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The reason for this book

Why address Australian clinical legal education now?

Australian legal education is evolving rapidly in response to university competition for more students in perceived high-status courses. The lack of any caps on law enrolments, and the perception that some courses can be delivered less expensively online, have encouraged a belief that much larger numbers of students can be graduated from old and new law schools alike. The typical law school business model is increasingly and inevitably fee-driven, since graduate law students can be charged large amounts of money for their degrees.[1]

At the same time, law schools are delivering larger numbers of graduates into a shrinking or, at best, stable legal jobs market. Regardless of the state of the Australian economy in any one period, overseas legal process providers are succeeding in standardising and commodifying local, routine legal work at such levels that many local law graduates, particularly those without much or any experience of legal practice or who don't have family connections, struggle to get jobs.[2] And there is every indication

1 See e.g. M Thornton, 'Deregulation, Debt and the Discipline of Law' (2014) 39(4) *Alternative Law Journal* 213–16; M Thornton, 'Legal education in the corporate university' (2014) 10 *Annual Review of Law and Social Science* 19–35; M Thornton, 'Introduction [to Part IV: Justice in a Comparative Context]', in M Thornton and L Shannon, '"Selling the Dream": Law School Branding and the Illusion of Choice' (2013) 23(2) *Legal Education Review* 249–71.

2 See Law Society of New South Wales, *Future Prospects of Law Graduates Report and Recommendations* (2015), perma.cc/3CPB-HTWF.

that the application of artificial intelligence to many legal processes is only in its infancy, so that the number of local legal jobs may never return to buoyancy under the sheer weight and number of instantly accessible overseas providers, combined with these emerging technologies.

There may be no solution to this economic pincer movement if governments remain unwilling to cap law enrolments. In fact, the opposite may be the case, as free-trade agreements increasingly specify greater access to Australian higher education.[3] But there is also a strong desire for quality legal education through the development of standards, particularly the threshold learning outcomes project,[4] and law school legal educators are increasingly committed to doing things better, not just to withstand the above pressures, but to fulfil their own desires for excellence. Even if legal education and legal employment is being squeezed, many academic law teachers believe that the social and justice values of the Australian legal profession cannot be allowed to wither for want of law graduates who are practice-ready, ethically aware and intending to contribute to justice and social equity.[5] Contemporary major reviews of legal education in the United States and the United Kingdom—discussed in detail in Chapter 10—concur that clinical legal education is a key strategy not just for legal educators determined to strengthen law graduates' professional capacities, but also in support of the wider and more fundamental task of maintaining the rule of law.

This book is dedicated to those teachers and law schools who view academic legal education as a force for good and, in particular, to an aspect of that process—clinical legal education—that has the best chance of strengthening legal education and hence law graduates of the future.

Clinical teachers largely appreciate that they are 'on a mission' to strengthen legal education and have gathered for irregular conferences at different law schools since the 1980s. As referred to in Chapter 3,

3 See, generally, Angel J Calderon, J Tangas, 'Trade Liberalisation, Regional Agreements and Implications for Higher Education' (2007) 5(18) *Higher Education Management and Policy* 29–104.

4 These outcomes are a generally accepted set of standards for the learning process in law schools. See Anna Huggins, 'Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law' (2015), 38(1) *UNSW Law Journal* 264.

5 See e.g. V Holmes and others, *Submission to LACC Review of Academic Requirements for Admission to the Legal Profession* (26 March 2015); www.lawsociety.com.au/about/StudentHub/LawGraduatesReport/index.htm.

Kingsford Legal Service (a clinical site of the University of New South Wales law school) publishes an annual guide to current Australian clinical programs in an effort to disseminate knowledge of their depth and breadth. Of course, the clinical legal education 'movement' is not alone in a desire to improve legal education. The federal government's Office of Learning and Teaching (OLT),[6] the Council of Australian Law Deans (CALD),[7] the Law Admissions Consultative Committee (LACC)[8] and the Australian Professional Legal Education Council (APLEC),[9] which oversees pre-admission practical legal training, are all attempting to improve educational quality in different ways.

Regulatory bodies are well aware of the potential and the capacity of clinical legal education to improve law courses and they interact routinely with law school deans. The Victorian regulator of that state's law schools' curricula, the then Council of Legal Education,[10] was closely involved in our research phase and is influential in other jurisdictions. Similarly, the Australia New Zealand Law Admissions Consultative Committee (LACC) reports to the Council of Australian and New Zealand Chief Justices and counts CALD among its membership.[11] But these are institutional bodies rather than actual teachers. While this book is addressed to clinical teachers—'clinicians'—and intending clinicians, it will also be of considerable use to law school leaders and legal professionals with an interest in legal education. It is written by clinicians and is informed by empirical research conducted by them. That research led to the September 2012 report known as 'Best Practices: Australian Clinical Legal Education' and then to the larger final published report, *Best Practices: Australian*

6 See www.olt.gov.au. Accessed 4 June 2015.
7 See perma.cc/GT6V-UZY4. Accessed 4 June 2015.
8 See www.lawcouncil.asn.au/LACC. Accessed 4 June 2015.
9 See perma.cc/E8UD-H5UM. Accessed 4 June 2015.
10 This body is now the Victorian Legal Admissions Board (VLAB). See perma.cc/BV66-4EBJ.
11 See Law Admissions Consultative Committee at perma.cc/Y7PC-C9DR. This site states: 'The Law Admissions Consultative Committee (LACC) consists of representatives of the Law Admitting Authority in each Australian jurisdiction, the Committee of Australian Law Deans, the Australasian Professional Legal Education Council and the Law Council of Australia. It is generally responsible to the Australian and New Zealand Council of Chief Justices, which appoints the Chairman of the Committee.'

Clinical Legal Education (2013) (referred to here as *Best Practices*).[12] Throughout this book, we refer to the best practices developed for those reports because, as we describe in Chapter 10, they are the product of a research program and are not just a matter of individual opinion.

Each of the following chapters represents a tangible extension of *Best Practices*. We became acutely aware during the research process that each of the topics we address has individual importance, not just as a descriptor of some aspect of Australian clinical legal education, but as a key element in the best of clinical legal education. These topics did not suddenly emerge in a flash of light. Long and sometimes difficult debates about what the research process had uncovered were followed by agreement and then U-turns, as often as not. Gradually, a shared understanding of what is truly best, and not just good or better, emerged from a digestion of research reports and the literature, and our reflection on both.

This book takes *Best Practices* one step further, or perhaps one step deeper. In that report we condensed the underlying debates into concise statements so that key players, especially law deans, might readily accept that clinical legal education is not just an option within wider legal education, but a necessity for the best of legal education. That task was achieved in the unanimous adoption of our best practices by CALD in November 2012.[13]

Now, our (educational) task is to more clearly inform and persuade Australian colleagues not just of the depth and potential of clinical legal education, but also of the detailed operational issues that, when confronted,

12 The development of this report occurred during 2010–12. An application by Adrian Evans in 2009 to the then Australian Learning and Teaching Council (ALTC) (now the Office for Learning and Teaching (OLT)) led to a research grant to investigate clinical teaching practices in Australian law schools with a view to improving and strengthening student learning in clinics and, hence, the wider law curriculum. The authors of this book (other than Peter Joy) were joint researchers (along with Ebony Booth) in this project. Regional surveys of all Australian law schools allowed the identification of all those offering a clinical course or utilising clinical legal methods in their teaching. Analyses of these clinicians' responses to subsequent surveys and interviews permitted the authors to develop best practices in clinical legal education. The document titled 'Best Practices: Australian Clinical Legal Education Sept 2012' contains only those best practices and was uploaded to the CALD website in November 2012 after it had been endorsed by CALD. It is document number 14 and can be found at perma.cc/BY6N-6SRF. For the larger final project report, published in 2013, see Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Mary Anne Noone, Simon Rice and Ebony Booth, *Best Practices: Australian Clinical Legal Education* (cited hereafter as *Best Practices*), which can be downloaded from the OLT website: www.olt.gov.au/resource-best-practices-Australian-clinical-legal-education; perma.cc/2J6E-ZMQX. Ebony Booth was a research assistant on the research project and contributed considerably to its organisation, background research and management. The supporting research material (including summaries of the Regional Reports) is also linked to this site.

13 See footnote 12.

will result in the best clinical legal education. This task is not simple. The greater use of clinical teaching methods in Australian law schools is yet to be matched by a strong understanding of the pedagogical choices required to maximise this most powerful of teaching methods. This lack of strong engagement with the pedagogy of clinical legal education was one catalyst for *Best Practices*, but such a commitment remains elusive. In this book we use the research results that led to *Best Practices* as a pathway into the discussion of these key areas of engagement. Each is canvassed thoroughly by one or two of us as authors of a chapter, with moderation provided by each of the other authors.

Coverage of chapters

The primary authorship of each chapter varies and, to that extent, there will be a difference in voice in each chapter, albeit one that has been moderated by the comments of every other author. Chapter 2 is primarily the work of Jeff Giddings, and dissects the extended context of Australian legal education generally, explaining the regulatory framework and distinguishing clinical legal education from practical legal training, service learning and *pro bono* programs, while discussing the relationship with work-integrated learning. Beyond scene-setting, we discuss in Chapter 2 the need for a functioning 'ethical infrastructure' to strengthen the professionalism of clinical legal practice. Finally, Chapter 2 offers an extended overview of the state of play in Australian legal education and its relationship to clinical legal education, including the currently vexing issues of wellness and depression and their effect on all law students' performance.

Chapter 3 is authored by Mary Anne Noone and Anna Cody. It reflects the multilayered debates about definitions and the proliferation of terms that always come up whenever clinical legal education is discussed. This chapter appears early on in the book so that readers can be clear about what is actually meant by terms such as clinical legal education, a clinic, a client and a 'model'. Different models of clinical legal education are suited to making different contributions to aims and learning outcomes. Phrases such as 'in-house live client clinic', 'in-house live client clinic (some external funding)', 'external live client clinic (agency clinic)', 'externships (includes internships and placements)' and 'clinical components' are all identified, distinguished and justified. Chapter 3 will

be of special interest to clinicians and law deans looking at externships because of tight budgets. Externships and agency clinics are increasingly the point of entry to clinical legal education for smaller law schools because of the view that they cost less to implement and run. The conflict about whether a simulated experience is or is not 'clinical' is also addressed, for similar reasons.

In Chapter 4, Simon Rice tackles good course design. It is a first-order mistake to simply begin a clinic and hope for the best, because it is only possible to assess whether a clinic is successful by measuring it against the aim behind its establishment. In clarifying clinical aims and objectives, the design process identifies the potential to shape clinical experiences in order to make them as constructive as possible for students and other communities. The provision of clinical experience involves broader and significantly more complex learning outcomes beyond the acquisition of practical skills. Course aims can include the promotion of legal doctrine, addressing specific social issues, developing legal and/or professional skills, promotion of social values, strengthening of legal theory or social justice, the provision of public service or the development of legal policy and law reform. The chapter also looks at the options for student selection, a topic that will become increasingly important as student pressure for selection into clinical legal education programs increases.

Chapter 5 is composed by Anna Cody and Simon Rice and recognises that notions of justice are the central framework for our endeavours as clinicians. Social justice inspired the emergence of clinics, both in Australia and elsewhere, and should, in our view, continue to guide their development. The chapter explores what justice means for contemporary clinical legal education, whether community legal education, community development, strategic litigation or policy advocacy leading to law reform. But there is a recurring debate—encouraged to some extent by the prevailing conservative political mood of the last decade—should clinics be about social justice at all, or only really about direct service and student learning? In an era when some new clinics may attempt to provide business advice or deliver services for a fee, it might be suggested that our emphasis on a justice focus for clinical programs is passé. We do not agree and are confident that the socially appropriate focus of an Australian clinical program is the promotion of justice for clients and clients' interests, and of students' appreciation of this priority as they grow in confidence and understanding of injustice in contemporary societies. Clinical education is significantly more than a 'mechanistic' educational methodology.

Chapter 6 deals with clinical supervision, perhaps the most neglected of clinical skills as well as the most important for the best clinical legal education. Jeff Giddings makes a strong case for effective supervision as central to clinical pedagogy, and that effective practices need to be developed in order to enable students to learn as much as possible from their (relatively short) clinic experience. And the unexpected benefits for supervisors are not forgotten: because good supervision is mutually enriching for supervisor and supervisee alike, competent supervision training is likely to be a strengthening and re-energising experience for all. Clinicians will be particularly interested in supervision from the point of view of the sometimes problematic externship clinic, where the practice environment can permit less than effective supervision and where clinicians may have less access to good supervision training. Online supervision poses particular challenges, but the underlying principles of effective supervision, affirmed in our research program, are identical regardless of media. Importantly for new clinics, the chapter addresses the sensitive topic of supervision ratios, that is, the maximum number of students that a law school ought to require a clinician to simultaneously supervise; and offers practical, accessible guidance for new supervisors.

A popular but not well understood aspect of clinical legal education is the power of reflection. This issue is explored in great depth by Anna Copeland in Chapter 7. Anna asks rhetorically whether reflection is as important to clinicians and their students as water is to human survival. Clinical legal education cannot do without it. Good reflection by a student means that their mistakes are less likely to be repeated and, in grasping that simple insight, students learn how to learn indefinitely. Optimal clinical legal education involves a circular sequence of experience, reflection, theory, practice, and then further reflection. The best reflective practice exposes students sensitively but sharply to the essentially positivist nature of much law teaching and, in that moment, encourages them to get involved in serious law reform and community development. Students are enabled through reflection to continue to learn from their own experience, long after they have left their clinic. The chapter leads into a wider discussion about clinical assessment in Chapter 8, by raising questions about how reflection can be taught and assessed. For example, should clinical legal education even attempt to assess a student's capacity for reflection, or should the essentially intimate nature of reflection justify its remaining private and unexplored?

The assessment of students' clinical performance is next on our list of 'must discuss' clinical legal education issues. Assessment is often an afterthought in a new clinical legal education program, but not in this book. In Chapter 8, Adrian Evans highlights why assessment is critical to achieving course aims and objectives and can lead to student dissatisfaction if not thought through carefully. For example, if a law school operates a criminal defence or Innocence clinic (the latter aims to achieve post-conviction pardons in the light of new evidence), how will clinic performance be measured if there are few acquittals or releases of clients from custody? Assessment must be thought through so that its components are significantly wider than the success of client representation. It can occur in different forms, with some programs preferring to grade only on a pass/fail basis, while others prefer the full range from fail through to distinction.

Chapter 9 is also authored by Adrian Evans and discusses adequate staffing and infrastructure levels in Australian clinics, depending on the type of clinic and its learning objectives. Under-resourced (that is, underfunded) clinics face major challenges, so that finding ways to involve a range of external partners has potential to promote the contributions clinics can make. Chapter 9 also recognises that even the well-structured clinic will decline if people with inadequate skills are appointed to run it. We pay specific attention to clinical directors, administrators and 'coal-face' clinicians, and provide a table that lists minimum resources needed in different clinic structures.

In Chapter 10, Peter Joy provides international comparisons, along with a very helpful analysis, of the approaches taken to strengthening live client clinical legal education by each of the United Kingdom, the United States of America and Australia. The analysis highlights what is distinctive about Australia's approach (for example, the dual emphasis on both education and service), and helps clinicians reflect on what is generic to all good programs and what ought to be improved in Australian clinical legal education (for example, the academic status of clinicians). The chapter concludes with a cross-referenced table, offering a valuable overview of the general focus of each country's set of best clinical practices.

In our concluding Chapter 11, Mary Anne Noone discusses the links between some recent developments in Australian clinical legal education and emerging trends in legal education, legal practice and the delivery of legal aid services. Mary Anne's focus is the changing legal educational

landscape since the 2010–11 collection of data for the *Best Practices* report. Since then, the rise of the JD degree coupled with federal regulatory developments has improved the climate for greater penetration of clinical methods into Australian law schools. And clinicians themselves are strengthening and deepening their commitment, though never in smooth waters. The resilience of clinical teachers in adapting to course restrictions caused by reductions in community legal aid funding, is a case in point. Yet the innovative spirit of these teachers remains constant, particularly in their creation of cross-jurisdictional and multidisciplinary clinics and in their participation in global justice movements of various dimensions. It is for good reason that Australian clinicians are now well-regarded contributors to a number of emerging Southeast Asian clinical programs.

Conclusion

Australian clinical legal education remains a rapidly evolving phenomenon. Our prior efforts to underpin this growth and depth with an empirically based report and analysis of current practices were a necessary precursor to this book. Here we set out our understanding of the thematic history of clinical legal education in this country—and of its transformative potential for legal education—in the light of that research and of our subsequent experiences and reflection.