight into the issues of social deprivation frequently faced by young offenders and how this might lead to criminality.

It was aiming not only to put teaching and learning in context for students but also put the legal process, insofar as it affects young offenders, into a context for the general public as well.

It was also examining whether use of new technologies can assist the pursuit of social justice and also enhance students' lawyering skills by making them more aware of conditions surrounding actors in the legal process and giving an insight into how the use of new technologies might promote change.

2. Using narrative

There are a number of ways to define narrative, but, at its most abstract, it could be described as a 'representation of an event' or 'a connected sequence of events'.[4] Narrative is obviously used in law. It could be said that in civil cases the claimant casts the narrative, the respondent recasts it, and the judge re-recasts it. In criminal cases the jury will process and test the validity of the defendant's narrative in relation to their own narrative as community members. Narrative within law is distilled until one arrives at the *ratio decidendi*: that combination of law and fact on which the case is decided.

Lord Denning used narrative techniques as a way of conveying, typically with an economical use of words, an impression of the facts of a case. The famous opening line of his judgment in *Hinz v. Berry*[5]*:* "It was bluebell time in Kent,"[6] conveys in very few words the tranquility and beauty of the scene, immediately interposed to the carnage that was about to occur as a result of a serious car accident. It is a highly evocative statement, and an effective narrative technique.

3. Using narrative in legal education

Narrative is being increasingly used in professional education. There are examples of it being used in medicine and accounting and a number of advantages have been

4 Lacy, as cited in Dawn Watkins, 'The Role of Narratives in Legal Education' (2011) 32 Liverpool Law Review 113

5 [1970] 2 QB 40

6 ibid 42

identified in using narrative techniques in legal education. It has been claimed that it leads to greater student engagement by allowing students to create meaning by imagining what happened or could have happened.[7] It allows for greater empathy and seeing the actors in legal process as fully realised people situated in a social context thereby creating more rounded lawyers.

Students taught in a legal positivist tradition are used to seeing legal education being reduced to a set of rules, to think rationally about these rules, and to privilege rationality over emotion. Narrative though can meet a basic human need. All societies throughout history have used narrative techniques, such as storytelling, so to overlook narrative is to dehumanise legal education. The post modern loss of belief in an objective reality also favours use of narrative techniques. It creates extra dimensions to law students' education as they see the perspectives of others. It creates an alternative to positivistic approaches to legal education and demonstrates to students that there can be an approach to legal education which looks at the law as lived.[8] Those who have studied use of narrative in legal education have seen its possibility for hearing the voice of those who are suffering and oppressed. It also explores the limits of law and develops an imagination for what the law might become.[9] Through providing context, it reveals the messiness of many people's lives

7 Michael Blissenden, 'Using storytelling as a teaching model in a law school: The experience in an Australian context' (2007) 41(3) The Law Teacher 260

8 Narnia Bohler-Muller, 'The challenges of teaching law differently: Tales of spiders, sawdust and sedition' (2007) 41(1) The Law Teacher 50, 52.

9 ibid

and provides the basis for approaching problems intelligently and creatively for those who go onto to legal advice work.

However, narrative techniques have been criticised for not being clear as to the legal rule in which the problem is grounded, what the legal response should be to problems raised by the narrative or suggesting solutions only in general terms.[10] Further criticism is levelled at narrative's failure to attempt neutrality and instead aligns itself with a particular group; it also does not test ideas through adversarial debate with those holding opposing views.[11] Its use of anecdote is unscientific and it is hard to know how far it is possible to generalise from people's specific stories. This latter criticism seems to overlook that narrative is just one of many sources that can be examined when looking at a group's situation. It is not a privileged source but it can be a valued source. There are also concerns that narrative infers your views are less valid if you have not experienced a situation directly yourself. In other words, it creates a danger that it will not be possible to gainsay a young offender's interpretation of their experience of being incarcerated unless you too have been imprisoned as a young offender.

This mistakes the role of narrative. Its role is not to diminish the views of those who have not been imprisoned as young offenders but to more easily empathise with those who have been in that situation and to have a greater insight as to what it might be like to be a youth in prison.

10 Kathryn Abrams, 'Hearing the Call of Stories' (1991) 7 (4) California Law Review 971, 978
11 ibid, 979

What was experimental about this project was that it attempted to use narrative techniques in community, as opposed to classroom based, legal education utilising new technologies. It aimed to release narratives about the young offenders' experiences of the criminal justice system into the public domain, not to advocate in specific disputes and with no particular end result in mind other than promoting reflections on this experience.

THE TXT INSIDE/TXT OUTSIDE PROJECT

The project involved two initial workshops working with ten young offenders who were all male and all aged between 15 and 17. They were all held together under secure conditions in the same Young Offender Institution.

In the first two workshops, the texts were produced by the young offenders. In the first workshop the young offenders wrote their responses to a series of prompts:

> *What is your favourite moment?*
>
> *What do you think of when you first wake up?*
>
> *What are your dreams?*
>
> *What would you like to do when you get out of here?*

A group discussion then followed which examined the responses. In the second workshop, three members worked on a one to one basis with the young offenders or in small groups about their experience of the criminal justice system. They were asked if they thought their treatment had been fair; who had helped them when they

were in trouble; whether they had been listened to during trial and in the Young Offender Institution; and their experiences of being incarcerated.

The characteristics of many of the young offenders reflected those of the prison population as a whole. Members of prison staff told the project team that many had only managed low attainment at school and from the text messages they produced it was clear many had poor self-image.[12] Whilst there is a strong, systemic emphasis on attaining qualifications in prison education generally in order to enhance the prisoners' prospects in the labour market upon release, there is also an emphasis on developing self-image through experiencing success.[13] Raising self-esteem is seen by many members of staff working in the system as a necessary precondition to success in education, and one of its major purposes. Art, drama and music are seen as important factors in helping to raise self-esteem. There have been a number of studies which have shown that art as part of a prison education programme raises prisoners' self-esteem.[14] Art is often a portal through which young offenders pass prior to becoming more engaged in education generally.[15] Prison officers usually value the acquisition of 'soft skills' for making a contribution to offenders'

12 Jane Hurry and others, *Inside Education: The Aspirations and Realities of prison education for under 25s in the London area* (Sir John Cass's Foundation/Institute of Education, University of London 2012) 4

13 ibid 9

14 L Digard, A von Sponeck, and A Liebling, 'All Together Now: The Therapeutic Potential of a Prison-Based Music Programme' (2007) 170 Prison Service Journal 3; Laya Silber, 'Bars behind Bars: The Impact of Women's Prison Choir on Social Harmony' (2005) 7:2 Music Education Research 251; D Wilson and M Logan, *Breaking Down Walls – The Good Vibrations Project in Prison* (Centre for Criminal Justice Policy and Research 2005) all cited in K Anderson and Katie Overy, 'Engaging Scottish young offenders in education through music and art' (2010) 3(1) International Journal of Community Music 47, 48

15 Anderson and Overy (n14) 47

development; however, the targets set for prison educational programmes in England and Wales focus narrowly on the functional requirements of accredited skills based employment orientated qualifications.

In these workshops some 31 text messages were prepared by the young people (Inside), and 29 of these were cleared by the prison authorities for later transmission; these were 'released' to the public with the public being invited to respond by texting their own messages (Outside). The reasons why two were not approved are discussed below.

Fig. 1 BBC Cymru Wales Information Screen, Cardiff

On Saturday 11th February 2012, the large BBC Cymru Wales information screen in Cardiff city centre was used to display the messages in a three hour event. Postcards announcing the event and inviting participation were handed out by the team in the morning. The messages of the young people in custody were displayed on the left

hand side of the screen, while the passing public sent live SMS text messages for instant display on the right hand side. A live roll of adjacent text messages from the young offenders and the public was created putting them in 'dialogue' with one another.

The event was videotaped and included interviews from members of the public. An edited documentary was played two weeks later to the young offenders in a final workshop. The film provided a platform for discussion of the original text messages written by the young people, of the messages posted on the screen by the public, and of the interviews with members of the public. The young people in custody who saw their messages displayed on the large, public screen in the film appeared to be profoundly moved. Their behaviour was noticeably different from the two earlier workshops when they had been more exuberant, and more inclined to allow their attention to wander. Experienced prison officers who were present at the screening commented on unprecedented levels of attention and focus.

The decision to use texting was intended to be a reflection of teenagers' lives today. Whilst people of all ages are increasingly reliant on mobile phones to transact all manner of business, teenagers are particularly dependent on mobile phone technology to conduct a social life.

Adolescents have been shown to be heavy users of all forms of electronic communication, including text messaging.[16] Virgin Mobile USA reports that two thirds of teenagers with mobile phones send text messages daily; half of Virgin's customers aged between fifteen and twenty receive at least eleven text messages a day, while approximately a fifth text twenty one times a day or more.[17] Electronic communications have the effect of reinforcing the relationships of adolescents with their peers at the expense of communication with their parents; it expands their social circle; enables them to join offline cliques; plan social events; and it is often a vehicle to form and maintain romantic attachments. Electronic communications such as instant messaging and texting have been found particularly useful by adolescents as a way of talking freely to members of the opposite gender.[18] However, use of electronic communications is not wholly positive. The more private forms of electronic communication, such as texting, have been found in reports of usage in the United Kingdom to have particularly high levels of harassment and bullying.[19] Undoubtedly, loss of the phones and the resulting ability to text means that offenders lose many avenues of communication, which weakens their sense of identity. Creative activities involving texting help them rediscover their voice and emphasise the more positive uses of texting.

16 Kaveri Subrahmanyam and Patricia Greenfield, 'Online communication and adolescent relationships' (2008) 18(1) The Future of Children 119, 119

17 ibid 122

18 ibid 125

19 ibid 128

Best practice in prison education also shows that the positive results are more likely to be obtained when a project draws upon prisoners' age related interests and culture so text art is seen as a suitable vehicle for engaging young offenders.[20]

1. Methodology for evaluating the project

A recursive approach was taken to methodology in which outcomes were continuously reviewed and assessed; the lessons were learnt and reinvested in the next stage of the project.

As the project was predicated on the basis of the responsivity of not only offenders but also members of the public, it had to adapt to the offenders' reports of their experiences and priorities and the public's reaction to them. As a result, observation was thought to be the best way of gaining insight into the effect of the process on the offenders and as a form of community legal education.

An observation framework was developed with project team reflections after each stage of the process also sometimes involving prison officers for the stages held in the prison. This involved the project team meeting immediately after each session and assessing the young offenders' engagement with the process. The framework looked for the young offenders' attitude to their trials whether they regarded the process as fair; their attitude to the actors in the legal process; who they regarded as

[20] Hurry (n 12) 24

supportive and who was unsupportive; their life experiences, particularly risky behaviours, and whether they made any link between them and offending; their experience of prison life; and their ambitions for the future.

These areas were being observed to see if they felt that their trials had followed due process; whether or not they regarded their legal representatives as being effective; who could be of assistance in preventing reoffending and who and what might cause them to reoffend; whether they regarded their treatment in prison as capable of rehabilitating them; and whether or not they regarded their prospects as blighted as a result of imprisonment.

After the first session, the project team had to assess how to deal with the young offenders' attitude: they were convinced that the project was designed to exploit them and make money out of them in some way. They were impressed by the expensive equipment which had been taken into the prison, but this further convinced them it was a money making venture.

As a result of the lack of trust shown by the young offenders towards members of the project team during the first session, there was much more one to one interaction between members of the project team and the young offenders during the second session. The reflection on the first session also concluded that the overall feeling amongst the young offenders was that they had been fairly treated by the criminal justice system and they were many who believed in due process even if they did not express it in that way. The team reflected on how far it was possible to probe. In the

event, the greater incidence of one to one interaction in the second session made it easier, as it was more conversational and it was possible to ask for elaborations on statements or gently challenge what had been said.

Prison officers and educators had been present at the third session where the film was screened. Everyone discussed their observations of the young offenders: how attentive they had been, and their emotional reaction. Everyone involved put forwarded their explanations for their reactions.

Ten young offenders completed a Sense of Coherence questionnaire at the start of the first workshop and another ten the end of the final workshop although of the final ten only six were from the initial group. The inevitable churn in the prison population meant that some of the original group were no longer being detained in the Young Offender Institution whilst new inmates made up the rest of the group for the final session. This is a small group and it is hard to see with a declining population in Young Offender Institutions how it could be anything other. Equally, it is difficult to see how it would be possible to stick with the same group of young offenders through the project. In addition to young offenders completing their sentences they may be unavailable due to other reasons.

Sense of Coherence is the inclination to assess life events as "comprehensible": events are perceived as ordered, consistent, structured; "manageable": whether you feel you can cope with events; and "meaningful": the extent to which life makes sense and it is worth making, as a result, a commitment to things. In other words, it

is the ability to cope with and assess events in order to behave in a constructive way. The concept of Sense of Coherence was first put forward by Aaron Antonovsky in 1979 to explain why some people respond better to stress than others. It arose from the salutogenic approach i.e. the search for the origins of health rather than the causes of disease.

Permission was sought and obtained to use a questionnaire which had been adapted for children's needs and uses a 19 point scale.[21] However, some suggestions were made to alter it for adolescents. The more childish references which were consequently thought to be inappropriate referred to ice cream and school classes. Examples of questions used included:

When I need help, there is someone around to help me.

1	2	3	4
never	sometimes	often	always

I feel that I'm not being treated fairly.

1	2	3	4
never	sometimes	often	always

I feel confused, mixed up.

1	2	3	4
never	sometimes	often	always

[21] Permission was kindly given by Professor Malka Margalit of Tel Aviv University to use a questionnaire he had devised and used for children although he suggested amendments as the project was working with adolescents.

The questionnaire was designed to measure the offenders' feelings of control, optimism and self-esteem at the beginning and the end of the project. Previous research with young offenders in Spain found they had moderate Sense of Coherence scores.[22] The research took the health assets model which is defined as factors and resources which enhance the ability of an individual, group, community or institution to maintain health and wellbeing and reduce health inequities.

The young offenders in the Spanish research did not mention self-esteem or positive role models as assets in the promotion of health.[23] They also did not regard relating to any community group or association to be an asset even though other research has shown it has positive health benefits.[24]

2. Issues around young offenders held under secure conditions

Whilst the types of issues young offenders would raise could not be predicted in advance, the public debate around young offenders in England and Wales has been informed by a number of issues which have caused widespread concern.

The most broad offence types are breach (breach of statutory order, bail or conditional discharge) committed by 21% of children committed to custody; violence against the person committed by 20%; robbery committed by 17%; and burglary

22 JJ Paredes-Carbonell and others, 'Sense of coherence and health assets in a youth center for minors' (2013) 15 Rev Esp Sanid Penit 87

23 Ibid 95

24 ibid

committed by 13%.[25] The young offenders who participated in the project reflected the typical young offender population when it can to offences of violence, robbery and burglary but none had committed breach offences. The rest were made up of offences relating to drugs.

The numbers of young people held under secure conditions in England and Wales although historically high has been in sharp decline since 2008. However, although the numbers of young offenders held in secure conditions are in decline, the number of offenders from ethnic minorities is rising: 39% of those held, which is up from 33% in 2009/10.[26] The percentage of ethnic minority offenders involved in the project at 30% was lower than the percentage for the entire population of young offenders in England and Wales.

In addition, young offenders from ethnic minorities are more likely to have a less positive experience of being held in secure conditions than their white counterparts: there has been a 'steady decline' in those who thought the majority of staff treated them with respect with the perception of black and ethnic minority young people worse than that of whites.[27] This was reflected in the young offenders who participated in the project. They were less happy with the way they had been dealt with by the criminal justice system and the treatment they were receiving in prison.

[25] Jessica Jacobson and others, *Punishing Disadvantage: a profile of children in custody* (Prison Reform Trust 2010) 14

[26] Amy Summerfield, *Children and Young People in Custody 2010–11. An analysis of the experiences of 15–18-year-olds in prison.* (H.M. Inspectorate of Prisons/Youth Justice Board 2011) 7

[27] HM Inspectorate of Prisons, *HM Chief Inspector of Prisons for England and Wales Annual Report 2011–12* (The Stationary Office 2012) 75

There is a problem of bullying in Young Offender Institutions. It is estimated that 25% of young men in prison have been victimised by others.[28] Victimisation covers a range of behaviour from name calling to murder, as in the case of Zahid Mubarek who was murdered in Feltham Young Offender Institution by his racist, psychopathic cellmate in 2000. The most common type of victimisation is being hit, kicked or assaulted which is reported in 11% of cases.[29] Twenty-two per cent of inmates report being victimised by staff with insulting remarks at 12% being the most commonly reported form of victimisation.[30] Unsurprisingly, it was hard to get the young offenders to talk about bullying probably because of the public nature of the discussions.

Incarceration can often be predicted from the socio-economic circumstances which prevailed at birth, with a quarter of male young offenders having been in care.[31] Troubled or disrupted family life is another feature of children in trouble with the law. A study of children and young people in custody and the community found that two thirds came from families where the structure has broken down and only one third come from families where the biological parents remain married or living together.[32] The participants reflected these statistics. About 9% of children in

28 ibid

29 Ewan Kennedy, *Children and Young People in Custody 2012–13 An analysis of the experiences of 15–18-year-olds in prison* (HM Inspectorate of Prisons/ Youth Justice Board 2013) 39

30 ibid 40 – 41

31 HM Inspectorate of Prisons and Youth Justice Board, *Children and Young People in Custody 2010–11. An analysis of the experiences of 15–18-year-olds in prison.* (The Stationary Office 2011) 7

32 Richard Harrington and Sue Bailey, *Mental Health Needs and Effectiveness of Provision for Young Offenders in Custody and Community*. (Youth Justice Board 2005) 38

custody are parents themselves.[33] Using small numbers, the participants reflected this as one (10%) already had a child with a partner expecting another child. For many young offenders crime is a family business: around one third have a parent or sibling who is involved in criminal activity.[34] The project team found through discussion that at least two of the participants had siblings who were in trouble with the law. Another study of children who are persistent offenders also found higher than average levels of loss, bereavement, abuse and violence experienced within the family.[35] One participant had suffered the loss of a sibling. In addition, children in custody often suffer multiple layers of disadvantage experiencing not only problems within the home and family but also psycho-social and educational problems as well. From observing the participants and information provided by prison officers, it would seem that they reflected this too.

Holding young people under secure conditions is not proven to be effective. Seventy three per cent of offenders held within Young Offender Institutions reoffend with a high likelihood that they will reoffend within a year.[36] The participants did not see any rehabilitative benefits to being incarcerated and there was a broad consensus that they would be forever stigmatised after being imprisoned.

3. Young offenders do not always see themselves as victims

33 ibid 53

34 ibid

35 Elaine Arnull and others, *Accommodation needs and experiences* (Youth Justice Board 2007)

36 Ministry of Justice, *Transforming Youth Custody Putting education at the heart of detention* (Stationery Office 2013) 8

Whilst the issues such as multiple disadvantages are of widespread concern in academic circles, they are not always reflected in the views of young offenders themselves. Amongst the text messages put forward by the young offenders were the following:

- *Do the crime do the time*
- *My solicitor helped me most when I was in trouble*
- *My family and my solicitor helped me most when I got in trouble*

Many of them seemed to have faith in the due process of the criminal justice system. In discussions, there was broad, but not unanimous, agreement that they would not be in prison unless they had done something wrong. They only said complimentary things about their solicitors, and clearly thought that they had been well represented. This, of course, might have been due to concern that the project team or others might pass on negative comments to the prison authorities.

Of those who commented, they regarded their families as effective support mechanisms. The grandmother was frequently cited as an important figure who held the family together often in what must be difficult circumstances.

These comments show a belief in the criminal justice system, that the young offenders felt they had been effectively represented and supported by their families. However, academics often believe that there are serious deficiencies in the youth justice system and that crime is often a result of socio-economic and personal

circumstances.[37] This creates an ethical dilemma that a well-educated, liberal elite, might well see young offenders as victims of circumstance projecting their ideas onto these young offenders who do not self-identify as victims.

4. Evidence that young offenders do see themselves as excluded

There were other messages which were more critical of the criminal justice system. One example is the following:

- *I don't think the judge understood my life - the things that are important to me*

This would appear to be an argument in favour of using narrative techniques in community legal education. The feeling amongst young offenders that their lives differ from decision makers and that their voice is not heard was picked up in other texts:

- *You'll only listen to a millionaire*
- *I really doubt anyone would listen to a young offender*

[37] Fifty one per cent of children in custody come from deprived households which is defined as households on benefits or where there is unsuitable accommodation compared to 13% in the population as a whole; 39% have experienced abuse in the family compared to 16%; 7% have parents with substance misuse problems compared to 2 -3 %; and 12% have suffered bereavement through loss of a parent and/or sibling compared to 4%. Source: Jacobson (n 25) 52

There was a strong feeling that as they had been convicted, they were now locked into a lifetime of stigmatisation as a result of their conviction and would never escape its effects:

- *Shit sticks for life*
- *As soon as you've been in once the police will come knocking on my door*

Further mistrust of the police, and less confidence in the criminal justice system, was demonstrated by this statement:

- *I really don't trust the police at all*

The 21% of young offenders held in care and separation units was referred to obliquely in this statement:[38]

- *He can't ride his bang up*

This was a reference by the young offenders to one of their number who was physically restless after having been held apart from the rest of the group, as a punishment, in a care and separation unit and was finding it difficult to settle back within the group after coming out of the unit.

In most, but not all cases, there was a sense that their life chances were severely diminished, that they were disengaged from education, and their prospects were pretty hopeless, as shown by this statement:

[38] HM Inspectorate of Prisons (n 27) 74

- *Most YPs [Young Prisoners] don't come to education to learn, they come to associate with others*

It is hard to tell whether this is a reflection of the young offenders' view of their future, i.e. it is destined to be bleak, or whether it is a reflection of their view of the relevance of the curriculum they were studying. This would explain why their Sense of Coherence scores were low.

One young offender did, however, express great optimism about his prospects on release. He played sport at an elite level which has probably contributed to a greater Sense of Coherence in his life as his life is imbued with greater meaningfulness and is in line with the Spanish research.[39]

Clements (2004) draws on literature to draw a distinction between 'education of empowerment', on the one hand, which is defined as personally transformative education and distinguishes it from 'education of emancipation', on the other, which is aimed at critiquing the system's structures and transcends individual concerns.[40] The young offenders are challenging the power structures in the community and the nation. They are proclaiming their social exclusion; that they lack a voice; and that they are stigmatised for life which is an injustice as the effects of the punishment vastly exceed the prescribed period of punishment. They challenge existing structures in an 'education of emancipation' whilst 'education of

39 Paredes-Carbonell (n 22)

40 Paul Clements, 'The Rehabilitative Role of Arts Education in Prison: Accommodation or Enlightenment' (2004) 23(2) Journal of Art Design Education 169, 174

empowerment' would be directed at individual transformation.[41] However, there are limits to these emancipatory aspects, as some messages supported the structures of the criminal justice process, and none really challenged their socio-economic status despite the link between this and incarceration or the less positive experiences of black and ethnic minority young offenders in prison. Also absent was any challenge to the need to detain them in penal institutions despite the fact that England and Wales has, on an historic, comparative basis with other European countries, felt the need to detain so many young people.[42]

5. Unused messages

The prison authorities would not allow use of two of the text messages. One was refused as it was thought to glorify crime. The text had been, *'Valleys' boys on tour'*, which was a reference to the offenders coming from the South Wales valleys. The other was refused as it commemorated the tragic early death of the brother of one of the young offenders, and therefore was capable of identifying him. The project team asked the prison authorities to speak to the young offender concerned to explain the situation. He attended the third and final session and challenged the team as to why

41 ibid

42 On 1st September 2006 there were 2,751 teenagers in custody in the UK compared to 646 in France and 1,422 in Germany. Note that the figures are given for the UK even though youth justice is a devolved issue for Scotland and Northern Ireland. Source: BBC News, 'Too many' young offenders jailed' (13 August 2009) <http://news.bbc.co.uk/1/hi/uk/8198496.stm#map> accessed 27 June 2014

the text had not been used, and the situation was explained again. Whilst his demeanour was inscrutable, it is reasonable to assume that he was disappointed.

The prison authorities also objected to a comment by the interviewer in the film which referred to the number of hours young offenders spend out of their cell each day. The figure was based on information supplied by a young offender to the interviewer, but the authorities insisted it was not accurate. Whilst it is possible the figure was not accurate, the amount of (or lack of) young offenders' out of cell time would surprise many. Figures vary depending on the type of regime a young offender is on such as the level of rewards, etc. However, sixteen hours a day confined to a cell by a young offender who is not being punished is still seen by the Chief Inspector of Prisons as being consistent with a well-run Young Offender Institution.[43]

The comment by the interviewer in the film shows the limits of narrative techniques. There is an issue to explore over the lack of time young offenders, who are young people with a lot of energy to burn, spend outside their cells. However, because the figure provided was contested and may not have been accurate then discussion was pre-empted even though the issue was valid. It creates ethical dilemmas. The project team wanted to empower the young offenders by giving them a voice. The first two workshops encouraged them to think that their voice would be heard without being censored, yet inevitably comments have to be approved by the prison

[43] HM Chief Inspector of Prisons, *Report on an unannounced inspection of HMP & YOI Wetherby7th – 18th October 2013* (HM's Inspectorate of Prisons 2014) 14

authorities before being broadcast otherwise permission would never have been given to work with them in the first place. Any such projects have to make it clear, at every stage, to the young offenders that there is not complete freedom to broadcast their views and that comments have to be approved by prison authorities before being released to the public.

6. The 'stage event'

When the texts were shown at the stage event there was minimal mediation of the public's responses. Texts were received in a control room where one of the project team was based and there was a slight delay before they were shown on the screen. Any texts submitted by members of the public which breached any of the participating institutions' equalities policies would not have been displayed. In the event, there were no such comments.

Whilst the stage event was taking place, an interviewer was circulating with a film crew asking onlookers questions and going through the texts, printed on card, with the interviewees asking for their reaction. All onlookers who were asked to give an interview agreed.

When asked whether they would employ a young offender a number of people answered that it depended on the offence. Crimes of violence were cited more than once as a reason for not employing a young offender. When one interviewee was

asked whether she would give a job to a young offender she said, *'It depends on what he's done, I suppose, isn't it?'* When asked by the interviewer when she would not give a job to a young offender, she said, *'Violent crime, things like that. You would want to know they are properly reformed rather than taking them on but if it's petty crime there's probably a reason behind it.'*

Statistically, one fifth of young offenders will have committed acts of violence.[44] Some of the offenders who participated in the project had been convicted of serious offences of violence, and would therefore be regarded by many members of the public as unemployable. It is submitted, that although such offences can have serious effects, from discussion with the participants their accounts of their own acts of violence seemed to be the result of teenage impetuosity or poor judgment. It seems unjust that a young offender could suffer for their offence through being unemployable for the rest of their life when they may have genuinely been rehabilitated. A violent offence committed whilst an adolescent is not necessarily an indicator that the person will have a propensity towards violence throughout life; it only proves that they are violent at the time of the offence. It also overlooks the complexity of problems which contribute to youth crime. Many offences are linked to alcohol and/or substance abuse. If the underlying problem relating to abuse is resolved then the propensity to violence may disappear. They are more likely to

[44] Jacobson (n 25) 14

have suffered abuse and bereavement. Again propensities towards violence may decrease if they receive suitable treatment.

There was, however, awareness amongst at least some members of the public that young offenders will have suffered deprivation prior to imprisonment. It tended to be expressed as genuine sympathy for young people who had lived difficult lives. This was the attitude of virtually every interviewee whilst the stage event was taking place.

This type of event does have the potential to move forward public debate by getting the public to think through their attitudes towards rehabilitation of young offenders. Previous studies have shown that 'face-ing' young offenders, i.e. having information about a young offender, means that the public are more like to rate them favourably. [45] Previous trials have shown that members of the public are significantly less punitive when given extra background information about a young offender than those given basic information. [46] The public were generally sympathetic to the young offenders possibly because of the fact that they had discovered more about them. Of the twelve people interviewed, all expressed some degree of sympathy for the young offenders.

As the whole idea was that the conversation could not be controlled some messages, inevitably, were frivolous:

45 KN Varma, 'Face-ing the Offender: Examining Public Attitudes Towards Young Offenders' (2006) 9(2) Contemporary Justice Review 175

46 Varma (n 47) 178

Young Offender: *My favourite moment when my ex Mrs gave birth to my baby. Now my girlfriend's pregnant.*

Texted reply: *Get drunk and smoke*

In answer to the same message an interviewee said, '*That's sad isn't it? They can't be there for the baby's first months or days.'*

There was also some cynicism expressed about the process:

Young Offender : *S*** sticks for life* (This was the from it appeared on the screen).

Texted reply: *How much censoring are you doing b00110ks*

Although there was less so from interviewees, *'I suppose that's true, isn't it? Everyone makes mistakes. You know what I mean?'* Although a less sympathetic tone was adopted by another interviewee who said, *'I suppose prison stops some people doing it again, but some people just live off it.'*

The public did show awareness of the lifelong effects of stigmatisation as shown by these exchanges:

Young Offender: *As soon as you've been in once the police will come knocking on my door.*

Texted reply: *Are we free?*

In answer to the same message an interviewee said, *'I think it almost becomes like a vicious circle when you're a young offender. There's always the fear of being picked up for something again. It stops you living a proper life really, in the way you should do. If I*

interpret this right, the person probably has redeemed themselves but can never quite free themselves from their past and it's quite sad.'

Another interviewee was prepared to criticise the criminal justice system with its historic tendency to incarcerate large numbers of young offenders in England and Wales, *'It shows you need to reform how you're doing it and why you're doing it. Whether that's lessening what you are locking people up for or having, you know, a work study programme or community service instead …because locking impressionable young people up with tons of other offenders, it just means they are more likely to commit another crime.'*

There were signs of a connection being made. In response to a text which said, *'All I look forward to in my regular day is going to bed,'* one interviewee said, *'That's when I felt suddenly, you know, some of those small things we start taking for granted until you look at it from the people who are in those kind of circumstances, we feel how important those things are. What I was saying is that for kids, say ten or twelve years old, if they realised this it would change their thought processes, their behaviours for good. I think the impact it has is something you cannot explain. You know, you can feel it here. The feeling has come from [the young offenders] directly.'*

Members of the public were prepared to engage in repartee or possibly a sideswipe, as is shown by this:

Young Offender: *When I got in trouble, I didn't help myself*

Texted reply: *Helping myself got me in trouble*

Another did not seem to think life was wonderful on the outside or perhaps it was though necessary to console the young offenders:

> Young Offender: *I would most like to become a plumber and have a steady job*
>
> Texted reply: *We're free to buy things. Look how happy we are! :)*

7. The final workshop

The documentary film that was made of the stage event was shown to the young offenders. The atmosphere of this final workshop was very different from the first two when the text messages were being prepared. Whilst they had initially been exuberant, but probably no more so than adolescents of an equivalent age at secondary school, in the final workshop they paid rapt attention. This included young offenders who had been brain damaged through glue sniffing who find maintaining concentration over a prolonged period difficult. The prison officers who were present commented that they had never previously seen such sustained concentration from them.

Their reaction was initially curious. Early in the film three women appear who were a grandmother, mother and daughter from the same family. The grandmother is interviewed and is highly sympathetic to the young offenders. One of them shouted out *'bitch'* which was particularly surprising as grandmothers were widely identified

as a supportive figure in the earlier workshops. Shortly following this outburst one of the young offenders burst into tears, and was followed by others.

There are a number of possible explanations for this reaction. As already noted, young offenders frequently suffer from low self-esteem and often do not feel that they are listened to. This is borne out by the text messages they prepared. It could be that a public event where random members of the public treat their comments with great seriousness was an unprecedented and overpowering event in their lives.

Secondly, a Young Offender Institution is a dangerous place for an adolescent. One quarter of young offenders complain of having been victimised in prison.[47] This could well lead to the need to adopt an invulnerable, 'hard man' persona to their fellow offenders to deter any attempts at victimisation. This could be an 'external' self which bears a weak relationship to the prisoner's interior life or their 'internal' self, which may be tormented by homesickness, anxiety, and any other number of vulnerabilities. It is possible that the effect of the film was to break down the wall between the external and internal self so that they were able to present a more authentic face to the world. Such an emotional reaction shows that the group communally underwent a 'felt' experience, which suggests that it was particularly meaningful for them.[48] This greater authenticity in their emotional displays has the potential to increase trust within the group. It could help with the manageability of their emotions so develop their Sense of Coherence, which, in turn, could lower

47 HM Inspectorate of Prisons (n 27) 75

48 Anne Reuss, 'Prison(er) Education' (1999) 38(2) The Howard Journal 113, 124

reoffending rates. The second Sense of Coherence questionnaire showed 20% higher scores and, therefore a better sense of coherence, on questions such as 'I feel confused, mixed up', but as the sample was small and it was beyond the power of the project team to control the group.

The strength of the emotional reaction took the project team by surprise. This meant that there was an insufficient framework to deal with it. It is hard to discuss this publically with young offenders when it is known that they are living in an environment rife with bullying and harassment. It would be better to have had breakout sessions where the young offenders have the opportunity to discuss their feelings privately.

CONCLUSIONS

The project was experimental in nature and the 'stage event' took place on one day in one city so there are limitations on the extent to which it is possible to generalise about the project. However, it does show that this type of interdisciplinary work does have the potential to engage in meaningful community legal education.

Use of narrative is sometimes criticised for not being clear as to the type of legal response that is required in answer to a particular problem. Yet it was clear from the young offenders' accounts that they suffer a lifelong blighting of employment prospects, which is a well-defined problem. Whilst the solution is less clear, it is

clear that rehabilitation is the area that needs to be on the agenda. It can therefore be a useful part of a student's clinical legal education as they can work on specific solutions where a general area for concern has been identified and it places their learning and teaching in context.

It offers the possibility of enabling students to reflect critically on the structure of the criminal justice system by witnessing its effects firsthand, and getting them to think of solutions to problems such as lifelong blighting of opportunities as a result of imprisonment. Such 'education of emancipation' will complement other approaches on their programmes.

It creates the possibility of assisting in the rehabilitation of young offenders. The Sense of Coherence questionnaires, the observations of the prison officers at the third workshop and the emotional reaction of the young offenders all point to the project having enhanced the young offenders' self-esteem. The seriousness with which their views were taken could be significant in building self image and reconstructing their identity which is seen as a necessary precondition to them succeeding in educational activities.

It can help improve the young offenders' self-awareness as they are afforded greater insight into how they are perceived by the public at large. This can help them connect, as the Spanish Sense of Coherence research shows that young offenders

typically have a weak connection to community.[49] They can be reassured that attitudes towards them are sympathetic albeit conditional.

The lessons they can learn from the reaction to their narrative could help them overcome the stigma they face and which parts of the narrative they need to reveal to overcome prejudice. For example, as there is a particular prejudice against young offenders who have committed acts of violence, they need to be aware that people need to know the underlying causes such as drink or alcohol related offences or impetuosity and demonstrate that these underlying causes have been successfully addressed. In this way, use of narrative helps reconnect them with society and breaks down their isolation.

Undergraduate law students, have the potential to add a lot of value to a project of this nature in excess of academic staff. Young offenders in prison education have a particularly strong need to identify with their educators, to see them as role models with a shared understanding of their culture.[50]

There are a number of difficulties which remain to be overcome. Any art course as part of a prison education programme has to fight for survival. This puts a premium on demonstrating measurable improvements in projects of this nature, and having the research skills to be able to do this. The project did experience difficulties in measuring the offenders' increases in their self-esteem. Sense of Coherence

49 Paredes-Carbonell (n 22)
50 Hurry (n 12) 27

questionnaires were distributed and completed at the beginning and end of the project but there was a lot of churn in the offenders involved in the project in its various stages. Offenders were not always available because they had meetings with probation officers or social workers, had been placed in a Care and Separation Unit, or were released. Some of the offenders who completed questionnaires at the end had not completed them in the beginning making measurement in the change of Sense of Coherence challenging. In future, the project needs better coordination with prison officers, and the project team needs to explain to them the reason behind the Sense of Coherence questionnaire and work with them to ensure there is a viable control group. Churn is inevitable in a secure environment, and will always occur, but that should not prevent the formation of a viable control group.

Clinical legal education students will need an ethical awareness of issues relating to this type of project. There is always the possibility of imposing a 'privileged' voice in respect of offenders who do not see themselves as victims at all. This creates a dilemma as to the extent to which they should prompt or challenge young offenders when they do not discuss issues such as their socio economic status; institutional racism; victimisation within prisons or recidivism rates when there is evidence to suggest that these are problems. Do you probe young offenders when they say they are satisfied with the standard of their legal representation? At what point does it cease to be the offenders' own authentic voice if you do?

Another ethical consideration is the need to be aware of managing the young offenders' expectations, for example, the text message which was a memorial to the dead brother of a young offender and which was not released by the prison authorities. It is best to stress throughout the process that not all messages are able to be used even if they are of great personal significance.

The main benefit for clinical legal students is that they experience more perspectives on the criminal justice process than could be gleaned from other educational approaches. Their exposure to young offenders' narrative gives them a deeper understanding of those at the centre of the process.

Reviewed Article: Teaching and Learning in Clinic

The Rise and Rise of Tribunals – Engaging Law Students in Tribunal Advocacy

Shaun McCarthy,

University of Newcastle, Australia

shaun.mccarthy@newcastle.edu.au

ABSTRACT

Over the past 30 years there has been a rise in the determination of legal disputes in non-adversarial and less adversarial forums such as tribunals. Tribunals deal with an increasing diversity of legal matters including cases of anti-discrimination, consumer claims and reviewing executive governmental decisions. Traditionally, Australian law schools and higher education practical legal training providers focus on the development of advocacy skills in an adversarial context set in a courtroom. Law students often study compulsory doctrinal courses solely from an adversarial court perspective. Little emphasis is placed on developing skills and knowledge in the practice and procedure of tribunals despite entry level lawyers appearing more frequently in such forums. This paper argues that there is a need for law students to engage in advocacy experiences in tribunal settings as distinct from the courtroom so they can acquire and foster skills to appear in such non-adversarial and less adversarial forums when in legal practice. By engaging expert witnesses, such as medical experts, in simulated tribunal hearings the realism of the advocacy experience for the student is heightened.

THE RISE OF TRIBUNALS IN THE AUSTRALIAN LEGAL SYSTEM

Over the past thirty years tribunals have become a distinctive feature in the Australian civil legal landscape. There are tribunals operating in all Australian states and territories and at the Commonwealth level. They deal with a variety of matters including as primary decision makers in cases of anti-discrimination, consumer claims, mental health, tenancy, professional discipline and guardianship. They also deal with the review of executive governmental decisions such as the refusal to issue migration visas, claims for asylum protection, access to public documents and licensing cases. Tribunals are able to draw on legal and non-legal members who have particular expertise in a variety of fields and are designed to be more accessible and 'user friendly' for consumers than the formal court system.

Tribunals deal with an ever increasing number of civil disputes. In 2011/2012 the NSW Consumer Trader and Tenancy Tribunal, a tribunal which made decisions regarding a diverse range of consumer disputes, received around 65,000 applications for determination and held over 76,000 hearings across NSW.[1] This number represented around a 10% increase in applications lodged during the previous year. Similarly, in 2011/2012 the Victorian Civil and Administrative Tribunal recorded a sizeable increase in applications

[1] NSW Consumer, Trader and Tenancy Tribunal Annual Report 2011-2012. The Tribunal received 58,808 applications during 2010-2011 as reported in the NSW Consumer, Trader and Tenancy Tribunal Annual Report 2010-2011. The Consumer, Trader and Tenancy Tribunal has been replaced by the New South Wales Civil and Administrative Tribunal, Consumer and Commercial Division, from 1 January 2014.

lodged over the previous year.[2] Further, the rise in the numbers and types of tribunals has seen the establishment of a peak body, the Council of Australasian Tribunals, which is designed to facilitate the dissemination of information and views between tribunals.[3]

Tribunals have been described as bodies which are court substitutes that carry out a mix of judicial and non-judicial functions.[4] While tribunals are sometimes referred to as being inquisitorial in nature, there is some resistance to adopting such a characterisation for Australian tribunals. Bedford and Creyke contend that Australian tribunals should not be categorised as inquisitorial in their operation as they do not possess all of the features of a typical civil law inquisitorial body and exhibit a range of practice approaches from the heavily investigative to adversarial.[5] King, Freiberg, Batagol and Hyams opine that "the variability of Australian tribunals' compliance with adversarial, non-adversarial and inquisitorial paradigms renders it difficult to categorise tribunals as one or the other."[6] They employ the term 'non-adversarial justice' when describing the role of administrative tribunals in the Australian legal framework.

[2] Victorian Civil and Administrative Tribunal Annual Report 2011-2012.
[3] Council of Australasian Tribunals, Memorandum of Objects of State and Territory Chapters, www.coat.gov.au/about/constitution-and-memorandum-of-objects.html, accessed 28 August 2013.
[4] N. Rees, Procedure and Evidence in Court Substitute Tribunals, 28 Australian Bar Review, 2006, 41.
[5] N. Bedford and R. Creyke, Inquisitorial Processes in Australian Tribunals, The Australian Institute of Judicial Administration, Melbourne, 2006, 18.
[6] M. King, A. Freiberg, B. Batagol, R. Hyams, Non-Adversarial Justice, Federation Press, Leichhardt, 2009, 198.

Although tribunals vary in the way that their proceedings are conducted, they can and do differ from a traditional adversarial approach. In some tribunals its membership actively question witnesses and parties attending a hearing. This can involve the member informing the parties as to the procedure that the hearing will follow, identifying the key issues and ensuring that the parties have a reasonable opportunity to present their case.[7] Legislators have armed tribunals with the power to operate in a quick, informal, cheap and flexible fashion,[8] while many tribunals are not bound by the rules of evidence.[9] This does not necessarily mean that the rules of evidence are not to be taken into account by a tribunal in determining whether or not information or a document is admissible, but there is no strict application of the evidentiary rules in some tribunal proceedings. Many tribunals can inform themselves on any matter in the manner that they think fit and the procedure by which a tribunal conducts its proceedings can vary and does not necessarily follow a set or rigid procedure.[10]

While a tribunal can refuse to allow an applicant or party to be legally represented in the proceedings,[11] legal practitioners can seek leave to appear for parties in some tribunal hearings and some tribunals do not place

[7] Statutory provisions dealing with this include s38(5) Civil and Administrative Tribunal Act 2013 (NSW).
[8] s36(1) Civil and Administrative Tribunal Act.
[9] s38(2) Civil and Administrative Tribunal Act, s151 Mental Health Act 2007 (NSW), s98 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s311E Migration Act 1958 (Cth).
[10] s38 Civil and Administrative Tribunal Act, s62 Victorian Civil and Administrative Tribunal Act, s311E Migration Act.
[11] s366B Migration Act.

restrictions at all on the appearance of lawyers.[12] Sometimes there can be limited or no tribunal practice directions or practice notes so it can be difficult for a lawyer inexperienced in appearing before a particular tribunal or in tribunal jurisdictions generally to have a proper understanding as to the way in which a tribunal hearing will likely be conducted. Further, while a lawyer might not be appearing in an actual tribunal hearing they can be called upon to advise a client as to the procedure the tribunal will likely adopt to deal with an application, the format of the hearing, anticipate the questions that will be asked and generally advise the client as to the best way to prepare for the hearing. In order for a lawyer to professionally advise a client about tribunal processes or appear in tribunal proceedings they need to have sufficient familiarity with a tribunal's non-adversarial and less adversarial processes and the manner in which tribunals conduct their proceedings and make determinations.

LAW STUDENT ADVOCACY SKILLS TRAINING

In the advocacy training of law students, non-adversarial and inquisitorial approaches and the use of tribunal decisions can take a 'back seat' to formal

[12] s45 Civil and Administrative Tribunal Act, s154 Mental Health Act, s62 Victorian Civil and Administrative Tribunal Act. It is difficult to obtain details as to the precise number of legal representatives appearing in tribunal proceedings. In the NSW Guardianship Tribunal Annual Report 2010-2011there were 1,311 procedural hearings which included applications for leave for a party to be legally represented. In 2011/12 the NSW Mental Health Review Tribunal conducted 13,501mental health inquiries where a significant number of persons appearing at the inquiry had a legal practitioner representing them. Section 32 Administrative Appeals Tribunal Act 1975 (Cth) allows legal representation of a party without having to seek leave of the tribunal.

trial and appellate court cases. Moot court hearings typically involve advocacy in appellate jurisdictions and trial hearings and there is little focus on developing advocacy skills in the informality and flexibility of tribunal proceedings. In criminal law and procedure courses students become familiar with the formal prosecution requirements when a defendant is charged by the police and the case is pursued through the criminal justice system. In their law degree students might take part in a court observation program where they see first-hand the role of legal practitioners appearing in a defended criminal hearing. This entails a prosecutor and defence lawyer undertaking most of the questioning of witnesses in the hearing or trial while the judicial officer presiding over the case generally does not pursue detailed questioning of witnesses. Students observe there are formal procedures in place where witnesses give evidence in examination in chief and cross examination, see the rigid structure of criminal proceedings and the strict application of the rules of evidence. There are similar procedures in many civil court hearings where there is heavy use of court pleadings, the application of the formal evidentiary rules and interlocutory procedures such as the discovery of documents. By contrast, as many tribunals are not bound by the rules of evidence, operate in an informal and flexible manner and the role of the legal representative and decision maker can differ from adversarial court hearings, law students need to have opportunities to develop advocacy skills and specialised knowledge in tribunal forums.

SIMULATIONS IN THE LAW SCHOOL CURRICULUM

Experiential learning is considered to be a vital component in the learning process of the practice of law.[13] One type of experiential learning used in law schools is simulation. Simulations can involve a student taking on the role of a lawyer in a hypothetical case in a controlled situation under the proper supervision of an experienced academic or lawyer.[14] Ferber employs the term simulation in circumstances where a student is required to perform a lawyering activity utilising a mock scenario which matches a real-life situation and there is sufficient time allocated for the student to perform the learning activity.[15] An arranged simulated hearing provides an opportunity for a student to receive constructive feedback in a timely manner and to reflect on their advocacy performance. The use of student reflection and debriefing in simulations has been referred to in a recent study of clinical legal education in Australian law schools.[16]

Simulations can engage students in active learning by developing their problem solving skills and strategies to deal with client matters. Chavkin promotes the merits of simulation as an important component in the

[13] A. Chay and F. Gibson, Excellence and Innovation in Legal Education, Clinical Legal Education and Practical Legal Training, Lexis Nexis Butterworths, 2011, Chapter 18, 502.
[14] E. S. Milstein, Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations, Journal of Legal Education, vol 51, no 3, September 2001, 376.
[15] P.S. Ferber, Adult Learning and Simulations – Designing Simulations to Educate Lawyers, 9 Clinical Law Review, 418.
[16] A. Evans, A. Cody, A. Copeland, J. Giddings, M.A. Noone and S. Rice, Best Practices Australian Clinical Legal Education, September 2012, www.cald.asn.au/assets/lists/Resources/Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf, 13.

development of persuasive advocacy skills in students. He argues that students should participate in simulated advocacy cases where they can build their skills and develop values in a setting where no one is damaged by their errors while at the same time providing an opportunity for students to engage in some risks which they would not ordinarily be able to experience if the student was formally acting for a 'live' client and their client's interests could potentially be jeopardised.[17] Stuckey maintains that simulated hearings enable students to gain insight into their personal and professional strengths and weaknesses, enhance their skills in identifying and dealing with professional conduct dilemmas and foster the development of the necessary skills and values in a legal professional.[18] A simulated hearing can require a student to make the connections between their acquired doctrinal knowledge and practical reality which is an essential skill in thinking as a lawyer.[19] Coupled with this, well-devised simulations provide opportunities for students to be exposed to professional values, develop effective

[17] D. Chavkin, Experience is the Only Teacher: Meeting the Challenge of the Carnegie Foundation Report, Paper presented at the Newcastle Law School, University of Newcastle NSW, 9 August 2007 48-49 as cited in J. Anderson, Identification Evidence – Proof and Doubt: An Experiential Teaching and Learning Strategy to Promote Deep Analytical Understanding Combined with Incremental Development of Practical Legal Skills, Journal of the Australasian Law Teachers Association, 2008, vol 1, 127.

[18] R. Stuckey and others, Best Practices for Legal Education, Clinical Legal Education Association, 2007, 135.

[19] C.K. Gunsalus and J.S. Beckett, Playing Doctor, Playing Lawyer: Interdisciplinary Simulations, 14 Clinical Law Review, 2008, 444. See also R. Park in Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses, Journal of Professional Legal Education, 1990, vol 8, no 2, 177 who argues that simulations provide a realistic place to assess competency.

communication and advocacy skills in a specialised forum and participate in collaborative student settings.[20]

The use of group simulated hearings gives academics and practical legal training providers the opportunity to provide advocacy experiences to a large number of students without significant resource implications. It is highly unlikely that large numbers of students could have such advocacy experiences with 'live' clients given the number of clients necessary to replicate the simulation and the legislative and ethical restrictions of student appearances in legal proceedings. Group simulations also allow students to develop their advocacy skills within a definite timeframe which coincides with the running of the law course.

As noted, a focus of Australian law schools and practical legal training courses has been the development of advocacy skills in simulated adversarial court trials and appellate moot courts. These hearings can involve students, academics, clinical supervisors and others playing the role of a lay witness in a trial being questioned by law students or they can be set in an appellate jurisdiction where argument and submissions are made to the bench. The format is typically adversarial in nature and follows a formal and expected procedure with limited flexibility. Students should also be exposed to advocacy experiences in non-adversarial, inquisitorial and less adversarial

[20] K. Barton, P. McKellar, P. Maharg, Authentic Fictions: Simulation, Professionalism and Legal Learning, 14 Clinical Law Review, 2007-2008, 184.

hearings set in tribunal forums given the increasing likelihood that lawyers will have contact with clients having matters in those jurisdictions. In fact, entry level lawyers are probably less likely to be appearing in appellate jurisdictions as opposed to tribunals and less adversarial forums.

SIMULATED MENTAL HEALTH TRIBUNAL HEARINGS

The mental health tribunals operating in Australian jurisdictions are independent statutory bodies enacted under legislation which review the decisions made by treating health professionals regarding the involuntary detention of persons in hospital for their treatment and care. The tribunal is required to determine, on the balance of probabilities, whether the detained person has a serious mental illness which causes harm to the person or to others or both and should be detained in hospital.[21] The tribunal is a 'check and balance' on the decision of a health professional to detain a person against their will. It has the legal authority to make orders to continue the involuntary detention of a person in hospital.[22]

Simulated mental health tribunal hearings form part of the practical legal education course at Newcastle Law School, NSW. They are conducted in a final year clinical module which runs over four weeks with seminars, group work and culminating in simulated tribunal hearings. The seminars provide

[21] Ch 6 Mental Health Act (NSW), Part 4, Mental Health Act 1986 (Vic), Part 6, Mental Health Act 1996 (WA).
[22] s37 Mental Health Act (NSW), s36 Mental Health Act (Vic), Part 6, Mental Health Act (WA).

students with substantive knowledge in mental health law, an overview of specialised tribunals and in-depth analysis of the practices and procedures of tribunals. An interdisciplinary approach is adopted in the module with a health professional being invited to speak to the class outlining their perspectives of the tribunal process and the challenges of maintaining a professional and supportive relationship with their patient following a contested tribunal hearing where they give evidence which the patient disputes.

The module has a number of primary learning objectives. Students develop detailed knowledge in a specialised area of law while critically evaluating the access to justice issues which can arise for persons with a serious mental disability. Other objectives include students developing client centred lawyering approaches, fostering strong communication and advocacy skills in an inquisitorial context, generating strategies to deal with issues arising in a hearing and effectively collaborating with peers.

The hearings are set in a mental health tribunal forum so as to give students the opportunity in a short timeframe to develop their knowledge and skills in an area of law that is not overly complex but is challenging. Lawyers can be required in legal practice to be across a previously unfamiliar area of law within a limited period of time to meet the needs of their client. Mental health tribunal hearings are typically around 20-30 minutes in duration and can be modified so that groups of students have specific advocacy roles in the

hearings. This lengthens the simulated hearing time to around 50 minutes. While the hearings are informal in nature they can vary from being less adversarial to more adversarial depending on the evidence, the approaches and personal style of the participants and the composition of the tribunal.

To make a tribunal simulation as realistic as possible it should involve participants who are familiar with its particular procedures and practices. Building on links between the University of Newcastle Legal Centre[23] and the local area health service, psychiatric registrars in training are invited to take part in the simulated hearings. The involvement of the registrars is promoted by the registrars' teaching health professionals as an opportunity to enhance their skills in giving evidence at tribunal hearings through responding to vigorous questioning by eager law students. Having psychiatric registrars, who have expertise in the diagnosis and treatment of mental illnesses, appear as witnesses makes a simulated mental health tribunal hearing more realistic. Their involvement heightens the preparedness of students as they are required to question a real expert and need to be sufficiently familiar with the law and tribunal procedure so as to avoid embarrassment. As Gunsalus and Beckett point out

> "it seems to help our students focus on the fundamentals in ways that simulations involving only law students do not. That is, we find that

[23] The University of Newcastle Legal Centre is conducted by the Newcastle Law School and is an intensive clinical placement site for law students.

> the introduction of complexity to the exercises by adding role-playing clients from other disciplines advances the acquisition of fundamental skills, rather than distracting from them."[24]

The simulated mental health tribunal also provides an opportunity for students to focus on the workings of a specialised tribunal which makes decisions directly affecting the liberty of individuals in a very obvious way. Students in the module have opportunities to consider the barriers that people with a serious mental illness may face in advocating for their rights and interests and the important role of a lawyer in that process.

There a number of distinctive learning opportunities which are offered by the use of a specialised interdisciplinary tribunal. Bliss, Caley and Pettignano refer to the benefits provided by interdisciplinary education as including

> "developing respect and appreciation among the disciplines, teaching team work and collaboration, developing a knowledge-base about other disciplines, teaching communication among disciplines, and teaching other disciplines' rules, beliefs, and ethical principles."[25]

[24] Gunsalus and Beckett, n19, 441-442.
[25] L. Bliss, S. Caley and R Pettignano, A Model for Interdisciplinary Clinical Education: Medical and Legal Professionals Learning and Working Together to Promote Public Health, 18 International Journal of Clinical Legal Education, 153. At 155 the authors refer to the added benefit that students become familiar with the specific terminology used by health professionals.

Additionally, these interdisciplinary approaches are important for new lawyers as they are becoming much more likely to interact with professionals and experts outside the area of law placing their learning in context.[26]

Prior to participating in the simulated hearings arrangements are made for students to attend and observe a 'real' mental health review tribunal hearing at a local psychiatric hospital accompanied by a legal aid solicitor. This provides students with the opportunity to observe a live tribunal in operation and consider the manner and procedure of the tribunal hearing before participating in the simulated hearings. Students accompany the solicitor to the hospital where they meet with the client and observe a client interview. They can then critically reflect on the challenges posed for a lawyer in taking instructions where their client may lack capacity or there is a doubt about their capacity. Students can sometimes be troubled by what they observe. For example, one student who saw a patient in a catatonic state later reflected on the experience causing them some disquiet. An important aspect of the observation program is that there is a proper briefing and debriefing with students both before and following the tribunal hearing which is provided by the solicitor. Prior to the hospital visit students discuss in the seminars the issues and tensions which might arise during a client interview in a psychiatric hospital, the laws regarding access to clinical records, the work of

[26] K.D. Connolly, Elucidating the Elephant: Interdisciplinary Law School Classes, Washington University Journal of Law and Policy, vol 11, 14.

the health professionals in hospital, the role of the lawyer appearing at the mental health tribunal hearing and the tribunal processes.

A number of mock scenarios have been developed for the module following extensive discussions with mental health professionals. These scenarios consist of a medical report from a registrar who then appears for questioning at the simulated hearing. The report is provided to students a week prior to the hearing detailing the facts that the registrar is relying upon to support their case for the subject person to remain in hospital as an involuntary patient. An outline of the client's instructions is given to students. The exercise is based on a client who has the mental capacity to provide instructions notwithstanding their involuntary hospitalisation. Students are supplied with updated facts about the case twenty minutes prior to each hearing in a time frame which mirrors what might happen in legal practice when a lawyer meets with their client just prior to their tribunal appearance and receives further instructions. While the registrar's report is detailed as to the person's mental health condition and the reasons that the person should remain in hospital against their will, the problem is scripted so that there is sufficient uncertainty about some facts to give students ample opportunity to question the registrar about the basis for their opinion. Further, the scenario and client's instructions are designed so that there are conflicting views between the client and the registrar which ensures a contested hearing.

The simulated tribunal is required to determine whether the subject person should continue to remain as an involuntary patient in hospital or be discharged. The client's instruction to the students is that they oppose the application for their continuing detention. Students are divided into groups of five or six with each student allocated a role for the hearing and one of the students playing the role of the client. Students are required to deliver opening and closing addresses, cross examine the registrar on their report and question their client. The client is required to answer questions in accordance with the set instructions provided when being questioned by the student lawyers and tribunal members. The student lawyers and client are able to 'make-up' additional facts provided that they are consistent with the set instructions. Students are to seek instructions from their client when necessary. Time limits are placed on each advocacy role. Students are informed that the tribunal hearings will be conducted in a way that the tribunal thinks fit and it should be expected that the hearings will be conducted informally with a flexible procedure. The tribunal members act in an interventionist way by asking questions of the witnesses and legal representatives and direct the procedure of the hearings. At the end of each hearing the simulated tribunal makes an order regarding the application for detention giving short reasons for its decision. Immediate general feedback is given to the group and individualised student feedback is provided in some circumstances.

Following the hearings students are required to submit a reflective piece of around 1,000 words reflecting on their performance in the simulated hearing, the effectiveness of their group in advocating for their client and their views of the tribunal as a mechanism to make legal decisions. The strengths and weaknesses of the client's case are identified by the student together with an analysis as to the effectiveness of their group's questioning and whether in hindsight they should have asked additional questions or not have pursued a particular line of questioning. Students are also required to discuss the way in which the tribunal conducted the hearing, how they adapted to the tribunal procedure and provide a comparison of the non-adversarial or less adversarial approach of the tribunal with their experiences of the traditional adversarial court model. Any ethical and professional responsibility issues which arise in the simulated hearing are to be discussed and analysed. Students are assessed on a pass/fail basis as to whether they have met the course objectives at a competent level.

It is acknowledged that there are limitations in relying upon student reflections as a basis for evaluating this distinctive advocacy experience. Reflections are not de-identified and sometimes students can tailor their responses in line with what they perceive the lecturer wishes to hear as their written piece forms part of the assessment regime in the course. Nevertheless, they do provide a source of primary material which can be used in a limited way as an evaluation of the tribunal activity itself and flag areas

for further evaluation and research. The student reflections frequently refer to the difficulty in adapting to the informality and flexibility of less adversarial hearings and it is intended to undertake further evaluation of this element. They also refer to the specific challenges of appearing in a tribunal jurisdiction and its less adversarial approach and in working with a simulated client. An on-line survey is to be conducted with the student cohort in an anonymous way to obtain qualitative and quantitative responses to set questions about the tribunal experience taking into account these views. Further, students who have appeared in a simulated tribunal hearing will be invited to participate in a focus group and in its small group discussions respond to more detailed questions posed by a facilitator about the advocacy experience. The survey and focus group responses should enable common views and opinions about the learning activity to be identified and noted.

STUDENT REFLECTIONS ON THE TRIBUNAL EXPERIENCE

One of the constant statements made by students in their reflections is the challenge of appearing in a jurisdiction which is not bound by the rules of evidence. In doing so students often make reference to their exposure of adversarial legal proceedings where there is a strict application of the evidentiary rules. In one simulated hearing the tribunal admitted evidence of a violent incident where the key witness is (deliberately) not available to attend the hearing for questioning. While students objected to a description

of the incident being admitted into evidence the tribunal decided to admit the evidence. In an adversarial court hearing an outline of the incident would likely have been ruled inadmissible on the basis that it is hearsay. Once the details of the incident was admitted into evidence the students showed difficulty in arguing the weight which should be attached to this piece of evidence and how the tribunal should view the evidence.

Conversely, some students failed to draw on their prior study of evidence law to object to technically inadmissible conversations such as privileged communications between the client and lawyer. A tribunal hearing set late in the degree requires students to draw on their earlier studies in law so that they can be effective advocates for their client.

The informal procedure of the tribunal hearing troubled students. The uncertainty as to what evidence might be admitted into the hearing unsettled a number of students. A typical student comment:

> *'I was expecting the tribunal to be informal but I don't think I fully grasped what that would mean in a legal context, where the majority of what I have learnt and experienced has been heavily based on structure and process.'*

The flexible approach of the tribunal hearing posed challenges for students. Students had prepared prior to the hearing a list of questions to be asked but the tribunal interrupted their lines of questioning forcing students to move

away from their scripted questions. In informal group discussions a student reflected that:

> *'I learnt much more about advocacy in terms of being flexible and being able to move away from your set questions as well as what it is like to have things not go your own way.'*

A simulated hearing using expert witnesses is likely to have an impact on a student's approach and performance. The daunting task of questioning a medical registrar was referred to by a number of students. Students found the questioning much more taxing and challenging than they had anticipated despite extensive preparation. Some expressed the view that questioning the registrar was intimidating and that the tribunal had placed undue weight on the answers given by the doctor. Typical student comments included:

> *'I found it off putting and I got frustrated as I had prepared the questions and the doctor did not give the answers that I wanted. I understand that this would happen in a real hearing though.'*
>
> *'At times I think we all felt very stonewalled and didn't expect the psychiatrist to pre-empt our questions as much as she did. I did not expect the doctor to be able to have an answer for every question and that threw me a bit, though I know in real life this would happen. Reflecting on the hearing we entered it with unrealistic expectations. We became fixed on trying to get the*

psychiatrist to admit she might be wrong, when we should have been asking her why they were not trying different approaches to treatment and care.'

A number of professional responsibility issues arose during the hearings. During one hearing a tribunal member asked the student whether they wished to seek an adjournment of the proceedings when the answers being given by the registrar were suggestive of the need for supplementary information before the tribunal could make its determination. The student lawyer readily agreed to seek such an adjournment without conferring with their client. In discussions following the hearing the student indicated that they had considered an adjournment was in the best interests of their client but then noted that they had overlooked their ethical obligation to consult with their client and obtain instructions before making such an application. Failure by the student lawyers to properly consult and seek instructions from their client was referred to by some of the students who played the role of the patient in the hearings. A student playing the role of the client/patient provided an insight into their feelings regarding the experience:

'I did not feel that I was engaged by my legal team, it is very easy to see how clients could be ignored by their lawyer.'

The professional conduct issue as to whether a client hospitalised in a mental health unit has the mental capacity to validly make a legal document arose

during the hearings. The student had submitted in the hearing that their client could execute a power of attorney[27] while a patient in hospital so that their client's financial affairs could be put in order by the attorney. On making this submission the registrar responded that they held serious concerns about the capacity of the client to validly execute an important legal document, such as a power of attorney, while an involuntary patient in hospital. The student referred to this ethical issue in discussions following the hearing stating:

> *'I raised that the client… could execute a power of attorney. I was flummoxed when the doctor said that he did not consider that the client had the mental capacity to execute a power of attorney being an involuntary patient in a psychiatric hospital. I had not considered this before making the submission.'*

A feature of the simulated hearings that had not been anticipated was the apparent concern that students had for the welfare of their client.[28] The hearings also presented challenges for students who were required to act in accordance with their client's instructions even though they may have conflicted with their own personal views as to what orders the tribunal should make.[29] The hearings generated a reaction by students on an

[27] A legal document where a person with the requisite mental capacity indicates who they wish to manage their financial affairs.
[28] Ferber notes that simulations can lead to students identifying issues which were not intended by the simulation which reflects the open-ended use of simulations, n.15, 423.
[29] Background reading for the module includes C. Parker, A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics, Monash University Law Review, 2004, vol 30, no 1.

emotional level. Some students reflected that they found it difficult to argue their client's instructions to be discharged when they formed the view that it was in the best interests of their client to remain in hospital:

> *'In advocating for the client I was aware that my personal views of what was in the best interests of the client were different to what my client wanted. In order to properly act on their instructions I needed to separate my personal views and advocate purely on the instructions provided to me.'*

The important role and purpose of a mental health tribunal was noted by a number of students in their reflections. A student commented that:

> *'the tribunal is the last bastion for some of society's most vulnerable and fragile members. The tribunal must do its utmost to protect these individuals from the deprivation of their liberty and subjection to treatment...'*

EVALUATION

In most cases students showed a high level of professionalism in preparing and appearing at the simulated hearings. Students acquired detailed knowledge of the mental health laws focusing on the threshold questions to be considered by the tribunal in determining the application for detention. Their problem solving skills were enhanced by questioning the registrar on the strengths of their client's case while formulating strategies to argue that

their client could receive the necessary support and care outside the restrictive hospital setting. Both formal and informal student reflections showed that students had reflected on the appropriate professional values when acting for a client in a mental health setting while developing a critical awareness of the access to justice issues which can arise for persons with a serious mental disability. The involvement of psychiatric registrars likely increased the level of student preparedness for the hearings while at the same time exposing students to experts in other disciplines. The challenges in switching from a familiar adversarial approach to a less adversarial and inquisitorial tribunal forum was a constant theme referred to by students. As the factual scenarios and tribunal questioning provided some uncertainty for students their skills in having to be flexible and adapt to the unfolding narrative were stretched. The practical reality and challenges of appearing for a client in an informal and flexible tribunal hearing was evident in student reflections. Heavily scripted questions prepared prior to the hearing often did not serve the client or student lawyers well. This was particularly evident when the registrars gave evidence which did not assist the group's overall arguments. Using groups of students with specifically defined roles provided collaborative opportunities as students were required to develop team strategies in approaching the questioning of the medical registrars and the making of submissions. Having a student play the role of a patient and then eliciting their responses regarding their interaction with the student lawyers

provided insights for students as to the importance of effectively communicating with clients throughout the proceedings and adopting client centred lawyering approaches. Depriving someone of their liberty and taking away their choice to make autonomous decisions regarding what treatment is to be administered likely resonated in a way different to what would be expected if no-one played the role of a patient in the hearing.

REVIEW

The use of simulation in a tribunal context provides law students with the opportunity to develop their advocacy skills in less adversarial and inquisitorial forums. Such experiences add to the suite of advocacy skills needed by 21st century lawyers. Setting the advocacy hearing in a forum which entry level lawyers may be advising and appearing in is an important addition to the knowledge and advocacy skills base of a law student. Student reflection on the tribunal hearings indicated that there are challenges posed for them when they move from an adversarial approach to a less adversarial style. This challenge should prompt the introduction of tribunal advocacy opportunities for students during their legal training so that they can acquire and develop such skills as they transition into legal practice. The use of expert witnesses provides a realistic aspect to a simulated hearing in exposing students to the challenges of questioning professional witnesses.

There is scope to develop tribunal simulations in other specialist tribunals, such as building and consumer claims, with the engagement of relevant and appropriate experts. A building dispute case can involve a conclave of experts where there is argument over the precise terms of the contract and whether there has been an actual breach. Arguments as to whether the parties have mitigated their loss can also arise. Experts from opposing sides could be involved in a simulated tribunal hearing so that students have the opportunity to cross examine in a commercially focused hearing. A building or engineering discipline within a university may provide a source of experts who could be used. Tenancy and consumer disputes provide opportunities for tribunal simulations dealing with issues such as disputed damage to rental premises and whether goods that have been bought are fit for their purpose and are of merchantable quality. Builders could be called as experts to provide competing evidence assessing the damage to rental premises. The simulation could be devised so that there is significant dispute as to the quantum of damage and loss and arguments raised such as whether the damage was pre-existing. Prior to the simulated hearing students could be involved in shadowing lawyers or tenancy advocates who attend commercial and tenancy tribunal hearings so that they are familiar with the particular nuances of the jurisdiction.

What remains critical is that law students are provided with opportunities to advocate in forums which are non-adversarial or less adversarial in nature so

as to equip them with the requisite skills and techniques that they can draw upon as they transition into the diverse range of legal practice advocacy environments.

Reviewed Article: Teaching and Learning in Clinic

Integrating Two Measures of Quality Practice into Clinical and Practical Legal Education Assessment: Good client interviewing and effective community legal education

Liz Curran and Tony Foley

Australian National University, Canberra, Australia

Liz.Curran@lanu.edu.au

INTRODUCTION

This paper will examine, through two case studies (an undergraduate clinical program and a Practical Legal Education (PLE) advice clinic) the scope for indicators developed by Curran to assess the outcomes, effectiveness and quality of legal assistance services[1] in Australia to be used in clinical assessment. This article will explore how two particular indicators evaluated as fundamental in that research might be utilised to assess students so as to enhance the quality of their clinical participation.

Clinical Legal Education is seen by its adherents as 'a premier method of learning and teaching. Its intensive, one-on-one or small group nature can allow students to apply legal theory and develop their lawyering skills to solve client legal problems. Its teaching pedagogy is distinguished by a system of self-critique and supervisory

[1] In the National Partnership Agreement between the Commonwealth and State and territory governments legal assistance services are defined as legal services provided by Legal Aid Commissions, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Services. Australia has what is termed a mixed model of service delivery in terms of legal aid commissions as they have both in-house staff doing legal work and private practitioners with grants of aid.

feedback enabling law students to learn how to learn from their experiences'.[2] In many senses it is a form of experiential learning through engagement with the practice of law.[3] It aims to contextualise the study of law and draw on student learning in other courses to guide and support them in identifying, developing and applying ethical legal practice skills. But its scope is much wider than simply 'skills', it also aims to develop students' critical understanding of approaches to legal practice, to their understanding of the roles of lawyers in relation to individual clients and social justice issues and to encourage and as a means to validate student aspirations to promote access to justice and equality through the law.

We suggest ways to assess the quality of such engagement by clinical students, focusing on Curran's core quality measures of 'a good client interview' and 'quality community legal education'. The value of utilising these two indicators to assess the quality of student engagement is that they themselves are core to the activities in which students are involved in clinic.

BACKGROUND

Involvement in client interviewing in varying degrees and in the provision of community legal education through direct community engagement such as in street

[2] A Evans, A Cody, A Copeland, J Giddings, M Noone, La Trobe University, S Rice, Australian National University Best Practices in Clinical Legal Education, Australian Government Office for Learning and Teaching, September 2012, 4. (http://www.cald.asn.au/assets/lists/Resources/Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf) accessed 29/11/13.

[3] 'Clinical Legal Education Guide, Your Guide to Clinical Legal Education Courses Offered by Australian Universities in 2011 and 2013', University of New South Wales. (http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE_GUIDE_2011_12.pdf) accessed 2/12/13.

law programs is now common in Australia, the United States[4] and South Africa[5] and is expanding into many other countries.[6] It is for this reason that ensuring quality in client interviewing conducted by students and community legal education should be part of student assessment.

In addition in Australia, Practical Legal Education (PLE) courses (like the Graduate Diploma in Legal Practice (GDLP) program in which the authors also teach) prepare graduates of law for admission to practice with a more distinct focus on practice-ready skills. Such programs seek to ensure that entry level lawyers reach required levels of competency as prescribed by the Competency Standards for Entry Level Lawyers[7] of the Law Admissions Consultative Committee and Australian Professional Legal Education Council.[8] In other jurisdictions such as the United Kingdom, there is a similar requirement for law graduates seeking admission to complete the Legal Practice Course which lasts one year followed by a two-year apprenticeship, during which the trainee solicitor has to complete a Professional Skills Course.[9] Scotland takes a similar form of a Diploma in Legal Practice (one year), and completion of a two-year apprenticeship together with the Professional Competence Course in accordance with the Law Society of Scotland's Professional

[4] For example, the University of Washington, (http://www.law.washington.edu/Clinics/StreetLaw/)
[5] D McQuoid-Mason, 'Street Law as a Clinical Program The South African Experience with Particular Reference to the University of KwaZulu-Natel, 17 Griffith Law Review, 2008, 27.
[6] P Maisel, 'Expanding and Sustaining CLE in Developing Countries, What we can Learn from South Africa', Vol 30 (2) *Fordham International Law Journal,* 2006, 384. (http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2044&context=ilj) accessed 2/12/13.
[7] Australasian Professional Legal Education Council and Law Admissions Consultative Committee, Competency Standards for Entry Level Lawyers, November 2000 (updated February 2002). (http://www.aplec.asn.au/Pdf/Competency_Standards_for_Entry_Level_Lawyers.pdf) accessed 2/12/13
[8] (http://www.aplec.asn.au/aplec/dsp_resources.cfm) accessed 2/12/13.
[9] (http://www.lawsociety.org.uk/careers/becoming-a-solicitor/routes-to-qualifying/) accessed 2/12/13.

Education and Training Stage 1 (PEAT 1).[10] The same model is followed in New Zealand and other Southern Hemisphere countries.[11] These competency-based programs all have the distinctive mission to equip trainees with practice-ready skills and knowledge and so are fundamentally different in kind and nature from clinical programs.

In seeking to find measures to gauge the quality of student engagement in such clinical and PLE programs we draw upon recent research by Curran examining what leads to 'effective outcomes' and 'quality legal service' in the context of public legal services (legal aid, community legal centres, family violence services and Aboriginal and Torres Strait Islander services). From 2011 - 2013, Curran conducted research into what constitutes a 'successful outcome'[12] and quality legal aid services and how to measure these on behalf of Legal Aid ACT[13], the Commonwealth Government's Attorney General's Department[14] and Consumer Action Law Centre with the

[10] (http://www.lawscot.org.uk/media/561669/peat%201%20guidelines.pdf) accessed 2/12/13.

[11] See Fiji (http://www.unifiji.ac.fj/undergraduate-study/graduate-diploma-in-legal-practice-2/) accessed 2/12/13 and New Zealand (http://www.lawsociety.org.nz/for-lawyers/joining-the-legal-profession/admission) accessed 2/12/13.

[12] The National Partnership Agreement signed by the Commonwealth Government and each state and territory government for the funding Legal Aid Commissions, and which came into effect on 1 July 2010 talks in terms of 'successful outcomes'.
(http://www.ag.gov.au/LegalSystem/Legalaidprograms/Documents/National%20Partnership%20Agreement%20on%20Legal%20Assistance%20Services.pdf) accessed 9 December 2013

[13] L Curran, 'I Can See Now there's Light at the End of the Tunnel' Legal Aid ACT: Demonstrating and Ensuring Quality Service to Clients, Legal Aid ACT, 2012
(http://www.legalaidact.org.au/pdf/Light at the end of the Tunnel Legal Aid Services Quality and Outcomes.pdf) accessed 9 December 2013

[14] 'A Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services, Attorney General's Department, 2012. (http://www.ag.gov.au/Legalaid/.../Lit%20review%20%20FINAL.DOC*)* accessed 9 December 2013

Footscray Community Legal Service.[15] This research has since been the subject of academic discussion (in the United Kingdom,[16] the Netherlands,[17] and Canada[18]), practical application (by various services [legal and non-legal] across Australia, by Law Clinics Ontario and Legal Aid Ontario[19]) and interest from external agencies (e.g. the World Bank.[20]). Our surmise is that the robust measures developed in that research might have a place in student assessment in clinical and PLE programs as a way to enhance student learning and build capacity in students to be mindful of quality and impact. We considered how existing assessment and learning outcomes might be adapted to incorporate indicators of quality practice in both the interviewing of clients and in the delivery of community education.

Our two sites were a clinical youth law course and a PLE advice clinic. The clinical site is a course which operates within a Youth Law Centre (YLC) which provides free and confidential advice to young people aged 12-25 and outreach and

[15] L Curran, 'Encouraging Good Practice in Measuring Effectiveness in the Legal Service Sector', May 2013. (http://www.law.anu.edu.au/legalworkshop-gdlp/publications) and (http://consumeraction.org.au/report-encouraging-good-practice-in-measuring-effectiveness-in-the-legal-service-sector/) accessed 9 December 2013

[16] L Curran, 'The Challenges of Measuring Outcomes – Examining quality, responsiveness and legal professionalism as a way forward', Legal Research Centre's International Research Conference, 2012, Rights and Wrongs: Developments in Access to Justice, Magdalen College, Oxford, United Kingdom, September, 2012. (http://www.justice.gov.uk/downloads/about/lsrc/conference-booklet-2012.pdf).

[17] A Crockett and L Curran, Conference Paper International Legal Aid Group Conference, A Practical Model for Measuring Effectiveness.., The Hague, June 2013. (http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/Session_Papers/Session_3_-_Liz_Curran_and_Andrew_Crockett.pdf).

[18] Access to Justice Metrics: Envisioning Equal Justice, A Discussion Paper, The Canadian Bar Association, April 2013, (http://www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf).

[19] See also Law Clinics Ontario. (http://www.plelearningexchange.ca/promising-practices-and-tools/) accessed 9 December 2013

[20] Email communication to Curran (16 July 2013) with Paul Prettitore of the World Bank requesting details of the research undertaken for Legal Aid ACT.

community legal education to schools, technical colleges and to non-legal youth agencies. While the legal advice is provided directly, much of the community legal education is provided to secondary youth agencies. Research suggests that many vulnerable and disadvantaged people (which is typically legal aid's client demographic) do not contact a lawyer because of perception and access barriers.[21] The CLE focus is therefore directed to non-legal agencies and youth workers who can be trained to help overcome these barriers.[22] The PLE site is a course which operates in the form of a Legal Advice Clinic as part of the ACT Legal Aid Office's 'advice and minor assistance' activities. The LAC Program is intended to expose students to social justice issues through direct contact with disadvantaged clients and to provide students with "hands on" legal experience, principally through interviewing and interview follow-up, in the period just before they are admitted as practitioners.

The authors maintain that lessons from the research on measuring quality legal services and outcomes can be adapted to enable clinical and PLE students in these settings to provide an enhanced experience of the law in practice.[23] These two

[21] Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Report, Law and Justice Foundation of New South Wales, (August 2012) <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html> and M Schwarz, F Allison and C Cunneen, 'A Report of the Australian Indigenous Legal Needs Project', Cairns, James Cook University (2013) <http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_131180.pdf> accessed 17 January 2014 and M Schwarz, F Allison and C Cunneen 'The Civil and Family Law Needs of Indigenous People in Victoria', Cairns, James Cook University (2013).

[22] Buck and L Curran, 'Delivery of Advice to Marginalised and Vulnerable People: the Need for Innovative Approaches', *Public Space: The Journal of Law and Social Justice* vol. 3, Art. 7 (2009), 1-29.

[23] See also J Leiper, 'Transnationalising Legal Education: Nurturing Commitment in the Legal profession: Student Experiences with the Osgoode Public Interest Requirement' 2009 Vol 10 No 7, *German Law Review*,

groups of programs – clinical and PLE – are substantially different in nature and aims. Clinical programs are designed to provide opportunities for law students to critically examine the operation of the law "on the ground". Practical legal education placement programs are designed to provide opportunities to acquire practice-ready skills. As such what is being assessed in terms of student performance is likely to be substantially different in each program, but nevertheless measures of quality as regards the delivery of client services remain important for both. The balance of this paper will explore how this might be done.

This article focuses only on those elements of Curran's research that are specifically relevant to the experiential learning of students either in a clinical context, placement context or simulated client practical legal training scenario. Assessment processes now usually rely only on students' own perceptions as to how effective an interview seemed to them or how useful and practical they felt a legal education or street law session had been. More independent approaches than self-critiquing are usually confined to peer or supervisor observation with little use of client feedback. But we consider feedback from clients involved in the interviewing or CLE session fits well within the scope of exemplars of best clinical practice such as Stuckey and colleagues' 'road map'.[24] This notes the importance of balancing student autonomy with client protection.[25] We accept their strong stress on the role of supervision and

1087 – 1094, 1094 which examines the relationship of students in watching lawyers and come students exposure to the difficulties of facing real life circumstances of legal practice.

[24] R Stuckey and others, 'Best Practices for Legal Education', Clinical Legal Education Association, 2007.

[25] Above note 24, 195.

teaching in practice environments that never loses sight of 'the requirement that no client be subjected to incompetent representation'.[26] As a further protection clinical and PLE students are subject to Legal Aid ACT's Practice Standards. Students are required to adhere to these standards. The culture instilled is around their responsibility as lawyers and the need to adhere to standard in order to ensure accurate and relevant advice to real clients.

1. Using the first measure of quality – Fostering Students in the Conduct of a 'Good Client Interview'

A good client interview

Work undertaken in Scotland[27] highlights the importance of focusing students on the critical nature of their role as lawyers in client interviews and the importance of their interaction with clients. The concern of the authors is that monitoring progress in this area should not simply be left to student's perceptions. Self-reflection though important is not sufficient.

Some external method of gaining feedback on how effective the interaction has been from the client's point of view can add an important perspective. We suggest a protocol of brief questioning of clients post-interview as to their level of satisfaction with the interaction. In some clinics and PLE settings a supervisor may also sit in on an interview and be in a position to provide post-interview feedback.

[26] Above note 24,195.

[27] K Barton, D Clark Cunningham, G T Jones and P Maharg, Valuing What Clients Think: Standardised Clients and the Assessment of Communicative Competence, 13 Clinical L Rev 1 (Fall, 2006), 33-50.

In Curran's research on behalf of Legal Aid ACT broad methods of obtaining feedback were utilised, including focus groups and stakeholder interviews, interviews with legal aid staff, interviews with clients and others involved in criminal, family or civil disputes. Participants were asked to define outcomes that were both "positive" and "within your control to achieve". The results suggest that a positive outcome was seen more in terms of the processes that the lawyer, staff and client go through rather than simply focusing on the advice given or the end result of a case.

The data revealed certain "positive" outcomes seen as critical; most importantly for our purposes these include an effective client interview. In practice terms, an initial interview can impact on later follow-up interviews or contacts, rapport, trust, confidence, as well as the conduct of any litigation or negotiations that may follow. We suggest clinical and PLE students ought to be taught and assessed on the conduct of an effective interview given so much turns on it in legal practice. For clinical students, the primary importance is the insights examining this interaction can provide in terms of seeing the law in action. For PLE students, its value is more pressing in terms of preparing them as effective entry level lawyers.

Another "positive" aspect in terms of a good outcome identified in the Curran research is the importance that clients placed on the level of non-legal support they were provided with. For clients with a mental illness, with drug or alcohol addiction, who are homeless or live chaotic lives, practical support in terms of personal management was seen as critical. For such clients, a positive outcome might well be

that they attend their Legal Aid appointment or advises legal aid staff of a new mobile phone number or address. This support work is seen as critical and highlights the multifarious roles a lawyer needs to take in order to deliver legal advice. Evans and colleagues argue that the skills training provided to clinical students should incorporate a client focussed approach which would include inculcating such an awareness of the subjective circumstances of clients and the specific access to justice barriers (e.g. cultural barriers and communication strategies) they face.[28]

We agree that students in clinical and PLE programs need to be taught such a client focussed approach to practice.

Assessing a Good Client Interview

If as the Curran research suggests, a legal interview is pivotal in providing quality legal service and leading to a successful outcome then, how might the measuring of a quality legal interview translate when students are delivering legal assistance under supervision? There is a well-developed literature on the elements that constitute an effective legal interview. Wolski, Field and Bahrij[29] examine the nature and processes of participatory, client-focussed interviewing and Chay and Smith[30] further unpack the staged process for a good interview. Wolski and colleagues

[28] Above note 2, 15.

[29] B Wolski, D Field and J Bahrij 'Legal Skills: A Practical Guide for Students', (Thompson and Legal Regulatory, 2006) Chapter 2 59- 116.

[30] A Chay and J Smith, 'Legal Interviewing in Practice', (Law Book Co. , North Ryde, 1996).

underline the importance of a shared understanding of roles and responsibilities, managing expectations, providing clear communication, focusing on problem solving, maintaining ethical values and responsibilities and dealing sympathetically with clients' needs, especially those with special needs. They discuss the underlining need for co-operation and trust between lawyer and client, for real client participation, for the lawyer to probe deeply but respectfully, so as to reassure clients that they are heard and understood and to obtain accurate instructions and provide accurate advice.

Similarly, there is empirical research as to the presence of such qualities in the client interviews conducted by practising lawyers. Moorhead and Robinson[31] conducted interviews with lawyers and clients after an initial consultation. Follow-up interviews were then conducted six months later as the lawyer-client relationship developed. In the worst cases they found that, even after six months, the lawyer had still not identified the issue for which the clients said they were seeking assistance. The study remarked on lawyers' poor listening skills, their lack of fact checking and their lack of understanding regarding client needs. Kreiger has highlighted in his own empirical work the potential of clinic to make students 'more adept at exploring client interests and determining next steps to take in a case' and in imparting the ability to identify legal rules applicable to a problem.[32]

[31] R Moorhead, M Robinson and Matrix Research and Consultancy, *A Trouble Shared: Legal Problems Clusters in Solicitors' and Advice Agencies* (London: Department of Constitutional Affairs, 2006).
[32] S H Kreiger, 'The Effect of Clinical Legal Education on Law Students: An Empirical Study, 2008 Vol 35:1, *William Mitchell Law Review*, 359-400 at 397.

This research provides the groundwork for the specific skills relevant to the conduct of a good client interview. Curran's work sought to develop a set of indicators as to whether a good legal interview has occurred. These are now being used with adaptations to suit Consumer Action Law Centre in the evaluation of its Advice Line and in an evaluation of a Medico-Legal Alliance in the rural Bendigo region of Victoria, in south eastern Australia. It is suggested that the indicators can also be utilised in assessing students in clinical and PLE programs. A short form interview of clinical clients post-interview might include the following set of questions:

- *Did the interviewing student lawyer listen as you explained your situation?*
- *Did the student lawyer make you feel safe, comfortable and respected during the interview?*
- *Did the student lawyer ask questions that extracted all you think they needed to know and did they check with you to see they had understood what you told them?*
- *Did the student lawyer give you an opportunity to ask questions or clarify all you wanted to know?*
- *Did the student lawyer give you an opportunity to ask questions or clarify all you wanted to know?*
- *Did the student lawyer explain how the law affects your problem, the various options open to you, and what might happen next in a way that you could understand?*
- *Do you feel:*

  a. you understand what to do next?

  b. you understand what steps you need to take?

  c. you understand what steps the lawyer will/will not take and why?

  d. you understand all the options open to you?
- *Would you feel comfortable seeking help from this lawyer again if required?*[33]

[33] These questions have been adapted to suit a clinical/PLE context but are based on questions from Curran, above note 13.

Many of the questions intersect with those used by Barton and colleagues[34] as a basis for constructive feedback to students on the effectiveness of their simulated interviewing in PLE programs.

Case Study of client interviewing: The Legal Advice Clinic- PLE students

The Legal Aid Clinic Program (LAC) provides one option for students to satisfy the legal placement experience requirements of their PLE study. LAC is conducted at the ACT Legal Aid Office in Canberra and the program is integrated into Legal Aid's "advice and minor assistance" activities. The LAC Program is intended to expose students to social justice issues through direct contact with Legal Aid clients and to provide students with "hands on" legal experience, principally through interviewing and interview follow-up, just before they are admitted as practitioners. LAC is a clinical program running since 1996 and has been the subject of earlier research as an example of the delivery of minor assistance follow up work.[35]

Client interviews follow a standard methodology designed to expose students to live client contact whilst recognising that they are unlikely to have relevant legal content knowledge and are not permitted to give legal advice. Each student meets the client and conducts a "pre-interview" where their task essentially is to determine the

[34] Above note 27, 33-50.

[35] Harrison, J, Holmes, V, Rowe, M, Foley, T, Sutherland, P 'Capacity of a Clinical Program to provide 'Minor Assistance' within the Structure of a Legal Aid Commission, paper presented to the 3rd *International Journal of Clinical Legal Education*/8th Aust. Clinical Legal Education Conference, Melbourne, 13-15 July 2005

nature of the legal problem presented by the client. The pre-interview is primarily intended to allow the student to test their interview skills in a totally open, live client situation. The solicitor/instructor then enters the interview room, is briefed by the student as to the client's 'legal problem' in the client's presence and then continues the interview (which may or may not include legal advice) in the presence of the student. The student may be called upon in the interview to comment or assist and will be required to undertake, under supervision, any follow-up work from the interview. The student prepares a file note of the interview for Legal Aid records. Feedback to students on their performance is an important part of the LAC Program and it may be that this provides supervisors with an opportunity to incorporate some of the questions suggested above into their feedback to students. Additionally, there is scope to select appropriate questions from those suggested above to ask the client upon exiting the interview. This would provide additional feedback for the student as to whether the client saw the interview as effective.

Student evaluation reports over the life of the LAC Program identify interviewing exposure as one of its most valuable learning experience (typical comments in 2013 course evaluations include 'a great experience in making chronological notes, interviewing clients, watching supervisors give advice', 'very valuable experience interviewing clients, never had this experience in law school' and 'it was great to interact with the clients on a one-on-one basis. It was helpful to learn from the supervising lawyer what issues to focus on & how to focus on those issues.').

Assessment regime

Students' effectiveness in participating in both pre-interviews and the advice interview conducted by the lawyer/instructor could be assessed against a set of 'indicators of good practice'[36] which take into account feedback received from the client in their post-interview survey responses:

Pre-interviews		
1. *Collected information required for the Advice Sheet* (e.g. clearly & succinctly explained need; collected without unsettling client / disturbing flow; exercised judgement)	Self assess	Supervisor assess
2. *Efficiently undertook pre-interviews* (e.g. maintained role / observed boundaries; rapport; structure; identification of issues & needs; open & closed questions; identified relevant questions to ask and information to receive; summarising back; notes: legible, structured, relevant)		
3. *Debriefed after pre-interview* with other student or solicitor (insight about strengths / weaknesses; analysing knowledge / skills; ideas for improvement)		
Interviews		
4. *Effectively briefed solicitor* (pace; clarity; structure; coverage; relevance; maintained client rapport & managed client)		
5. *Attempt to apply initiative in interviews* (e.g. teamwork; explaining to client; client questions/ issues addressed; client options explored; problem solving; assistance as complete / empowering for the client as possible in the circumstances)		
6. *Notes finalised* (interview notes include facts; advice given; action steps listed at end; notes checked / approved by solicitor)		
7. *Initiated / participated in efficient post interview discussion* (e.g. sought & gave feedback; put forward any concerns; debriefed where appropriate)		

In addition students could be required to submit a short (250 words) reflection on how well a chosen interview went addressing this assessment regime and recording any feedback from clients. This could be done as part of an existing reflective journal or part of a case study component of the course.

[36] These 'indicators of good practice' are adapted from the learning outcomes devised and implemented by our colleague Judy Harrison in the Clinical Youth Law Program course over many years.

2. Using the second measure of quality – Fostering Students in the Conduct of a 'Effective Community Legal Education session'

Effective Community Legal Education

Community legal education (CLE) is seen as 'the provision of information and education to members of the community, on an individual or group basis, concerning the law and legal processes, and the place of these in the structure of society. The community may be defined geographically or by issue'.[37] Our view is that community legal education is critical in a 'participatory democracy'. If people are to participate effectively in a democracy they need to have a fundamental understanding of how legislation passed by parliaments and administered by government departments affects their lives. Clinical students often engage in the provision of community legal education by delivering training or information sessions to sections of the community. But assessment of the quality of their involvement is mostly subjective and unstructured. In research examining CLE[38] Curran critiqued lecture style approaches since feedback from participants revealed this was ineffective. Approaches that instead respond to the specific needs and experiences of the target audience were seen as much more effective. Such approaches have also been identified as effective in adult learning.[39]

---

[37] National Association of Community Legal Centres, Guidelines for the Management of Community Legal Education adopted by the National, CLEWS Network in October 2009. (http://www.naclc.org.au/cb_pages/files/13%20National%20CLE%20Guidelines%20%28Oct%202009%29%282%29.pdf)

[38] Above note 13, 1-2. The report including the research methodology, survey data (separately and full version also on the web site) and findings are on LAACT's website for agencies to examine and adapt.

[39] C Egle, 'A Guide to Facilitating Adult Learning' Rural Health Education Foundation and Department of Health and Aging, 2009, http://www.rhef.com.au/wp-content/uploads/a_guide_to_facilitating_adult_learning.pdf

Additionally, for people experiencing disadvantage (who are the main clients of legal aid and community legal centres in Australia), who are socially excluded or who are vulnerable for reasons (which include age or capacity) it becomes even more critical that they are able to understand what is being presented to them about the law so as to be able to protect or enforce their rights. Curran's research highlighted this, noting that CLE needs to be an effective endeavour to share knowledge that can be practically applied and effectively absorbed and implemented. Balmer and colleagues note 'the findings from the English and Welsh Civil and Social Justice Survey demonstrate that there are knowledge, skills and confidence gaps in the population which are barriers to achieving legal capability'.[40] Their findings highlight the importance of helping people to make sense of the law. Their analysis also demonstrated that disadvantaged groups were most likely to not obtain advice, to lack knowledge of rights, and so suffer adverse consequences. Respondents reporting problems with discrimination, clinical negligence, welfare benefit problems and homelessness were less likely to obtain advice, and as a consequence more likely to lack knowledge of rights and to suffer adverse outcomes. Their Report notes that those designing public legal education interventions need to take into account the 'whole' person as well as other contextual factors, such as

[40] N Balmer, A Buck, A Patel, C Denvir and P Pleasence 'Knowledge Capacity and the Experience of Rights Problems, Public Legal Education Network and Legal Services Research Centre (London, 2010). <http://www.lawforlife.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf>

literacy and numeracy levels, and anxiety and self-esteem considerations. The timing of the education is also crucial with people are more likely to be receptive to just-in-time education.[41] For students conducting community legal education it is therefore essential that it be highlighted that their role is to communicate effectively and appreciate the needs and capacities of the group.

Assessing Effective Community Legal Education

Drawing on the indicators of effective CLE developed in Curran's research we suggest a number of measures that may be effective for assessing community education provided by clinical students. We suggest surveying participants either orally (especially for participants with low literacy or poor written skills) or with a short written survey administered at the end of the session. Again a short form interview of CLE participants might include the participants responding to statements (in terms of 'strongly agree, agree, disagree and strongly disagree') such as:

- *The legal education session was clear and easy to understand*
- *The legal education session was practical and appropriate so as to assist my understanding of the topic.*

[41] Former Lord Justice of Appeal, Chair, the Plenet Steering Group, April 2010, 'Knowledge Capacity and the Experience of Rights Problems, cited in N Balmer, A Buck, A Patel, C Denvir and P Pleasence ' Public Legal Education Network and Legal Services Research Centre', London, 2010, 3.

< http://www.lawforlife.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf>

- *The legal education used practical scenarios and case studies which assisted me in gaining a picture of how the law works and the different contexts.*
- *The session met my expectations.*
- *The information was relevant, useful and helpful.*
- *As a result of this session/s I am more informed about how the law operates in this area and how I fit in.*
- *There were elements of the presentation that need improvement.*
- *Armed with the information from this session, I feel more confident to take steps involving my legal rights.*[42]

Participant feedback from such surveys can assist students in reflecting on how well the information they impart is received and encourage their continuing reflection and development as to how adept they are at communicating legal concepts to a non-legal audience. Supervisor observation using the statements can also provide a useful feedback tool. It might be useful for students to aggregate the data from surveys for pre4sentation to their supervisor. This would engage students in a process whereby they appreciate the tenor of responses and any recurrent themes that emerge. The students could usefully summarise the findings and present them in a debrief session with fellow students.

[42] These questions have been adapted to suit a community education context but are based on questions from Curran, above note 13 and from further work undertaken by Curran for the Consumer Action Law Centre in late 2013 and the Advocacy and Rights Centre, January 2014.

Case Study of community legal education: The Clinical Youth Law Program-clinical students

Youth Law Centre ACT (YLC) is a free legal service for young people between 12-25 years of age. It is provided through collaboration between the ACT Legal Aid and the ANU College of Law. A drop-in centre operates each weekday providing legal advice and referral service for young people. Clinical students work in the YLC one day a week in a paralegal role. As part of their involvement students conduct pre-interviews, brief solicitors, assist during interviews and complete follow up work on client files. The centre also undertakes extensive CLE, running outreach programs on a regular basis at high schools, colleges and with youth organisations. These are interactive programs designed to promote young people's knowledge of their legal rights and responsibilities and raises awareness of the services the YLC offers.[43] There is a weekly reflective and instruction session each Thursday morning.

The clinic identifies target groups for CLE as 'primary' (young people 12-25) and 'secondary' (e.g. youth workers, teachers, agencies). The students participate in CLE activities that occur by way of invitation (e.g. to schools, youth groups) for interactive sessions about the legal aspects of particular activities (like rave parties, sexting) or through requests from particular groups (young people from North Africa, young people on remand) to provide tailored sessions. They are also

[43] Recent sessions have discussed drug and alcohol; police powers and security guards; employment and apprenticeship; internet and mobile phone use including cyber-bullying and sexting; car accidents, and buying and selling goods (mobile phones etc.).

proactive in making overtures to youth agencies to have law students come and deliver sessions to workers about how to identify legal aspects of young people's problems and how and where to refer them to for assistance. All of this occurs under supervision of a staff lawyer or the course coordinator.

Student involvement in the CLE program takes a number of forms:

1. Students are closely involved in the preparation and revision of materials for outreach activities including tailoring materials and resources – as part of both onsite activities and as assessment items (current popular subjects include group housing, sexting, police and security personnel powers)

2. Students provide primary contact with young people in the delivery of CLE to school groups, youth groups, youth detention centre open day, youth expos, visits to drop in centres, and secondary contact through youth agencies, visits to youth worker agencies, school teachers and drop in centre workers.

3. Students debriefing in feedback session with the course coordinator, YLC staff and fellow clinical students about the response and effectiveness of CLE sessions as a learning process, specifically in terms of empowerment and engagement using a simple template questioning rubric of 'What worked? What could be done better? How could you be better prepared/equipped? What feedback did you get?'

Student evaluation reports once again are highly positive as to the benefits of involvement in CLE outreach activities.

Assessment regime

Students' effectiveness in participating in CLE can similarly be assessed against a set of 'indicators of good practice'[44] which take into account feedback received from participants in those sessions:

Community Legal Education		
1. *Preparing community legal education materials* (assist solicitor & others in preparing/revising materials including researching, drafting handouts, brochures etc)	Self assess	Supervisor assess
2. *Presenting community legal education sessions* (including level of engagement, using appropriate language [register, tone]; generating rapport; responding to group dynamics; fielding questions)		
3. *Problem solving* –identifying brief, determining level of content, appropriate presentation format; teamwork)		
4. *Quality of work* (timeliness; accuracy; performance against expectations including p, clarity of materials and in presentation style)		
5. *Initiated / participated in session discussion* (obtained client feedback; debriefed where appropriate)		

Effective debriefing is important. Careful debriefs about feedback received and how they felt about the sessions can provide fertile opportunities for deepened discussion on why skill, good human interaction and care are intrinsic to good lawyering. In a similar way, as with client interviewing, students could also be required to submit a short (250 words) reflective piece on how well their CLE involvement went and

[44] Again we are indebted to our colleague Judy Harrison for these 'indicators of good practice' adapted from her the Clinical Youth Law Program course learning outcomes.

recording any feedback from participants. This too could be done as part of an existing reflective journal or part of a case study component of the course.

CONCLUSION

The experiential learning opportunities in clinic or PLE placements are immense. Finding new ways to ensure students reflect on the quality of their participation can help them development professionally. By broadening the feedback students receive, in their learning, to those whom they seek to advise/instruct can enable them to appreciate that the work that they do as student lawyers directly affects clients and the community.

Conducting an interview and participating in an education session are very different activities but both highlight twin professional responsibilities – addressing the need for legal information and advice within a warm human exchange. Students participating in interviews (both directly in pre-interviews and collaboratively with a lawyer) are directly engaged in meeting and addressing human problems with legal aspects. Students involved in the empowering potential of CLE meet a crucial role in the administration of justice.

Students can, we argue, in a safe and guided context, emerge more mindful of the need to strive to deliver quality service, and reflect on what they do and how well it is received. Even though they are novices, notions of quality highlight their understanding of the effectiveness of law in operation. We suggest that careful

debriefs with students about this feedback can provide fertile opportunities for deepened discussion on the law and lawyers.

The two measures we have sought to extrapolate from the sphere of legal assistance service evaluation provide fertile methods that might be considered and adapted to clinical or PLE programs both in terms of assessment and program design. By connecting students early to notions of quality and effectiveness, may also have the benefit of driving up the quality of legal practice in the longer term.

From the Field: developments in clinic around the world

The Growth of Legal Clinics in Europe – Faith and Hope, or Evidence and Hard Work?

Maxim Tomoszek,

Palacky University, Olomouc, Czech Republic

maxim.tomoszek@upol.cz

Clinical legal education is a quickly growing and developing concept. Even in countries with traditionally conservative approaches to legal education and within very traditional institutions, we can observe significant growth of legal clinics. Throughout the Western Europe, which was considered to be the last holdout in the worldwide acceptance of clinical legal education,[1] many new legal clinics are being founded, changing the traditionally theoretical approach to legal education. Does it mean that the global environment of legal education is changing? What are the sources of this unprecedented spread of legal clinics? And what will be the consequences of this trend for legal education in a broader sense? I will endeavor to answer these questions mostly from the Czech and European perspective with a goal to bring some inspiration in a global context. In the end, I would like to share the surprising insights about clinical legal education I have gained at the conference dedicated to judicial independence and accountability.

First, I would like to make several observations. Legal clinics certainly are not a recent concept. The first clinics were established in the end of the 19th century and

[1] Wilson,R., Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education - Part I/II, 10 German Law Journal 823-846 (2009), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1123.

there was a significant discussion among scholars about the necessity of this type of legal education.[2] I find this very logical, since law is perfectly suited, or even requires to be taught in a practical way. The legal profession, as one of the helping professions, requires its members to master many professional skills. That is why law students quickly understand that a purely theoretical method of teaching law cannot prepare them properly for their future career in the legal profession and start looking for other sources of practical experience to compensate for that. It is remarkable that students also recognize the educational value of clinics on the area of theoretical knowledge – legal clinics allow them to acquire deeper and practical understanding of theoretical concepts, and most importantly require the students to combine and connect knowledge from different areas of law (i.e. different subjects) to get a full picture of the legal situation of the client. Thus legal clinics also offer a solution to the criticized compartmentalized nature of law studies.

Another important element often lacking in traditional legal education are professional values, again often due to theoretical nature of legal studies. A third factor important for development of legal clinics is the fact that there are many people in need of professional legal aid, who cannot afford to pay for a professional lawyer, despite the fact that states, bars or NGOs make huge efforts to make the situation better. At the same time, raising the awareness of law student to social

[2] Bloch, F., The Global Clinical Movement. Education Lawyers for Social Justice. Oxford: Oxford University Press, 2011, p. 5; Rekosh, E.,The Development of Clinical Legal Education: A Global Perspective – International Experience, the History of Legal Clinics. in: Łomowski, D. (ed.) The Legal Clinics. The Idea, Organization, Methodology. Warszawa: C. H. Beck, 2005, p. 45; Stilwell, P. (ed.), Clinical Law in South Africa. Lexis Nexis Butterworths 2004, p. 1; Who we are?, accessible at http://archive-dk.com/page/214151/2012-08-27/http://www.retshjaelpen.dk/eng/who-we-are, accessed on 30th May 2014.

justice elements of law motivates them and makes them better prepared for legal practice.

Legal clinics contribute significantly to all these areas, so it is remarkable that there were so many unsuccessful clinical projects all over the world, but especially in Europe. Therefore the question we ask should not be "Why did clinics develop now?" but rather "Why they did not last in the past?" and "Why are they re-discovered (in certain countries) exactly now?"

I would like to start answering these questions by using the example of the Czech Republic, which can be perceived as a bridge between Western and Eastern Europe and shares many common features with countries from both parts of Europe. The legal education was traditionally very theoretical, with occasional discussions about the lack of practical elements.[3] In the 1990s, there were several clinical projects taking place at different law schools, but none of them was particularly successful.[4] The reasons why these projects were not successful in the sense of long-term sustainability were astutely analyzed by Richard Wilson[5] focusing on situation in Western European and especially Germany and Stefan Krieger analyzing the

[3] Bobek, M. O (ne)reformovatelnosti studia práv v Čechách. Právní rozhledy, No. 10/2005, pp. 365–370; No. 12/2005, pp. 446–451; No. 14/2005, pp. 523–529 and No. 16/2005, pp. 601–606. Bobek also cites discussions from 1927 - Pošva, K., K reformě studia právnického. Hovorna časopisu Právník, Vol. LXVI (1927), pp. 132-133, Dymeš, B., K reformě studia právnického. Hovorna časopisu Právník, Vol. LXVI (1927), pp. 196 a 197.

[4] A very illustrative example of such a project was the housing clinic in Olomouc – Krieger, S. H., The Stories Clinicians Tell. in: Tomoszek, M. (ed.), Complex Law Teaching: Knowledge, Skills and Values. Olomouc: Palacký University, 2013, pp. 11-36. Available at: http://www.pf.upol.cz/fileadmin/user_upload/PF/Centrum/Complex_Law_elektronicky-_upravena.pdf, accessed on 30th May 2014.

[5] Wilson, 2009, p. 831-835.

situation in the Czech Republic.[6] The factors they identified as main obstacles to development of clinical legal education were the higher demands on methodology and organization within live-client clinics, existence of apprenticeships as a first stage of legal professions, legal obstacles such as non-existent student practice rule, the organization of legal practice and lack of social justice sensitivity at law schools. Other common obstacles perceived by starting clinicians in Europe are the fact that many law teachers are members of the bar and the bar opposes legal clinics as unfair competition due to potential low quality of advice, and criticizes clinics due to lack of insurance and confidentiality.

The story of legal clinics in Olomouc continues in 2002, when a very young Dean, Michal Malacka, decided to re-establish legal clinics at the law school. There were two main reasons to do that – one of them was the 'tradition' or rather an institutional memory of having the clinic in the 1990s. The other was the need to distinguish the relatively new law faculty in Olomouc from other, much more traditional and well-established law faculties in the Czech Republic. The clinic did not respect any basic rules of clinical legal education methodology, since it was organized and taught by the people with no experience in this area. In 2006, the law faculty in Olomouc acquired a substantial financial support from European Social Fund,[7] which allowed it to train the teachers in the clinical methodology and to

[6] Krieger, 2013, pp. 13-15.
[7] Project of HRD OP "Development of practical forms of teaching at LF PU" (reg. no. CZ.04.1.03/3.2.15.2/0273), financed from the sources of European Social Fund and state budget of the Czech Republic.

develop a complex clinical programme, which is not only still operating, but steadily growing.

At first, the clinical programme in Olomouc was considered to be an experiment by other law faculties. However, after it became well established and positively appraised by students and professionals, the law faculties of Charles University in Prague and Masaryk University in Brno have realized the importance of having complex systems of practical legal education embedded within the law school curriculum, including legal clinics, and currently offer several clinical or skills-oriented courses.

Does it mean that the above-mentioned obstacles have been overcome? I have the impression that the recent intensive development of legal clinics in the Czech Republic (and also in other European countries) derives from understanding that traditional legal education was inefficient and did not focus enough on skills and professional values. The importance of skills and values as a qualification requirement for legal profession is clearly formulated in CCBE (Council of Bars and Law Societies of Europe) recommendation[8] similar to ABA's so-called MacCrate report.[9] The need for development of key competences during higher education is

[8] CCBE Recommendation on Training Outcomes for European Lawyers, accessible at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf;
[9] American Bar Association, Legal Education and Professional Development – An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap. Accessible at: http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf

expressed in the Resolution of European Parliament.[10] Legal clinics were even recognized by United Nations resolution.[11] These documents were undoubtedly strong enough arguments to overcome the resistance of conservative members of law academia and the voices saying that clinical legal education is too cost-inefficient. However, other obstacles were not so easy to overcome. The newly established wave of law clinics is therefore still lacking with regard to student representation in court or filling the gap in the free legal aid system. It is striking that in many European countries, the social justice element of legal clinics is often neglected and underrated, or even non-existent, due to focus on simulation clinics or diminishing the extent of help provided by clinics to people in need.

The change in overall attitude to legal education can be demonstrated on the influence of legal clinics on the law school curriculum. In Olomouc, there are many members of the faculty who combine teaching of substantive, compulsory subjects, with supervision in legal clinics. This combination allows them best to understand the problems of traditional legal education, especially when compared to legal clinics. This experience leads them to improve their teaching methodology in substantive subjects and slowly changes the overall methodology in the curriculum. Since 2006, the attitude to teaching changed significantly and lead to accreditation of

[10] Recommendation of a European Parliament and Council no. 2006/962/EC on key competencies for life-long learning, accessible at http://www.cmepius.si/files/cmepius/userfiles/grundtvig/gradivo/key_competencies_2006_en.pdf

[11] Resolution adopted by the General Assembly of the United Nations: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Accessible at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf, accessed on 30th May 2014, para. 61 (a), 71 (e), 72 (a) and (b).

a new curriculum in 2009, profoundly different from any previous law school curriculum in the Czech Republic.

At this point, I come to the insights I have gained at the conference on judicial independence and accountability, which took place on 31st May and 1st June 2014 in Brno.[12] Its main focus was the administration of judiciary and especially the functioning of judicial councils in different countries. It is remarkable that they were adopted in many countries in a wave, which was argued to be caused by international pressure but also by attractiveness and fashionableness of judicial councils. Countries that resisted this trend were among others Germany and the Czech Republic. In the presentations at the conference, a research was presented concluding that judicial councils in fact do not increase judicial independence. In several countries, the judicial council had the opposite effect – some of the top officials from within the judiciary used them to control the judiciary as a whole for their own purposes.

I would like to make a parallel between the adoption of judicial councils and growth of clinical legal education in European countries. The basis for this parallel is the fact that the current developments in the area of clinical legal education can probably be also, at least partially, attributed to the fact that clinics are trendy and fashionable these days. And some countries with more conservative approach to legal education, for example Germany, also opposed this trend. The positive contribution of clinical

[12] You may find the detailed programme of the conference at http://jinepravo.blogspot.cz/2014/03/konference-politics-of-judicial.html

legal education towards the overall outcome of legal education system still has not been proven by a rigorous empirical evidence-based study – it is mostly based on belief of clinical teachers and clinical students.[13] So put in simple words – many of us very much like the idea of implementing something, lot of other people say it is great, we ourselves consider it to be great (or maybe we just feel that we should not be the only ones without it), so we do it!

I think there are two major lessons to be learnt from this parallel: first, it is important to be sure and to have evidence that clinical legal education really can achieve the goals that are usually attributed to it. Most of the clinical teachers and students are intuitively convinced that legal clinics have these effects. However, latest research shows that intuitive conclusions can be very wrong, especially when there is strong bias.[14] Therefore it is of utter importance to rigorously research the outcomes of clinical legal education and present clear scientific evidence of their benefits. I am convinced that the conditions right now allow conducting such research very effectively and on global scale, making the outcomes of the research relevant and persuasive. There are several international clinical networks, which could serve as a platform for organizing and conducting such research.

The second lesson to be learnt is that when adhering to a widely spread trend and adopting some new features (judicial councils or legal clinics), it is extremely important to do it well, especially if we ourselves are convinced that these new

[13] For detailed analysis see Krieger, 2013, pp. 30-33.
[14] Kahneman, D., Thinking, Fast and Slow. Macmillan, 2011.

features are really a positive development and want them to spread further. If we do not do it well and fail, we will significantly weaken the reputation of other people doing the same thing somewhere else, because we will be an example that it does not work or even works in opposite direction and that is excellent ammunition for critics and opponents. It means that becoming a member of international community of legal clinicians brings a lot of responsibility. Luckily, clinicians all over the world are in my own experience extremely forthcoming and helpful people, who gladly share their know-how and provide help to anyone in need. The exchange of information is already working on global, regional and national scale. There are several associations, which serve as platforms for such exchange, there are regular conferences taking place all over the world, and there are many supporters of idea of clinical legal education among members of legal professions, NGOs, international organizations, or human rights activists.

Going back to the questions from the beginning of this text, I would like to conclude that the environment of clinical legal education has definitely changed a lot. It is currently very open to innovations improving its results in the area of skills development and professional values. Legal clinics are widely accepted as a very effective mean to achieve that. The sources of this change were the recognition of importance of practical methods of teaching on many different levels and in many different contexts. What does all this mean for the future development in clinical legal education?

All these factors significantly increase the importance of networking. There are several excellent examples of benefits of establishing a clinical network, be it on national level (CLEO in UK, CLEA in USA or FUPP in Poland) or globally (GAJE). Several new networks are being established right now or have been established recently (European Network for Clinical Legal Education, Francophone network on clinical legal education, Jordanian Association for Legal Clinics). This all leads to unprecedented global communication and exchange of information. It also means that clinics are not experiment involving a couple of (hundreds of) people anymore – clinical legal education is a massive and global phenomenon. However, the global clinical community should not get too comfortable and rest. There are certainly countries of regions (including Europe), which still need significant help to make legal clinics a standard part of legal education.

However, in my understanding, clinical legal education is not a goal in itself; it is just one of the steps on the road to achieve truly important goals on global scale, most importantly reforming legal education and achieving social justice for everyone. I think that now the focus within clinical legal education will shift from expansion to quality and effectively achieving these goals, (re-)opening questions such as "How can we improve non-clinical legal education by our clinical experience?" and "How can legal clinics have greater social impact?"