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1 What is clinical legal education and pro bono?

'I shall not attempt to define hard core pornography but I know it when I see it ...'

Justice Potter Stewart, *Jacobellis v Ohio* 378 US 184 (1964)

1.1 What is in a name?

This book is about clinical legal education and pro bono activities. Although these are conceptually distinct, there is significant overlap in law school-based projects, and this is why they have been brought together for the purposes of this book. Often participants will not be concerned about whether a particular project is clinical or pro bono or both – you will be more interested in what learning or other opportunities it gives rise to. Nevertheless, sometimes categories are important and, given that this book professes to be a guide to clinical legal education and pro bono, you can legitimately expect it to provide workable definitions. Unsurprisingly, like many educational concepts, it is very difficult to pin down one all-encompassing definition that will meet with the approval of everyone. Nevertheless, this chapter will attempt to give you a coherent explanation that will help to set the parameters for the remainder of the book.

1.2 Types of clinical schemes

Before moving on to definitions, it may be helpful to look at some common types of clinical and pro bono schemes:

In-house advice and representation clinics

These are often viewed as the gold standard of law clinics as they seek to replicate in the law school the type of service clients could expect if they went to a firm of solicitors. You provide a full legal service to the public under the supervision of academic practitioners. These clinics may be general (covering a number of different areas of law) or may specialise in one or two areas (for example a housing law clinic specialising in landlord and tenant disputes). These clinics are often established only with significant backing from within the law school because they require sustained investment in staffing, premises and other resources (see **Chapter 2**).

Advice-only/gateway clinics

These provide initial advice and/or referral to other legal services. This is a more limited version of the in-house advice and representation clinic. The key distinction tends to be that the clinic's involvement with the client is limited to initial or other specific tasks so that there is no open-ended retainer. These clinics cover a very wide range of different activities, such as a drop-in advice clinic where you will provide a type of triage service to make clients aware of other sources of help, a telephone advice line where you never meet the client, or an email research service where clients can ask you specific questions to help them with their legal problems. These types of clinics often work with external lawyers or other agencies, either referring clients on, or assisting the law firm/agency with its case work.

Placement or externship schemes

These involve you going out of the law school to work (on a paid or unpaid basis) with law firms or other external agencies. This has the advantage of giving you an authentic experience in that you participate in a real-world organisation. It does this without the need to create a legal services infrastructure within the law school itself. A characteristic of this type of scheme is that the law school does not have day-to-day control or oversight of your learning experience. This can lead to quality control problems. There may also be challenges for assessment of learning outcomes if the clinic is part of an assessed module. Successful schemes therefore depend on good relationships between academic staff, external supervisors and you, the students.

Streetlaw projects

In this type of project you work as a member of a team to educate community groups about an area of law or legal rights relevant to members of the group. You work with a university-based and/or external supervisor to prepare a presentation or briefing for a group or organisation such as a school, residents' association, prison and so on. As will be seen, there is some doubt over whether this type of activity counts as clinical legal education. Streetlaw has been included within this book as the authors think that it does fall within a broad notion of clinical activity and is often the type of venture that a law school will introduce initially before deciding whether to proceed with more ambitious clinical schemes.

Simulation activities

You act in roles as lawyers performing realistic but standardised tasks set by your tutor. A major difference from other types of clinical project is that the clients and cases are hypothetical. This means that the academic coordinator/lecturer retains control of the experience and can to a significant extent dictate the tasks that you will need to perform and the learning outcomes to be achieved. Again, some have doubted whether such activities count as clinical legal education. This book will explain later that these activities clearly do count, albeit that your experience will often differ significantly from live client models.

Voluntary pro bono activities

There are a significant number of pro bono schemes that take place as part of or as an adjunct to study at law schools. These include legal letter clinics, coordination of pro bono activity by local lawyers, legal literacy projects, court buddy activity, prison rights workshops, helping bodies such as the Citizens Advice Bureau or the Free Representation Unit and many others. Students may often not secure academic credit for such activities, but it ought to inform and contextualise your wider learning about law and the legal process.

Specialist clinical projects

There is a wide range of other clinical projects which do not fall clearly into one of the above categories. These may include niche areas of law or provision of particular skills. Examples are Innocence Projects where students (possibly including non-law students) assist a criminal lawyer to investigate suspected miscarriages of justice, advocacy services such as the Free Representation Unit, or policy/law reform clinics which identify areas where the law operates unsatisfactorily and work with campaign or interest groups to try to change the law or procedure.

1.3 Definitions – what is pro bono?

Starting off with the more straightforward of the two concepts, pro bono is a shortened version of the Latin ‘pro bono publico’ which means ‘for the public good’. It can be applied to any service provided for free for public benefit, but is most often referred to in a professional and more specifically legal context when lawyers provide their services for free, normally to people who could not otherwise afford to pay.

For many, a commitment to pro bono is part of a lawyer’s ethical duty as a professional – given that lawyers make a living through the justice system, it is important that they give something back to benefit people who might otherwise not have access to justice. In some countries there is a professional expectation of pro bono, for example the American Bar Association requires US lawyers to provide a minimum of 50 hours of pro bono service each year (see ABA Model Rules of Professional Conduct, Rule 6.1). Some law societies have gone further and actually require lawyers to perform pro bono work, for instance, in South Africa, the Cape Law Society Rules, Rule 21 states: ‘Practising members who have practised for less than 40 years and who are less than 60 years of age, shall, subject to being asked to do so, perform pro bono services of not less than 24 hours per calendar year.’

In most common law jurisdictions, provision of pro bono services is a voluntary activity but one that is strongly encouraged by solicitor or bar associations and governments. In England and Wales, each of the representative bodies of solicitors, barristers and legal executives has created charities specifically designed to foster a culture of pro bono. LawWorks, formerly the Solicitors Pro Bono Group, is the charity established by the Law Society of England and Wales to promote pro bono. The Bar Pro Bono Unit and the ILEX Pro Bono Forum are the bar and legal executive

equivalent bodies. In summer 2010 the respective organisations joined together to create the National Pro Bono Centre with premises in Chancery Lane, London, to act as a unified national clearing house for pro bono legal services.

LawWorks and the Bar Pro Bono Unit jointly created the Pro Bono Protocol which has been approved by the Attorney General. It does not specify the amount of pro bono work that signatories will provide, but seeks to set the standard of work as equivalent to that provided to a paying client. It also includes a useful elaboration on the definition of pro bono.

Extract from the Pro Bono Protocol

1 What is Pro Bono Legal Work?

- 1.1 When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public funding is not available.
- 1.2 Legal work is Pro Bono Legal Work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.
- 1.3 Pro Bono Legal Work is always only an adjunct to, and not a substitute for, a proper system of publicly funded legal services.

There are a number of issues arising from this. First, pro bono is said to be provided in the public interest. At a basic level this will be satisfied whenever lawyers provide free legal services as they will be securing access to justice. However, it goes further in that it suggests this will be for the benefit of individuals or groups who could not otherwise access the services through private payment or public funding. This goes to the basic rationale for pro bono work. It is generally seen as a way for the legal profession to enhance access to justice. This would be less likely to be achieved if it were routinely provided to clients who would secure advice and representation anyway via personal payment or external funding (such as insurance or legal aid). Thus, although the Protocol does not impose a strict means test approach, the expectation is that pro bono services will be targeted at those who cannot afford to pay.

Secondly, the legal work must be free to the client regardless of the outcome. This prevents 'no win, no fee' conditional fee or contingency arrangements falling within the Protocol's definition of pro bono. It also rules out the 'first 30 minutes free' initiatives that some law firms offer to attract potential paying clients.

Thirdly, the Protocol emphasises that pro bono is not intended to replace the legal aid scheme. This reveals a tension in this jurisdiction and elsewhere about the balance between state-funded and voluntary legal services. Some fear that the more extensive and effective pro bono services become, the less committed the government is likely to be to funding legal aid schemes. Indeed legal aid lawyers are sometimes sceptical about pro bono initiatives given that their own commitment to access to justice requires them to work in an uncertain and often inadequate funding environment.

Pro bono in law schools

In light of the definition set out above, the focus of pro bono is provision of a service as opposed to student education. This begs the question why pro bono activity would take place in law schools which are by their nature in the business of educating students. As has been said, there is a lot of overlap between clinic and pro bono. Thus, many clinical legal education activities may also be pro bono services. Nevertheless, there are also many pro bono projects in law schools where the focus is primarily service provision as opposed to education. Why is this? The reasons are diverse but include the following:

- Awareness about the ethics and practice of pro bono can be seen as part of the broad education of future lawyers. In the USA the American Bar Association accreditation standards for law schools states that schools ‘should encourage and provide opportunities for student participation in pro bono activities’ (Standard 302(e) (1999)).
- If you are a law student, particularly on a professional course, although you are not a full member of the legal profession, you are probably on the path to qualification and should therefore develop established professional habits including pro bono service.
- As a student in higher education you have opportunities not open to all. Many consequently feel a moral obligation to help those less privileged in society.
- You may welcome the opportunity to enhance your CV/resume by participation in professional-type activities.
- Academic lawyers working in higher education often have a commitment to pro bono and create pro bono projects as a means of utilising your time and enthusiasm to help provide a free community service. Similarly, law firms might be willing to support pro bono projects in law schools as part of the firm’s pro bono provision and/or to enhance the firm’s reputation among the student body.
- Many universities have mission statement or other commitments to community engagement. Pro bono projects are seen as excellent ways of universities interacting in a positive way with their surrounding communities.

1.4 Definitions – what is clinical legal education?

Clinical legal education is a phrase that has been used to describe a multitude of different learning activities involving law students. As previously mentioned, there is no universal definition of the concept. This book defines clinical legal education as learning through participation in real or realistic legal interactions coupled with reflection on this experience. Set out below are the characteristics which, taken together, make an activity clinical legal education.

You learn by doing

Confucius, a Chinese philosopher who lived from 551 BC–479 BC, has had the following saying attributed to him: ‘I hear and I forget. I see and I remember. I do and I understand.’

Whatever the provenance of the quotation, it has been used by advocates of clinical legal education to identify the shortcomings of learning based only on reading or listening to the wisdom of others. It suggests that practical wisdom should also be developed through personal experience. Modern theories about the way adults learn have provided further support for experience to play an important part in the development of knowledge and understanding. See, for example, David Kolb's development of the experiential learning cycle (Kolb, 1984), explored in more detail in **Chapter 12**. There is still significant debate about the process of adult learning, but it is widely accepted that performance can be a valuable vehicle for learning. Thus, experiential learning has become a major aspect of modern thinking about effective learning methods. Clinical legal education is a good example of experiential learning.

It is important to note that it has never been seriously suggested that all legal education can be achieved through experiential learning alone. Clinical legal education provides one additional method to sit alongside other learning opportunities.

You learn through interacting in-role as a lawyer or other participant in the legal system

Learning by doing is a rather vague notion, so there is a need to be more specific. For example, pulling a statute book from a shelf and finding a particular statute could be described as 'doing' in a broad sense. Similarly, putting your hand up and answering a thorny question posed by the professor during a lecture is 'doing' as opposed to not doing. But this is insufficient. The 'clinical' aspect of the notion requires a context-specific approach towards the experience. As the name suggests, clinical legal education finds its origins in approaches towards learning in medical schools. For many years, medical students have developed their understanding of medicine and treatment, not just through study of biology or anatomy but through observation of and participation in clinical interactions with patients and other medical professionals. This pushes experiential learning into the specific context of personal interaction in the professional arenas of medicine (for example, patient consultation, ward round or operating theatre). In a legal context, 'clinic' requires that you act as participants in the professional arenas of the law (such as client interview, case strategy meeting and court hearing). This also means that clinic students are exposed to notions of professional ethics and the obligations of lawyers.

This criterion is not intended to be too limiting. Clinical legal education is broad enough to encompass a wide range of participation. The purest example is where you act as a legal advisor in the provision of legal services. However, it could also be met by you acting as a client, witness, investigator, opponent, judge, juror and so on in a simulated exercise. This could provide the necessary experience of professional arenas of the law but from a range of different but important perspectives.

Moreover, there are not always clear boundaries between clinical and non-clinical activity. So far, this chapter has suggested that some form of participation is required, but as part of this there may well be scope for significant observation or modelling activities. For example, as part of a free representation clinic, you might

spend a lot of time visiting courts or tribunals to observe professional advocates at work and to reflect on the skills and behaviours you observe. Alternatively, you might observe your supervisor conduct a complex client interview and afterwards analyse the interaction, hoping to learn lessons about your own approach towards client interviews. The observation so closely impacts on your experience to count as part of your participation.

There are some activities that at first glance may appear so far removed from the traditional notions of lawyering that they fall outside the definition. One example is Streetlaw or other public legal education projects which involve a broad notion of community service in a legal context. These activities can constitute clinical legal education, as although they may not address case or dispute-based advice, they do involve you working to a specific brief and interacting with the public in relation to real legal rights and responsibilities. Modern ideas of community lawyering embrace a much broader role for lawyers, which encompasses legal education, leadership and activism (Levy-Pounds and Tyner, 2008).

You learn by reflecting on your experience

Clinical *experience* is not the same thing as clinical *education*. The concept of 'learning by doing' suggests that the activity or experience is a means to an end and the end is education. Thus, an essential component of any clinical legal education project is that it has your learning at its heart. This requires those establishing such projects to think carefully about the type of learning they want to arise from your activities and to build opportunities for this into the scheme. Almost all legal experience provides the opportunity for a rich learning experience to take place. Learning outcomes might be quite modest or fairly broadly drafted, such as 'awareness-raising' or 'context-setting'. Nevertheless, this does mean that a clinical legal education project will be predicated on student learning as opposed to service provision per se. Clearly, there will often be a blurring of these distinct aims and a single activity may serve both educational and service purposes. For example, a drop-in clinic offering advice about entitlement to welfare benefits may provide a valuable community resource, while at the same time helping you to learn about welfare law, develop legal skills and appreciate some of the problems caused by poverty.

There is a further, more sophisticated (and difficult) distinction to consider between education and training. It has been argued that clinical learning offers the potential to provide much more than enhanced skills – it enables a richer understanding of legal rules, legal processes, the role of the legal professional and the impact of the legal system on people and organisations. This had led some to suggest that, in order to fully count as clinical legal education, an activity should achieve more than mere skills development or other technical how-to-do competencies, which can safely be left to the training stage of qualification as a lawyer. For example, Brayne, Duncan and Grimes in their book, *Clinical Legal Education, Active Learning in Your Law School*, state as follows:

‘... through clinical techniques students are capable of learning far more than skills, and can develop critical and contextual understanding of the law as it affects

people in society. Thus clinical education is defined as that which aims to achieve these intellectual and educational goals. The use of similar techniques with nothing other than skill development in mind would be seen as practical training, but not clinical in its true sense.’ (Brayne et al, 1998, at xiii–xiv)

One difficulty is that the supposed distinction between education and training is sometimes vanishingly small. Take client interviewing as an example. All future lawyers need to be technically competent in interviewing skills; they must know the importance of clarity and precision, how and when to use open and closed questions, how to listen and take effective notes, how to recap and summarise and so on. Yet these aspects of interviewing are not ‘mere’ how-to-do technical skills. They also help you understand the relationship between lawyer and client, the power imbalance inherent in an interview situation, the fact that interviews are as much creative as deductive interactions and the central importance of communication in the law. Some teachers are therefore sceptical of attempts to exclude certain activities from the notion of clinic on the basis that the learning is merely technical; rather it should be seen as a continuum. Some clinical activities will focus on skill competencies, whereas others will address broader learning outcomes. Indeed you will often achieve different learning outcomes from the same activity.

Nevertheless, it should be recognised that, in England and Wales, law is still partly an apprenticeship profession. Solicitors must complete a two-year training contract, while barristers undertake a one-year pupillage post-university. This training stage of legal education is largely outside the influence of law schools. It appears counter-productive to merely replicate at university the experience you will have if you commence the training stage in the profession. To do so would be repetitive, potentially confusing and would not take advantage of the learning environment offered by the academic context in which the activity takes place. Moreover, it would be a reductive view of clinical legal education as a mere precursor to professional training. It can be much more than this. Indeed, its aims and objectives should have validity irrespective of whether you intend to enter the legal profession once you graduate.

This is where reflection comes in as a necessary part of the notion of clinical legal education. Reflection can help to make the difference between doing and *learning from* doing. Reflection is dealt with in a chapter of its own (see **Chapter 12**) and you will see that it is a challenging but rewarding activity. For present purposes, reflection is the process of reviewing and analysing experience so that you can identify and absorb the elements of learning arising from it.

Clinical learning offers you the unique opportunity of time and expectation to reflect on your experience of legal practice which will not arise in the same way again once you enter the world of work. So, to count as clinical legal education, a programme must include reflection. If there is no opportunity or expectation to reflect then an activity is likely to be a valuable pro bono experience but it will not amount to clinic. A good example of the difference reflection makes is the Portsmouth University CAB project. In a collaboration between the law school and the Citizens Advice Bureau, students are trained to perform the role of a CAB

adviser and are placed in the CAB, dealing with members of the public. This is a good example of a pro bono partnership where students help to deliver a valuable voluntary legal service. However, it is transformed into clinical legal education by the educational aims of the academic module that is built around the project, and in particular by the reflective diary and essay undertaken by the students (Sparrow, 2009).

You address real or realistic legal issues

In this chapter it has already been suggested that clinical legal education requires participation in the legal system. It will now discuss an important and difficult question: can simulated legal issues count as clinical legal education? Some lecturers think the answer is clearly yes. Although the focus of this book will be about your involvement with real cases, it is important to recognise that clinical methodology can be used without a real client or real problems. It is possible to design simulated schemes that seek to achieve broadly equivalent learning outcomes and adopt similar teaching and learning methods as live client clinics. These can still count as clinical learning so long as they meet the other parts of the definition outlined above (learn by doing, participate in the legal system and reflect on the experience).

Clearly there will be major differences between live client and simulation clinics, and many people believe that a live client clinic is the best example of clinical legal education. Indeed, live client clinics do offer opportunities for learning that are simply not possible with simulated activity, such as spontaneity, authentic emotion, personal commitment etc. But there is no logical reason to exclude simulated activities from the definition of clinical learning. This is reinforced by the fact that many law courses use simulation as a preparatory, parallel or integrated activity alongside live client work. If a law school established a wholly simulated clinic with no possibility of live client interaction, it might be open to the challenge that it did not realise the full potential of clinical learning (and might be pressed to develop it further), but this would not stop the simulated scheme from counting as clinical legal education.

If a clinic does adopt simulated activities, these should be as realistic as possible. Examples of how this can be achieved are through the use of properly briefed actors or standardised clients (Barton et al, 2006), use of adapted/anonymised real case documentation, use of realistic or real courtrooms for mock hearings, and the introduction of unexpected events or requests.

1.5 A brief history of clinical legal education

Clinical legal education is now firmly established in higher education worldwide, but the origins of modern clinical legal education are relatively recent. In the early part of the twentieth century, only a handful of law schools in the USA offered community law clinics, although no academic credit was awarded and students offered their time voluntarily. Practical work was seen as outside the academic realm, and law schools mainly focused their efforts on developing the case method based on analysis of appeal court decisions. From the 1930s to the 1950s there were intermittent

critiques of the lack of attention to practical lawyering but no significant response from law school hierarchies. Towards the end of the 1950s, there was sporadic but significant growth of courses covering skills such as legal writing, research and advocacy. These courses began to adopt clinical methodology, but there was a lack of a common rationale and no academic clinical community as such.

The social problems, civil rights movement and political unrest of the 1960s and 1970s helped to provide a catalyst for student demand and a coherent purpose for the developing clinical movement. The focus shifted from skills development to service provision, particularly addressing social injustice by the creation of clinics aimed at providing access to justice for the poor and dispossessed. Another significant factor was that, for the first time, law schools were able to access funding (from the Council on Legal Education and Professional Responsibility) to establish or develop clinics. By the end of the 1970s, the modern American clinical structure was in place and has continued to grow since then with extensive clinical programmes in almost all law schools and a nationwide network of clinicians through the Clinical Legal Education Association (CLEA) and the Association of American Law Schools Clinical Section. There has been some concern that clinical method has not been embraced throughout law schools and that clinics are seen as separate from the main doctrinal purpose of the academy (Barry, Dubin and Joy, 2000).

In England and Wales clinics began to develop in the early 1970s, partly as awareness and interest in what was happening in the USA grew and partly as a consequence of greater commitment by academics and students to social justice issues in the time following the university unrest of 1968. Clinics were established in the then 'new' universities, such as the University of Kent and Warwick University, and in some polytechnics. Early clinics tended to offer advice to fellow students, but some, such as the one at Kent, were established as a fully fledged legal practice offering a wide range of advice and representation to the public. The majority of early clinics were extracurricular, so students did not receive any academic credit for their efforts. This fitted with the access to justice imperative of the original pioneers, although early adopters did see opportunities for changing the way law students learned.

Throughout the 1980s and 1990s there was sporadic development of clinical legal education, and a wide variety of clinical schemes came and went but with little coherence. In the late 1990s the establishment of the Clinical Legal Education Organisation saw the development of a small clinical community which offered mutual support and generated further interest. Former polytechnics, such as Northumbria University and Sheffield Hallam University, developed extensive credit bearing clinical programmes, the former being integrated into its curriculum as a mandatory part of undergraduate studies. The professional law schools, such as BPP and the College of Law, developed innovative clinical modules and extracurricular pro bono activities. Research done by LawWorks in 2008 suggests that 68% of law schools currently offer some form of clinical or pro bono activity to students (Curtis, 2008).

1.6 Some key questions about clinical legal education and pro bono

Are clinic and pro bono schemes part of law student education elsewhere in the world?

No comprehensive study has been completed, but clinical legal education is now firmly established in law schools right throughout the world. By far the most extensive network of clinical projects is in the USA, where almost all law schools offer clinical modules. There is well-developed coordination by academic faculty members committed to clinical methodology. The Clinical Legal Education Association is the interest group that promotes clinical learning and encourages scholarship in the field. The Clinical Law Review is a peer-reviewed journal devoted entirely to research and scholarship about the clinical approach to legal education.

Other countries where clinical legal education is very common include Australia, Canada, South Africa, Nigeria and Poland. There are also expanding opportunities in China and India and in many of the countries of the former Soviet Union. Western Europe (apart from England and Wales) has not embraced clinical methodology extensively, although in recent years a number of clinical schemes have been established in Ireland, Spain, Italy and the Netherlands.

There are clinical legal education associations in many countries, and the Global Alliance for Justice Education (GAJE) provides a loose network for those working in clinical legal education schemes worldwide. GAJE organises a bi-annual conference at different locations around the world. There is also an annual international conference organised by the International Journal of Clinical Legal Education. The Public Interest Law Institute, based in New York and Budapest, is a non-governmental organisation which seeks to advance human rights around the world by stimulating public interest advocacy and pro bono. It organises an annual European Pro Bono Forum.

The book, *The Global Clinical Movement: Educating Lawyers for Social Justice*, by Frank Bloch (Bloch, 2010), provides an excellent overview of the issues facing clinical legal education throughout the world, looking at the development of clinic in different regions and the problems faced and also addressing themes such as the relationship between clinic and social justice, legal ethics, public interest law and legal aid.

Are clinic and pro bono schemes carried out as part of the curriculum or as extracurricular activities?

There is a rich tapestry of clinical projects in law schools throughout the country. The relationship between the clinic or project and your other studies is important, not only because it will affect how much time you might have available to devote to it, but also because it will determine whether your performance is assessed and credited towards your overall degree classification. It will also affect the resources that your law school is willing to devote to the project.

Set out below are the typical models you will find for clinic projects in law schools. There is a separate chapter dealing with assessment (see **Chapter 13**), but outlined here is the possible relationship between your participation and your performance on the programme:

Extracurricular

If an activity is extracurricular, it does not constitute a formal part of your studies, and the law school will not be obliged to provide or continue to provide resources. The activity might not have detailed learning outcomes and will be viewed by the law school as an added value activity. It may be that other course commitments will be seen as taking priority, but if the project involves commitments to clients or others then there may be moral or professional duties to finish what has been started. It is essentially a voluntary activity that you will do alongside your studies. You will have the satisfaction of helping to provide a pro bono service and will also gather useful experience and enhance your profile. The activity may be:

- student-organised – the law school permits the activity but has little or no commitment to it. The onus is on you to generate interest, organise the activity and secure funding;
- law school-organised – the law school puts some (perhaps significant) resources into the programme, sometimes including a member of staff with responsibility for coordinating the activity. However, the activity is not assessed and does not count towards your overall performance on your course. Some law schools may not credit your performance towards your degree classification but will provide other benefits, such as a special prize, award or certificate for participants.

Intracurricular

Clinic or pro bono may feature within your curriculum as either a compulsory or optional module. All modules organised by your institution will have been through the law school's or university's quality control procedures. There is likely to be a list of learning outcomes associated with the module so that you can see what you are expected to achieve during your time in the clinic activity. You can also expect appropriate resources to be spent on the project as it is a formal part of your course of study. It is becoming increasingly common for clinic modules to count as formal modules. One reason is that students have requested this. Many students want their hard work, commitment and high level of performance to be appropriately recognised by credit on their programme of study. Clinical supervisors also see formal credit as a means of encouraging students to participate, spend more time and effort on the clinical project and as a way of embedding the project into the curriculum so as to make it sustainable.

Clinic and pro bono modules tend to be offered as options. Compulsory clinic schemes are rare if the project involves advising and representing clients. There are a number of reasons for this, including the high cost of providing such a service and the fact that clinical learning is not required as part of the qualifying law degree or professional courses. However, there are a large number of compulsory modules or activities on undergraduate and vocational courses which involve simulated clinical

legal education. Examples are required participation in a court visit scheme, mock trials, mooted projects and skills modules.

The module may or may not be assessed. **Chapter 13** deals with assessment issues in more detail.

I am doing a law degree but do not want to qualify as a lawyer – is clinic and pro bono relevant to me?

An obvious characteristic of learning via clinic or pro bono is that it relates to legal practice. This begs the question of its relevance to the significant proportion of law students who do not enter the legal profession. In other words, if law is studied as an academic inquiry, is there any place for clinical methodology? It is the contention of this book that clinic and pro bono has relevance through all aspects of the study of law, including the academic stage.

Clinical legal education is essentially a method of learning as opposed to a subject or discipline in its own right. The method can be utilised for a variety of different purposes. It can certainly be used to develop professional awareness and legal skills that will be of value for future lawyers, but it can also be deployed to develop knowledge and general or intellectual skills that are required for undergraduate legal study. Similarly, participation in pro bono activities provides a valuable platform for the achievement of graduate level outcomes. To illustrate this, outlined below are the key attributes that the Quality Assurance Agency expects from law graduates (Quality Assurance Agency, Benchmark Statements for Law, QAA 2010) and suggestion of how clinical methodology can help to achieve these. It is not suggested that clinic can achieve all this on its own but rather that it can contribute as part of a varied learning and teaching strategy.

Knowledge

The QAA requires that law students develop a broad knowledge of the legal system including legal concepts, values, principles and rules. Clinical methods cannot deliver all of this, but they can clearly contribute. In particular, you are required to demonstrate the study in depth and in context of some substantive areas of the legal system. A clinic or pro bono project can be an ideal vehicle for developing in-depth, contextualised knowledge because you tend to work on a specific area of law on behalf of a client and need to understand that area in great detail in order to be able to advise or otherwise advance the client's cause. You do this in a real or realistic context of the legal system in which the legal issue will be resolved.

Application and problem-solving

You must be able to demonstrate the ability to apply knowledge and provide arguable conclusions for actual or hypothetical problems. Clinical methodology is clearly appropriate for developing these abilities because it is built around the application of legal rules and principles to particular situations and involves exploration of authentic legal problems and their potential resolution.

Sources and research

The QAA requires that you demonstrate the ability to identify issues which need to be researched, and retrieve up-to-date legal information, using a variety of sources including relevant primary and secondary legal sources. Clinical methodology lends itself to the development of factual and legal research skills. In particular, the problem to be addressed is often not precise or coherently expressed (for example by the client during an interview) so you may need to explore and clarify the issues before embarking on the research. In order to be able to advise or otherwise advance your client's case, you need to explore the area of law in depth and find legal authorities that help or hinder the client's interests. Given that you are likely to be considering a fairly precise question, there is a risk that your research will be myopic in that some sources that are broadly relevant to the area of law will not be relevant to the particular issue. However, this does not undermine clinical methodology as a whole; it merely confirms that it should be part of a range of learning methods available to students.

Analysis, synthesis, critical judgement and evaluation

These are some of the core intellectual skills that you are required to develop and demonstrate through your legal studies. You should have the ability to recognise and rank the relevance and importance of issues; bring together material from a variety of sources; synthesise doctrinal and policy issues; make critical judgements; and present a reasoned choice between alternative solutions. Alongside other learning opportunities, clinical legal education can help you acquire and develop these attributes, but clearly you will require expert help. The clinical activity will need to be designed in order to address these areas, and your supervisor will need to encourage and assist you to undertake the tasks required in order to achieve these outcomes. These are quite high-level intellectual skills and are unlikely to arise automatically by participation in real or realistic scenarios. Guidance and reflection are essential components of the learning journey.

Autonomy and ability to learn

The QAA believes these are the key attributes of graduateness. You must be able to act independently when planning and undertaking tasks in areas of law you have already studied. You should also have the ability to research independently in areas you have not previously studied. You must also be able to reflect on your own learning and use feedback. Clinical projects tend to require you to act not only under instruction and supervision but also independently, using your initiative to explore problems in areas of law that you may or may not have encountered previously. As made clear earlier, reflection is an essential part of clinical learning and is what helps to distinguish it from mere legal experience.

Communication and literacy

The QAA requires you to demonstrate oral and written communications skills by understanding and using English language appropriately, presenting knowledge or arguments comprehensibly and reading and discussing technical and complex legal

materials. Clinical learning requires you to act as a participant in the legal system and thus necessarily involves extensive communication. Most clinical projects provide a wealth of opportunities to develop oral and written communication skills. In particular, where a clinic requires you to interact with a lay person about the law, you need to communicate about the law in an accessible manner which is targeted to the needs of the non-lawyer. This will often require you to translate technical and complex legal materials into plain English that can be more readily understood by the public.

Numeracy, information technology and teamwork

You must be able to use, present and evaluate numerical or statistical information, create word-processed documents, use information and communication technology, such as the Web and email, and be able to contribute effectively to group tasks. You may or may not have to work with numbers, but it is likely that all of the other requirements will be developed in the clinic or pro bono project. In particular, clinical learning tends to be collaborative. You will normally work with a variety of other people, including your fellow students and your supervisor, as part of a team and with common objectives. This is particularly the case if you are working with fellow students on behalf of a client.

Is clinic and pro bono relevant to me if I want to become a barrister?

In England and Wales there is a split profession, in that lawyers may practise either as a solicitor or a barrister but not as both at the same time. The professional bodies for solicitors and barristers specify certain requirements for the academic stage of legal education set out in the Joint Statement on the Academic Stage of Legal Education (Joint Academic Stage Board, 2002). These can be achieved either through a Qualifying Law Degree or a Common Professional Examination/Graduate Diploma in Law. Thereafter the qualification route diverges, in that intending solicitors study the Legal Practice Course while would-be barristers do the Bar Professional Training Course. There follows a two-year training contract for solicitors or a one-year pupillage for barristers.

The question about the relevance of clinic to future barristers tends to arise because clinic projects are often (but not always) designed so that the services offered or the experience gained is similar to that offered by solicitors. For example, a number of in-house law clinics are modelled on law firms, so that instructions are received directly from members of the public and case files are opened. Indeed, cases are often supervised by practising solicitors, and students carry out the tasks that would normally be performed by a solicitor. Is this experience and the learning arising from it helpful if you do not want to become a solicitor? The answer is yes, for a number of reasons. First, it is important to appreciate that clinic learning is not merely preparation for a particular profession. In the previous section it was explained that clinic can play an important part in developing the knowledge and general and intellectual skills you require as part of your legal education, irrespective of career choice. Secondly, awareness and experience of the role and duties of a solicitor is of significant value to future barristers. Remember that almost all

barristers' work comes from solicitors. Thirdly, knowledge and skills learned in a solicitor context are often transferrable to a barrister context. For example, the skills necessary for successful client interviewing by a solicitor are likely to be of real value for a barrister's ability to conduct effective conferencing.

Should clinic and pro bono schemes include a commitment to social justice?

The relationship between clinical legal education, pro bono and social justice is intimate and complex. For many clinical scholars educating students about and tackling the problems of poverty and other social injustice is a fundamental part of the purpose of clinical legal education. Indeed, as has been seen, the early development of clinical teaching and the struggle for social justice went hand-in-hand. The twin aims of educating students in practical lawyering while securing access to justice for dispossessed groups are seen as inseparable aspects of clinical endeavour. It has been argued that the social justice imperative of clinical legal education and pro bono helps students to understand essential values of the legal profession such as promotion of justice, fairness, and morality (Barry et al, 2000). Others have argued that a value of legal education lies in encouraging students to nurture their 'capacity for moral indignation at injustice in the world, or to challenge and inspire them as lawyers to use what they have learned to work for social justice' (Wizner, 2001). See also Aiken, 1997.

This view has been reinforced by the tendency of law school education in general to neglect social justice issues. Thus law students may fail to grasp the reality that legal rules and legal processes are not separate from social, political and economic relationships, but are an intrinsic part of the unequal distribution of power and resources in society. The clinic is seen as an opportunity to raise student consciousness to the social context of the law which they may not obtain elsewhere.

The relationship between clinic and social justice is thus long-standing and deeply entrenched. Clinical commentators sometimes debate whether the priority of clinic should be student education or meeting unmet legal need (see eg Nicolson, 2006), but the reality for most clinics is that the client base will be those at the margins of society or bodies representing such groups. The educational and service imperatives tend to go together.

In light of this, why does this chapter not include social justice as a core part of the definition of clinical legal education? Although it is acknowledged that most clinical programmes have education for social justice as a goal, it is argued that this should be viewed as part of the culture of clinical legal education as opposed to its meaning. Moreover, the emphasis on social justice will be to an extent context-specific. The greater the social problems and inequality in a society, and the greater the legal need that is not addressed by traditional legal services, the more likely it is that clinical education will focus on social issues. A law clinic that neglected social justice issues would be open to criticism that it was not fulfilling its potential, but it would still amount to clinical education. Ultimately, clinical legal education in law schools should reflect the educational needs of law students. A rounded legal education is bound to include some appreciation of the social context for the creation and

resolution of legal disputes and the role of lawyers within this. Clinical methodology provides an ideal but not exclusive means for addressing this context.

Should services offered by law clinics be means-tested?

This is linked to the social justice imperative of most law clinics and it touches on the relationship between clinical legal education and pro bono. Clinics that provide a legal service to clients do so without charging clients a fee. An equivalent paid-for service may cost many hundreds or even thousands of pounds. On what basis should these extremely valuable resources be allocated? One obvious basis is to allocate the service only to those who would not otherwise be able to access justice due to an inability to pay or secure external funding.

There is no common approach to the question of whether to means-test potential clients. Some clinics do so; others allocate their resources in different ways, eg by targeting services that are more likely to be relevant to poorer clients, such as welfare rights advice, without imposing a prior test of a client's ability to pay. Other clinics adopt an 'educational value' test to deciding whether to enter into a retainer, and may end up taking on clients who could afford to pay but prefer to use a free service. These matters are often the subject of ongoing debate within clinics because demand is almost always going to outstrip the ability of the clinic to supply the service, so there needs to be some means of deciding how to deploy scarce resources. Some of these issues are explored further in **Chapter 3**.

1.7 Summary

Clinical legal education and pro bono has been undertaken by law students in the United Kingdom since the 1970s and continues to expand in popularity amongst law teachers and law students. There is now a huge range of projects taking place in law schools in this country and throughout the world. Defining clinical legal education and pro bono is not straightforward, but this chapter has identified essential themes as follows: learning by doing; real or realistic participation in the legal system; and reflection on your experience. Although they are not the same thing, it is clear that there is significant overlap of clinic and pro bono, and the social justice origins and connections of the clinical movement have been noted. There is no reason at all why clinical methodology cannot be utilised at all levels of legal education and can help students develop a more holistic view, not just of legal skills but also of the role of the law in society, legal ethics, and doctrinal legal rules and principles. Moreover, general and intellectual skills can readily be developed and enhanced by involvement with clinical learning.



Further reading

Introductory

Bloch, F, *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2010)

This ambitious work is the first book to build a global picture of developments in clinical legal education and social justice initiatives. It draws on leading thinkers from all over the world and is edited by one of the founding members of GAJE, the Global Alliance for Justice Education.

Brayne, H, Duncan, N and Grimes, R, *Clinical Legal Education, Active Learning in Your Law School* (Blackstone Press, 1998)

This text is aimed primarily at law teachers. It provides an overview of the history and development of clinical legal education, expounds the advantages of this approach and explores the learning and teaching methodology in detail.

Curtis, M, 'Public Interest and Human Rights in Law Schools: Ideals and Realities – The UK Student Pro Bono Experience', unpublished paper, 2008. A copy is on file with the authors.

This paper provides an overview of pro bono activity in UK law schools drawing on LawWorks research into current projects.

Nicholson, D, 'Legal education or community service? The extra-curricular student law clinic' [2006] 3 Web JCLI

<http://webjcli.ncl.ac.uk/2006/issue3/nicolson3.html>

This article argues that the primary goal of clinics should be provision of legal services to the needy and that the prioritising of educational needs risks treating clients unethically as means to educational ends.

Sparrow, C, 'Reflective Student Practitioner – an example integrating clinical experience into the curriculum' [2009] IJCLE 70

This article summarises a partnership between Portsmouth Law School and Portsmouth Citizens Advice Bureau which created a clinical legal education project involving placement at the CAB and reflective analysis by students of their development.

Intermediate

Aiken, J, 'Striving to Teach Justice, Fairness and Morality' (1997) 4 Clinical L Rev 4

This article explores the role of the supervisor in the delivery of a justice education. It underlines an important point, 'Everything we do as law teachers suggests something about justice', and argues that law schools traditionally fail to explicitly teach justice, thereby undermining the potential of student learning.

Barton, K, Cunningham, C, Jones, G and Maharg, P, 'Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence' (2006) 13 Clinical L Rev 1

This article reports on research conducted into the effectiveness of standardised clients (trained actors briefed to perform the role of a client) for providing feedback and assessment of student performance in client interviewing.

Barry, M, Dubin, J and Joy, P, 'Clinical Education for This Millennium: The Third Wave' (2000) 7 Clinical L Rev 1

This important article provides a detailed overview of the growth, development, challenges and future opportunities for clinical legal education in this century. It focuses on the normalisation of clinical legal education as a routine method of delivery of legal knowledge, skills and awareness.

Levy-Pounds, N and Tyner, A, 'The principles of Ubuntu: Using the legal clinical model to train agents of social change' [2008] IJCLE 7

This article explains an ambitious notion of what clinical legal education and pro bono lawyering can achieve in terms of empowering communities and enabling students to become legal activists who can help to educate, enthuse and emancipate oppressed people.

Wizner, S, 'Beyond Skills Training' (2001) 7 Clinical L Rev 2

The author argues that clinical legal education has a moral and political purpose rooted in a social justice mission. He suggests that clinics should teach not only knowledge and skills but also the ethical value of pursuing social justice.

Advanced

Kolb, D, *Experiential learning: Experience as the source of learning and development* (Prentice Hall, 1984)

This is one of many publications by leading modern educational theorist, David A Kolb, exploring the value of practical experience and reflection as a learning tool.



Activities

Activity 1: The value of pro bono

This exercise can be run as a simple group discussion activity or as a series of mini-presentations or debates.

Group size: 4–20

Materials: access to the Internet

Instructions: your group should be divided into four small teams. Each team is allocated one of the following statements:

- Pro bono is part of the moral commitment all lawyers should make to access to justice.
- Pro bono should only be given to those who cannot afford to pay and are not eligible for external funding.
- Pro bono is dangerous because it undermines the state's commitment to publicly funded legal services.
- Pro bono is so important that all lawyers should be required to provide a minimum number of hours each year.

The teams should conduct some basic Internet-based research into the issues arising from their statement. Each team should then prepare a short (approximately 5 minutes) submission arguing in favour of its statement. You should deliver this presentation to the other members of the group who will ask questions. This should lead to a general discussion about the value and problems associated with pro bono.

Activity 2: Clinical legal education and pro bono balloon game

This exercise involves sorting and ranking of characteristics making up clinical legal education projects. It works best if you are contemplating a specific clinical scheme that you know something about, rather than considering the issues in the abstract.

Group size: 4–20

Materials: A3 paper, post-it notes and a marker pen (or alternatively the exercise can be done using a word processor)

Instructions: your group should be divided into four individuals or small teams. Each team should be given a sheet of A3 paper, 15 post-its and a marker pen. At the top of the A3 sheet you should write, 'Reasons for doing clinic or pro bono project'. On 10 of the post-its you should write the following with the marker pen:

- Work as a team.
- Reflect on student experience.
- Serve the community.
- Improve legal skills.
- Understand legal rules.
- Appreciate the law in context.
- Comprehend the role of the lawyer.
- Enhance employability.
- 'Hit the ground running' in your career.
- Improve exam grades.

You should then discuss within your team and attempt to rank the post-its as a hierarchy, with the most important reason at the top and the least important at the bottom. It is permissible to put two or more post-its side by side if they are deemed to be of equal rank.

Your team should then attach the sheet of paper to the wall or a flip chart and be prepared to justify your findings and identify any areas of disagreement within your team. You also have the opportunity to add up to five further post-its with additional reasons you believe ought to motivate students to participate in a clinic or pro bono project.

Activity 3: Social justice or education?

This is a group discussion exercise that will require you to read an article about clinical legal education and then discuss your thoughts about the issues it raises.

Group size: 4–20

Materials: you require prior access to the Internet.

Instructions: read the article by Professor Donald Nicolson, 'Legal Education or Community Service? The Extra-Curricular Student Law Clinic' [2006] 3 Web JCLI. You can access this by going to <http://webjcli.ncl.ac.uk/index.html> and searching under 'Nicolson'.

The article describes clinics where the priority is the education of law students as 'educationally-oriented' (EO) clinics and suggests there are three disadvantages with such clinics relating to (a) service to the community, (b) clinic ethics and (c) student ethics. Within your group discuss whether you think Nicolson's criticisms of EO clinics are valid, and if so whether the suggested alternative of the extracurricular in-house clinic (EIC) provides a suitable answer. What do you think ought to be the criteria for deciding whether to take on and/or continue with a client's case if you do not use educational priority?

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