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Selling intra-curricular clinical legal education

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A well-run student law clinic can bring benefits to its local community and to the students who participate in the initiative. The many shapes and sizes of law clinics mean that the model adopted can have an impact on the mix of community benefit and student benefit that any particular project brings. One key potential difference between clinical programmes is whether an intra- or extra-curricular model is employed, with the question of whether one is preferable to the other being a difficult one to contend with when considered in the light of the (often equally valid) competing interests that exist. This article makes a case for the practical and tactical decision of introducing an academic, credit-bearing element to student clinical legal activity, drawing on a literature review of clinical legal education (“CLE”) sources, lessons from experiences of CLE and survey data from volunteers at the Aberdeen Law Project, the University of Aberdeen’s student founded and, until recently, extra-curricular organisation.

Student law clinics: why, what and how?

Why?

In any legal system where legal advice is not free to all at point of need, unmet legal need can be a problem.¹ Broad potential solutions to unmet legal need include “new money”,² “new forms of delivery”³ or “new providers”. *Pro bono* student law clinics fall under the “new providers” banner, but addressing unmet legal need is not all that law clinics do. As explained in more detail below, they can provide insights for students into how law interacts with society and, in pedagogical terms, channel students through learning-by-doing and reflection. They can improve core skills like letter-writing, interviewing and even taken-for-granted skills such as reading.⁴ Ethical lessons can be learnt

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¹ See generally Hazel Genn and Alan Paterson, *Paths to Justice: Scotland* (Hart Publishing 2001) and more recently Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* The Hamlyn Lectures, 62nd Series (Cambridge University Press 2011).

² See Paterson (n 1) chapter 3.

³ Perhaps through increased usage of technology to mass-produce legal services (see especially Richard Susskind, *The End of Lawyers?: Rethinking the nature of legal services* (OUP: 2010)) or through innovations like telephone advice lines or websites.

⁴ See J P Ogilvy and Karen Czapsky, “Clinical Legal Education: An Annotated Bibliography” (2004-2005) 11 (Special Issue No. 2 – Fall 2005) *Clinical Law Review* 1, available online at <http://faculty.cua.edu/ogilvy/Biblio05clr.htm> (accessed 16 June 2014), where the “Lawyering Skills” section of that bibliography includes headings for interviewing, counselling, trial advocacy, mediation, negotiation, problem solving and collaboration among professionals. See also the titles of chapters 5 to 11 of Kevin Kerrigan and Victoria Murray, *A student guide to clinical legal education and pro bono* (Palgrave Macmillan 2011). Specific examples for writing (Tonya Kowalski, “Toward a Pedagogy of Teaching Legal Writing in Law School Clinics” (2010-2011) 17 *Clinical Law Review* 285 and Andrea McArdle, “Teaching Writing in Clinical

from student *pro bono* activity,⁵ plus there is also a case to be made that such involvement bring benefits to society where there is a need to publicise any problems with the law and campaign for change.⁶ With such varied functions, it is no wonder a surfeit of literature is available to analyse the many different nuances of clinical legal education.⁷

What?

In succinct terms, a law clinic is a place where clients⁸ who fall in the gap between those ineligible for legal aid and those able to afford a lawyer are offered advice and/or representation by students *pro bono publico* (normally shortened to *pro bono*) – for the good of the public. A number of models for student *pro bono* activity exist, ranging from in court support,⁹ drop-in centres,¹⁰ internship schemes,¹¹ appointment-only consultations where no advice is given with advice and/or representation being provided thereafter,¹² “Street Law” community legal education projects,¹³ or a mixture of these options. Another potential point of variation is that the student activity may be either intra- or extra-curricular, while in some cases student involvement may be compelled rather than voluntary. Whatever the form of initiative, it is clear that without such activity people could have their rights overlooked or be forced into representing themselves in court.¹⁴

How?

So that is the concept, but how does it educate? This paper proceeds on the basis that clinical legal education (“CLE”) is “learning through participation in real and realistic interactions coupled with

Lawyering and Legal Writing Courses: Negotiating Professional and Personal Voice” (2005-2006) 12 Clinical Law Review 501) and reading (Jay A Mitchell, “Reading (In The Clinic) is Fundamental” (2012-2013) 19 Clinical Law Review 297) can also be considered.

⁵ Stephen Wizner, “Can Law Schools Teach Law Students to do Good? Legal Education and the Future of Legal Services for the Poor” (2000) 3 New York City Law Review 259, 262.

⁶ Larry R Spain “The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students” (2003) 72:2 UMKC Law Review 477.

⁷ Ogilvy and Czapansky (n 4).

⁸ The term “client” is generally used, notwithstanding a lack of monetary relationship. It is worth noting clinics with a “live-client” element have been credited as being part of the “process of recovering real clients from the netherworld to which they have been banished” in legal education: Anne Shelleck, “Constructions of the Client Within Legal Education” (1993) 45 Stanford Law Review 1731, 1739. See also Ann Juergens, “Teach Your Students Well: Valuing Clients in the Law School Clinic” (1993) 2 Cornell Journal of Law and Public Policy 339.

⁹ See the University of Exeter model: see

<http://socialsciences.exeter.ac.uk/law/probono/communitylegalhelpdesk/> (accessed 16 June 2014).

¹⁰ Such as the LSBU Legal Advice Clinic: <http://www.lsbu.ac.uk/faculties-and-departments/arts-and-human-sciences/law/law-clinic/> (accessed 16 June 2014).

¹¹ This is the model at the University of Derby: see

<http://www.studentprobono.net/public/detailsSchool.php?schoolid=53579407> (accessed 16 June 2014).

¹² The universities of Strathclyde (<http://www.lawclinic.org.uk/>), Dundee

(<http://www.dundee.ac.uk/law/clinic/>) and Edinburgh (<http://www.freelegaladvice.ed.ac.uk/>) are closest to this model (all accessed 16 June 2014).

¹³ See <http://www.streetlaw.org> (accessed 16 June 2014). Street Law is the registered trade mark of Street Law, Inc.

¹⁴ Parties litigant, or litigants in person, play an increasing role in UK justice. In England, the Bar Council has published a 74-page booklet called “A Guide to Representing Yourself in Court” at http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf (accessed 16 June 2014). The conduct of proceedings by parties litigant has attracted (somewhat political) judicial comment: see the opening words of Sir Alan Ward in *Wright v Michael Wright Supplies Ltd and Turner Wright Investments Ltd* [2013] EWCA Civ 234.

reflection on this activity.”¹⁵ This should not necessarily be confused with student *pro bono* activity in its own right. Raw experience is not the same as education.¹⁶ The opening paragraph of this paper set out a number of pedagogical and other benefits to CLE, but these are not automatic accruals.

Where there is an intra-curricular element to clinical activity, that can be an adjunct to or in preparation for *pro bono* work. The latter is catered for through role play or simulation. It is generally argued that live-client work provides the optimum means of student learning,¹⁷ so whilst it is acknowledged there may be a place for simulation within CLE that is not the focus of this paper.¹⁸ Rather, the focus is on the benefits and practicality of introducing a course bearing academic credit tied to live-client *pro bono* activity. That raises a number of challenges, not least in terms student support.

Student support

There is a certain ambiguity in the phrase “student support”. One meaning relates to the supervision, advice and an academic framework that need to go with any properly designed course, without which students might be left to flounder. A second relates to students being in favour of the academic programme. Both have a contribution to make towards the vitality of a clinic.

¹⁵ This being definition of clinical legal education provided in the first chapter of Kerrigan and Murray (n 4). Cf the definition provided by Sylvester in an (unreferenced) quote of Andy Boon, that defines clinical legal education as “a curriculum-based learning experience, requiring students in role, interacting with others in role, to take responsibility for the resolution of a potentially dynamic problem”: Cath Sylvester, “Bridging the gap? The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK” (2003) 3 International Journal of Clinical Legal Education 29, 39. Tarr suggests a more radical (non) definition: “Clinical education is not simply a pedagogical method, it is a philosophy about the role of lawyers in our society.” Nina W Tarr, “Current Issues in Clinical Legal Education” (1993) 37 Howard Law Journal 31, 33. See also Andrew Boone, Michael Jeeves and Julie Macfarlane, “Clinical anatomy: Towards a working definition of clinical legal education” (1987) 21:1 The Law Teacher 61.

¹⁶ Kerrigan and Murray (n 4) note that clinical legal *experience* is not the same as clinical legal *education*. See also Sylvester (n 15) 39 and Roy Stuckey, “Can we Assess What We Purport to Teach In Clinical Law Courses?” (2006) 6 International Journal of Clinical Legal Education 9 at 14. Stuckey considers the distinction between learning (that can happen without teachers) and education (a designed, managed and guided experience).

¹⁷ To quote Conard, “[a]t best, simulated litigation offers verisimilitude rather than verity”: A F Conard, “Letter from the Law Clinic” (1974) 26 Journal of Legal Education 194, 197. Similarly, Tarr (n 15) notes “[s]imulations have limited value and do not begin to teach a fraction of what is taught in a live client clinic”, at 36. See also Samuel R Gross, “Clinical Realism: Simulated Hearings Based on Actual Events in Students’ Lives” (1990) 40 Journal of Legal Education 321, Michael A Millemann and Steven D Schwinn, “Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year” (2005-2006) 12 Clinical Law Review 441 (particularly the discussion at 448) and Donald Nicolson, “‘Education, education, education’: Legal, moral and clinical” (2008) 42:2 The Law Teacher 145, 165.

¹⁸ Consider: Angela McCaffrey, “Transforming Minnesota Nice Law Students into Vigorous, Yet Respectful advocates: The Value of Simulations in Preparing Clinical Law Students for Ethical and Effective Client Representation” (2004) 7 T.M. Cooley J. Prac. & Clinical L. 91, 93; Ann Juergens and Angela McCaffrey, “Roleplays as Rehearsals for ‘Doing the Right Thing:’ – Adding Practice in Professional Values to Moldovan and United States Legal Education” (2008) 28 Washington University Journal of Law and Policy 141; and Helen H Kang “Use of Role Play and Interview Modes in Law Clinic Case Rounds to Teach Essential Legal Skills and to Maximize Meaningful Participation” (2012) 19(1) Clinical Law Review 207. Writing about the UK experience of the 1980s Weaver noted that the lack of opportunity to engage with the “real thing” (as compared to the USA) meant that simulations can have a place, “sometimes as an end in themselves”: Max Weaver, “Clinical legal education – competing perspectives” (1983) 17:1 The Law Teacher 1 at 7.

Assuming the activity is voluntary, students may have volunteered for a number of reasons. To complement the aforementioned dual role of *pro bono* activity (providing public benefit and student insight), two broad student goals can be identified:

- a desire to help those in need (social justice); and
- an opportunity to develop (self-improvement).

Honing a rough diamond may be a happy by-product of a desire to help people in need, but equally students might reverse those two outcomes and would treat helping others as the happy by-product of their being honed.¹⁹ There may be a dichotomy between personal development and social justice worth grappling with,²⁰ not to mention the interests of the client in the proper selection, allocation and supervision of a case,²¹ but the focus of this paper is on making the case for intra-curricular clinical legal education. When making a comparison with a volunteer centric activity, that case is far from automatic,²² with a (non-exhaustive) selection of potential problems including:

- Attracting non-, or at least less, altruistic students.
- Skewing attention away from certain types of client disputes that either do not:
 - have any educational benefit; or
 - lend themselves to assessment.
- Distorting a student volunteer's performance, by rendering a student more concerned with an academic mark rather than a client's outcome (perhaps leading to concealment of an error from an assessing supervisor, to the ultimate detriment of a client).
- Introducing a barrier between students and supervising staff or practitioners, whereby students may feel asking for help is a sign of weakness.
- Undermining the volunteer ethos that ensures that a clinic can operate on a shoestring budget.
- Where a volunteer clinic is already in existence, interfering with established administrative processes without warrant.

¹⁹ In fact, a survey undertaken in connection with this work (and discussed below) suggested the most popular reason to get involved with *pro bono* work was experience, followed by social justice and skills development. See e.g. the blog of Alison Gurden, England's "Pro Bono Lawyer of the Year" for 2012, on the benefits for students and future employers, "Pro Bono Work – it doesn't just benefit the client", 3 December 2012 <http://alisongurden.wordpress.com/2012/12/03/pro-bono-work-it-doesnt-just-benefit-the-client/> (accessed 16 June 2014).

²⁰ This point has been addressed by Nicolson. His scepticism stems from the inherent paradox of trying to meet social justice goals when in fact doing anything that elevates student needs above client needs: see Nicolson (n 17) and Donald Nicolson "Legal Education or Community Service? The Extra-Curricular student Law Clinic" [2006] 3 Web Journal of Current Legal Issues at <http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html> (accessed 16 June 2014). Compare this view with that of Andy Boon, namely "in conflicts between student's educational needs and client needs, the former must triumph." "Making good lawyers: challenges to vocational legal education" Opening address at the UKCLE Vocational Teachers Forum, 26 September 2001, available at <http://www.ukcle.ac.uk/resources/employer-engagement/boon/> (accessed 16 June 2014). Notwithstanding the debate, Sylvester notes that to date UK law clinics have not necessarily been "demand led", meaning that there has not been such a British drive for free legal advice, which has allowed more of a focus on education to develop: Sylvester (n 22) 35.

²¹ See Juergens (n 8) at 349-365. Weaver (n 18) 4.

²² Some of the general balancing problems are identified in Kevin Kerrigan and Philip Plowden "Who benefits? — Case management and clinical education", (1996) 30:3 The Law Teacher 315.

A number of these problems are alluded to in literature, such as Schrag's acknowledgement that student concealment of errors might be an issue.²³ Some problems were gleaned from the writer's *pro bono* experience, namely as a student adviser at the then extra-curricular model at the University of Strathclyde, as a supervising solicitor at the Free Legal Advice Centre at the University of Edinburgh and now as the faculty director at the Aberdeen Law Project based at the University of Aberdeen. Granted, those concerns may have been hypothetical, as they were not actually wrestled with in those extra-curricular formats, but those concerns were identified in discussions with students and staff. Many of the concerns were repeated in a survey of Aberdeen Law Project volunteers who were asked for their views about a transition from extra-curricular to intra-curricular CLE, explained further below.

Having identified those potential hindrances to intra-curricular CLE, is opting for intra-curricular CLE, or making an extra-curricular *pro bono* activity intra-curricular, worth the bother? This paper will look at CLE and pedagogical literature to argue it is, before looking at some of the more practical issues students and staff may need to consider.

The case for intra-curricular CLE

Chermerinsky goes so far as to note "[t]here is no better way to prepare students to be lawyers than for them to participate in clinical education".²⁴ Whilst this is towards the more proselytising end of the literature, there is not much dissent to the claim that CLE is effective.²⁵ CLE is grounded in andragogical theory.²⁶ It is also an example of situated learning,²⁷ that is to say students can instantly apply learning rather than acquire knowledge in an abstract setting to be applied later, which may hammer home lessons more quickly. Looking beyond CLE, any means of providing academic credit at undergraduate level for skills that have been traditionally relegated to "marginal additions",²⁸ such as drafting or advocacy, might be seen as an opportunity to revitalise the traditionally staid undergraduate law degree with its focus on legal rules above all else.²⁹

In most UK law schools, the model of lectures to large groups of undergraduates with a top-up of several small-group tutorials remains prevalent.³⁰ There is no denying the blunt effectiveness of

²³ Philip G Schrag, "Constructing a Clinic" (1996-1997) 3 *Clinical Law Review* 175 at 202. The other problems he identifies are all about grading, such as the absurdity of grading someone when they might be undertaking a task for the first time, a lack of consensus on variables on which grades should be based, how difficult to compare students to each other "because different cases demand very different kinds of work" and the difficulty of grading individually when students often work in pairs or in teams, with differing efforts (at 201-202).

²⁴ Erwin Chemerinsky, "Why Not Clinical Education" (2009-2010) 16 *Clinical Law Review* 35, 35.

²⁵ But consider Robert J Condlin, "'Tastes Great, Less Filling': The Law School Clinic and Political Critique" (1986) 36 *Journal of Legal Education* 45. In answer to that critique, see Kenney Hegland "Condlin's Critique of Conventional Clinics: The Case of the Missing Case" (1986) 36 *Journal of Legal Education* 427.

²⁶ Frank S Bloch, "The Andragogical Basis of Clinical Legal Education" (1982) 35 *Vanderbilt Law Review* 321.

²⁷ Jean Lave and Etienne Wenger, *Situated learning : legitimate peripheral participation* (Cambridge University Press 1991).

²⁸ Donald Schön, *Educating the Reflective Practitioner* (Jossey-Bass 1987) at 11-12. See also Jeff Giddings, *Promoting Justice Through Clinical Legal Education* (Melbourne, Justice Press, 2013) at 32.

²⁹ Mary-Rose Russell, "Reflections on learning: students' insights on their learning in a legal research skills course in the core curriculum" (2011) 45(1) *The Law Teacher* 45.

³⁰ See generally Tracey Varnava and Julian Webb, "Key aspects of teaching and learning: Enhancing learning in legal education" in Heather Fry, Steve Ketteridge & Stephanie Marshall (eds), *A Handbook for Teaching and Learning in Higher Education* (3rd edn, Routledge 2009) 363.

lectures,³¹ but there are legitimate critiques, with some going so far as to suggest traditional methods might even be actively harming some students in their development.³² Anything that might remove “the rich complexity of actual situations that involve full dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions,”³³ might be retrograde rather than progressive. It also pays little attention to the different learning styles that exist, whether Kolb’s convergers, divergers, assimilators and accommodators³⁴ or Honey and Mumford’s activists, reflectors, theorists and pragmatists.³⁵ Assuming, of course, that you accept the notion of learning styles (on which Coffield *et al* have noted there is “no definitive answer” to the question of whether or not style of teaching should be consonant with style of learning),³⁶ anything that provides an alternative means of interaction gives a chance to improve engagement across a range of students. Further methods for student learning are available, either via a live case or engaging students as teachers through some kind of “Street Law” programme, whereby students engage in community legal education projects to improve access to justice in the broadest sense of that term. That process of redeploying students as teachers moves students to a higher level of information retention in the learning pyramid.³⁷

The place of reflection in pedagogy goes without saying.³⁸ Given its well documented and recognised benefits,³⁹ reflection can be brought to the fore and woven into the acts of representing a client,

³¹ Morton notes that lectures remain “an efficient means of delivery” and there seems to be no wider move to remove lectures from wider higher education. Ann Morton “Lecturing to Large Groups” in Fry, Ketteridge & Marshall (eds) (n 30) 58.

³² Maureen F. Fitzgerald, “Rite of passage: The impact of teaching methods on first year law students”, (2008) 42(1) *The Law Teacher* 60. Consider also Chemerinsky, who puts it bluntly, “Skills rarely can be learned solely in a classroom setting.” Chemerinsky (n 24) 38.

³³ See Sullivan *et al*, *Educating Lawyers: Preparation for the Profession of Law* The Carnegie Foundation for the Advancement of Teaching (Jossey Bass: 2007), Summary of the Findings and Recommendations at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf at 6 (accessed 16 June 2014).

³⁴ See David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall 1984) ch 4.

³⁵ See further the resources behind a pay-wall, but with “quick peak” features available, at http://www.peterhoney.com/eshop_products.aspx?c=14 (accessed 16 June 2014).

³⁶ Frank Coffield, David Moseley, Elaine Hall and Kathryn Ecclestone, *Should we be using learning styles? What research has to say to practice* (Learning and Skills Research Centre 2004) 58. In their study, they found only one out of thirteen learning styles (that of Allison & Hayes) met their parameters of internal consistency, test–retest reliability, construct validity and predictive validity. It should be noted that even Kolb was of the mindset that learning styles are not sacrosanct. “Learning styles are conceived not as fixed personality traits but as possibility-processing structures resulting from unique individual programming of the basic but flexible structure of human learning.” Kolb (n 34) 95.

³⁷ On the learning pyramid, see Stephen Abram, “The Learning Pyramid” at <http://stephenslighthouse.com/2010/02/26/the-learning-pyramid/> (accessed 16 June 2014).

³⁸ See e.g. Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983), Schön (n 28) and Jennifer A Moon, *A Handbook of Reflective and Experiential Learning: Theory and Practice* (RoutledgeFalmer 2004).

³⁹ If it was needed, a whole chapter in Kerrigan and Murray (n 4) confirms the central place of reflection, as does the corresponding book review: Nigel Duncan, “Kevin Kerrigan and Victoria Murray, *A Student Guide to Clinical Legal Education and Pro Bono*”, (2011) 45(3) *The Law Teacher* 379 at 380. See also: C Sparrow, “Reflective student practitioner: an example integrating clinical experience into the curriculum” (2009) 14 *International Journal for Clinical Legal Education* 70; Ross Hyams, “Assessing Insight: Grading Reflective Journals in Clinical Legal Education” (2010) 17 *James Cook U. L. Review* 25; Kelley J. Burton and Judith McNamara, “Assessing reflection skills in law using criterion-referenced assessment” (2009) 19(1-2) *Legal Education Review* 171; Nicolson (n 17) at 170; and Sylvester (n 22) at 36, where she in turn refers to Kolb’s

maintaining a file and building up expertise by presenting students with formal opportunities to do so as part of a clinically themed course.⁴⁰ Any students suffering from reflection-scepticism⁴¹ can be faced down with a learned article on (amongst other things) the importance of reflection written from a student's perspective.⁴²

A change of direction away from the prevailing didactic teaching method might move students away from more traditional methods of learning about substantive law subjects in the process. In UK legal education, learning practical skills and reflection is perhaps subordinated by another perceived dichotomy, between law as an art and law as a practical thing,⁴³ but given that can be classified as a false dichotomy arguably any challenge to that mindset is to be welcomed.⁴⁴ Granted, an already busy curriculum and issues of staff to student ratios may need to be considered, but there is a case to be made against the tendency to keep such skills and reflection as the exclusive preserve of the vocational post-graduate stage before becoming a solicitor in the UK.⁴⁵

This is all well and good, but could these benefits be obtained without formal teaching and learning? To put it another way, if the activities are so effective at educating, "what, if anything, can a clinical teacher add to that experience?"⁴⁶ There are some key arguments in favour of formalising a clinic within a curriculum. The simplest is to reward students for their efforts.⁴⁷ "Reward" is not necessarily to be confused with "incentivise", but the latter (implying greater care and a better product for the client) could be an argument for a credit bearing course. A formal structure may also engender professionalism and direct investment of time.⁴⁸ Tarr considers extra-curricular clinics can be somewhat marginalised, which "affects students' perceptions of the program's significance." She goes on to note, while citing the example of Harvard Law School, that "[a]t some schools, the programs are so far removed from the curriculum that the clinic is little more than extracurricular volunteer work".⁴⁹ A related theme raised by Dr Prince at a recent Higher Education Academy event

Cycle. Kolb elevates reflection by learners to an imperative part of his cycle, in that they "must be able to reflect on and observe their experiences from many perspectives" (my emphasis) in the reflective observation stage. See Kolb (n 34).

⁴⁰ Although this might bring challenges for the teaching staff. See Justine A Dunlap and Peter A Joy, "Reflection-In-Action: Designing New Clinical Training by Using Lessons Learned from New Clinicians" (2004-2005) 11 *Clinical Law Review* 49.

⁴¹ A phrase the writer has used previously: Malcolm M Combe, "Reflective learning explained", *Journal of the Law Society of Scotland* (2012) 57(8) 4, at <http://www.journalonline.co.uk/Magazine/57-8/1011501.aspx> (accessed 16 June 2014).

⁴² Jeffrey Ward, "One Student's Thoughts on Law School Clinics" (2009-2010) 16 *Clinical Law Review* 489, 495-496.

⁴³ As an example of the uncomfortable split, see Liz Ryan Cole, "Training the Mentor: Improving the ability of legal experts to teach students and new lawyers" (1989) 19 *New Mexico Law Review* 164, 164.

⁴⁴ Consider Hepple who rejects the false dichotomy in the strongest terms: Bob Hepple, "The Renewal of the Liberal Law Degree" (1996) 55(3) *Cambridge Law Journal* 470 at 486-487.

⁴⁵ Consider the work of Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (2nd edn, Cambridge University Press 2005).

⁴⁶ Stacy Caplow, "From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic" (1996) 75 *Nebraska Law Review* 872 at 876. Whilst a student clerkship (where students interned at local, state and federal courts) is "nothing like the typical live-client clinic" (at 875), there are some analogies to be drawn, not least the ceding of control of the educational institution to something else.

⁴⁷ Kerrigan and Murray (n 4) acknowledge that "many students want their hard work, commitment and high level of performance to be appropriately recognised by credit on their programme of study", at 12.

⁴⁸ Kerrigan and Murray (n 4) 250.

⁴⁹ Tarr (n 15) 40.

is that the students she supervises at Exeter's court-based law clinic seem to learn more when they know they are learning.⁵⁰ Related research from the field of occupational health and safety suggests that "unintentional learning" in the workplace, that is to say learning that is not the result of conscious decisions and lacking in proper reflection afterwards, could have negative consequences for the learner.⁵¹ Taking Kerrigan and Murray's analysis of CLE as providing overt learning, with an opportunity to reflect, compared to unstructured *pro bono*, which is more covert learning, the educational benefits of a structured programme are apparent.

Returning to the benefits of structure, Caplow advocates an element of "self-directed learning" that is "described and processed in journals, which is then enhanced and directed to other practical experiences through discussion", which shows a working and workable model for intra-curricular *pro bono* work.⁵² The point can also be made from an ethical perspective, with one article featuring the heading "Notions of access to justice and advocacy for the poor must be integrated into the law school curriculum as a whole and not left to a single poverty law course or a single clinical experience"⁵³ before beginning a five page discussion on the benefits of a clinical experience properly blended into the curriculum. That case is made whilst acknowledging there may be some (justifiable) sacrifices in terms of time and integration issues, the benefits being a greater understanding of concepts like access to justice and equality of arms in litigation when that is placed at the same level as other things in the curriculum.⁵⁴

Another important argument for a formal, curriculum oriented structure is that the staying power, or what Giddings describes as "sustainability", of a clinic programme can be improved when it is an "integral part of the legal education project."⁵⁵ Giddings identifies a number of "key strategic variables", including "the size and comprehensiveness of the proposed clinic initiative, the level of integration with other aspects of the law schools activities and the extent of the planning done before the first offering".⁵⁶ None of those key variables will protect a law clinic whose parent university decides to disinvest in legal education, as was the case at the University of the West of Scotland, but absent that most extreme of scenarios even a primarily educational clinic should be protected from the excesses of any curriculum reform exercises, particularly where a law school and university has shared in an ethos committed to a sustainable clinical programme.

Student perceptions

Without students, there are no student law clinics.⁵⁷ As such, it is crucial students are fully briefed and engaged with the intra-curricular element of clinical activity. In order to gauge student perceptions about a credit-bearing course, a series of questions were put to volunteers at the

⁵⁰ Details of the conference, together with Dr Prince's slides, are available on the HEAcademy website: Jenni Carr, "Clinical legal education – form and funding" 22 February 2013 <http://blogs.heacademy.ac.uk/social-sciences/2013/02/22/clinical-legal-education-form-and-funding/> (accessed 16 June 2014).

⁵¹ R Bruce Dodge, "Unintentional learning and the occupational health and safety experience" *Education & Training* (1998) 40 (2) 109.

⁵² Caplow (n 46) 890. Her 14-week syllabus is explained at 891-908.

⁵³ Ward (n 42) 495

⁵⁴ *Ibid.* 512.

⁵⁵ Giddings (n 28) 28 and the general coverage at chapter 4.

⁵⁶ Giddings (n 28) 143

⁵⁷ On student commitment generally, see Giddings (n 28) 147-148.

Aberdeen Law Project, a *pro bono* activity that has been extra-curricular since its founding in 2010, prior to the introduction of such an academic element.⁵⁸

Information was gathered via a non-compulsory electronic survey. A series of questions was sent to each student volunteer. When a range of opinions was being assessed, a five-point Likert scale was deployed to capture that range. Students were also given the opportunity to elaborate on their choices by way of written responses to the questions asked.

The forty respondents to that survey provided data that may sound familiar to CLE practitioners. For example, one recurring theme of the qualitative responses was a fear people would get involved with a clinical programmes for academic merit rather than for reasons of social justice. This is interesting, as one specific question in the survey asked the students to organise six reasons for joining the Aberdeen Law Project in order of priority. The highest ranking reason for joining was for experience, followed by social justice and skills development,⁵⁹ so by their own responses those same students indicated social justice was not the primary factor in their joining the volunteer activity.⁶⁰ This can be compared to the observation of Tarr, who surmised the most common reasons to participate are “to see if they will like being a lawyer, the hope of gaining practical experience, and a commitment to the social causes that the clinic represents.”⁶¹ Another (hypothetical) question asked students to consider whether having an academic course tied to clinical legal activity would have affected their decision to get involved with *pro bono publico* activity, with responses indicating they would have been slightly more likely to have participated.⁶²

Those results might indicate a potential to get involved with law clinics for non-social justice reasons, but is that a problem? One view is that it is not, as it is difficult to imagine involvement in a forum where ethics and morality are so important could have a deleterious effect on a student’s moral development.⁶³ In fact, on that basis it could even be *more* important for law schools to get such students involved, as it would expose them to social justice issues which they would be otherwise

⁵⁸ See Ryan T Whelan, “Casus Omissus – The Aberdeen Law Project” (2010) 1 Aberdeen Student Law Review 137 and www.abdnlawproject.com (accessed 16 June 2014).

⁵⁹ The average rankings were 5.4, 4.575 and 4.40 respectively (where the notional maximum was 6, if all forty respondents had ranked the same factor as most important). Twenty-two of the forty respondents ranked experience as the most important factor. The other three options (with corresponding average rankings in brackets) were “contribution to graduate profile” (3.075), “social life” (2.2) and “contribution to [co-curricular] student accreditation” (1.35).

⁶⁰ This can be compared to the survey undertaken by Professor Nicolson at the University of Strathclyde. In his survey of law students seeking entry to their law clinic, the altruistic “to help others” came third in the poll behind: 1) “to gain useful skills;” and 2) “to put theoretical knowledge into practice”. The same survey question was put to those who were successful in gaining entry to the law clinic after a “rigorous” selection process, which rebalanced the results to put the altruistic “to help others” first in the poll. Donald Nicolson, “Calling, Character and Clinical Legal Education: Inculcating a Love for Justice from Cradle to Grave” Legal Ethics (2013) 16(1) 36.

⁶¹ Tarr (n 15) 40. See also Julie Macfarlane, “The clinical legal education evaluation project: Analysing the lessons of research” (1990) 24:4 The Law Teacher, 65 at 71-72.

⁶² The five-point Likert scale (with the number of student responses corresponding to that option in brackets) was: “significantly more likely” (6); “more likely” (14); “no difference” (14); “less likely” (5); and “significantly less likely” (3).

⁶³ Nicolson (n 17).

oblivious to⁶⁴ (although that observation is subject to the very important caveat that the ethos within a clinical programme must be conducive to doing that, a point discussed below).

The question that drew the most emphatic response was whether a credit bearing course should be elective or mandatory for those who have volunteered to be involved with a *pro bono* activity, with 95% against. That response should not be treated as an answer to the separate (but important) question about compulsory *pro bono* hours for all students, as in certain American and South African universities.⁶⁵ Rather, it might be characterised as students placing a (welcome) degree of importance to the ethos of the clinic, which could be undermined when every volunteer has to then contend with an enforced academic programme. On that basis, Nicolson has been careful to gear his new Clinical LLB so as to avoid the undermining of the central, social justice ethos.⁶⁶ From that, it will also be apparent that the introduction of intra-curricular CLE need not (and arguably should not) be to the exclusion of extra-curricular *pro bono*. If students wish to be volunteers, that can continue, with or without existing co-curricular recognition schemes like the STAR award at the University of Aberdeen.⁶⁷

The biggest challenge wrestled with by the survey was that of assessment. No-one should be under any illusions that students are great fans of assessment anyway, but it is clear that assessment is crucial in directing student learning.⁶⁸ The quantitative responses to the question “would you feel comfortable being assessed on law clinic work?” indicated sixteen students (or 40%) did not. (The fact that the majority were either perfectly happy or indifferent to the prospect of assessment might actually be more of a surprise and at least demonstrates the mature attitude of students to the survey.) Qualitative clarifications to survey responses identified a number of student concerns on the impact of assessment. These are listed below:

- Increased formality.
- Lack of equality between student volunteers taking the course and those not.
- A related change in dynamic, by introducing competitiveness between students (perhaps academic competitiveness, but also competition for allocation of cases or other tasks so as to allow a student to report on that in a related assessment).
- Interference with administrative or disciplinary matters.
- Denial of a spirit of independence from organised university activities, which may be especially relevant when budgets are tight.

⁶⁴ Consider Wizner (n 5) on the special role of a law school in introducing morality to all. See also Ward (n 42) 516.

⁶⁵ See eg Hamline University School of Law in Minnesota, which requires students to complete twenty-four hours of legal volunteer work in an academic year. Apparently this has gained a positive reception, with a significant minority of students voluntarily doubling the requirement last year: Minnesota Daily, “Law students, profs debate required pro bono work” 16 October 2012 at <http://www.mndaily.com/2012/10/16/law-students-profs-debate-required-pro-bono-work> (accessed 16 June 2014). See also Spain, who inclines towards an element of compulsion, citing the example of the University of New Mexico: Larry R. Spain, “The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students” (2003) 72:2 UMKC Law Review 477, 486. The issue of mandatory pro bono is not restricted to university students: on the recent move of the New York Bar towards mandatory pro bono work, see Benjamin P Cooper, “Mandatory Pro Bono Redux: Guest Correspondent’s Report from the United States” Legal Ethics (2012), 15(1): 135.

⁶⁶ Nicolson (n 60).

⁶⁷ <http://www.abdn.ac.uk/careers/co-curriculum/staraward/> (accessed 16 June 2014).

⁶⁸ Graham Gibbs and Claire Simpson, “Conditions Under Which Assessment Supports Students’ Learning” (2004) 1 Learning and Teaching in Higher Education 3.

- A moral issue of profiting (academically) from a real-life problem.
- Subjectivity of marking and the related point of consistency of assessment.
- Inappropriateness of assessing students on tasks which they may be undertaking for the first time or without formal training.

The thorny issue of assessment is certainly not a new one for clinical legal education scholars.⁶⁹ In a challenging article on assessment in clinical law courses, Stuckey pondered whether clinicians are actually qualified to validly assess that which they purport to teach. As acknowledged by Stuckey, that article “raises more questions than it answers”.⁷⁰ In that tradition, this article will do likewise, but some thoughts are offered which might be factored into decisions about assessment. As for the specific concerns of students, it might be noted that one in particular falls into the proverbial double-edged sword category. Increased formality and the chance to engender professionalism have been lauded above, but some (although certainly not all) students actually thought this might be a problem.

Assessment can mean many things. Do you assess the *outcome* of a case (i.e. client wins in court or obtains a satisfactory settlement = good mark)? Or the *process* (i.e. client keeps a detailed file and responds promptly to communications)? Or do you assess something different but connected (i.e. a standalone question separate to law clinic activities, such as “law clinics are like food banks, they let governments off the hook - discuss”)? Owing to the arbitrariness of the client variable, the option of assessing the outcome is far more talked about than actually employed. The second two options can go some way to providing an opportunity for a fair academic mark that is not entirely based on the variable that is the client, and in turn moves towards an assessment model that does not incentivise concealment.⁷¹ The dangers of a crude assessment programme cutting off communication between students and supervisors/markers will also be mitigated.

Various assessment models are discussed in CLE literature.⁷² Outwith the world of CLE, work-based learning might prove to be a useful comparator.⁷³ Students can be asked to prove any claims of learning in a non-traditional university setting (i.e. a work environment or something akin to that, like a live-client clinic) by way of interview, portfolio, report or presentation. This would require students to “apply principles of learning, to identify where learning has occurred, and to demonstrate how it was achieved”, which would perhaps be preceded by an induction session then a presentation about students proposed learning outcomes.⁷⁴ There may also be scope to co-develop some kind of accreditation methodology with students rather than simply implementing an

⁶⁹ Giddings (n 28) 175.

⁷⁰ Stuckey (n 17) 28.

⁷¹ Schrag (n 23) 201-202.

⁷² Sparrow (n 39) 70-76. Laura Lundy, “The assessment of clinical legal education: An illustration”, (1995) 29.3 *The Law Teacher* 311, Caplow (n 46); Hyams (n 39); Burton and McNamara (n 39); Kerrigan and Murray (n 4) chapter 13.

⁷³ Stan Lester and Carol Costley, “Work-based learning at higher education level: value, practice and critique” (2010) 35(5) *Studies in Higher Education* 561.

⁷⁴ Pandy Brodie and Kate Irving, “Assessment in work-based learning: investigating a pedagogical approach to enhance student learning”, *Assessment & Evaluation in Higher Education* 32:1, 11 at 14

assessment methodology that is closely aligned with traditional reflective assessments, assuming institutional processes, time and attitudes allow for this.⁷⁵

Leaving that tantalising possibility to one side, what might be an optimum starting point for an assessment programme? The first answer to that question is that there is no such thing as a uniform optimum fit. With different structures, sizes and student/supervisor ratios from clinic to clinic, every CLE and assessment solution will have its own idiosyncrasies to contend with.⁷⁶ Some courses will start from a relatively blank canvas, perhaps allowing a well-designed, constructively aligned course to be developed in tandem with a new clinical programme.⁷⁷ Others may start as an adjunct to a smaller, informal programme. In fact, Giddings' research suggests sustainable clinical programmes often begin small and informal, but further development of such clinics "may be impeded by a lack of structure and insufficient recognition of the contribution clinics can make",⁷⁸ while Nicolson makes the related point that student responsibility for clinic management and direction (which is most likely when students have a central role from the genesis of a clinic) can contribute to students having a sense of "psychological ownership" and create an altruistic ethos for the clinic.⁷⁹ As such, perhaps the promised land of constructive alignment from the outset of a clinical programme is one that should in fact be approached with caution.

Standing all those considerations, a working initial model for assessment might involve a split between: 1) an assessment⁸⁰ on a theme not otherwise covered in the overall curriculum (perhaps access to justice); and 2) an evaluative/reflective element, commenting on the *process* rather than the *outcome* of a particular case. This is similar to the "hybrid" model initially adopted by Nicolson at Strathclyde and avoids any difficult case selection issues where client problems may be deemed not to have an educational benefit.⁸¹ In fact, such a model addresses or mitigates many of the concerns raised by the students in the survey, whilst benefiting from being grounded in CLE literature and certain comparisons with work-based learning programmes.

A model of this sort was introduced to the undergraduate curriculum at the University of Aberdeen in the academic year 2013/14, in the form of an optional third year course for students on the LLB programme. Although it is too early to draw bold conclusions about this initial Aberdonian dalliance with CLE, indications of student approval have been positive, so much so that students nominated

⁷⁵ See Margaret Harris, Colin Chisholm and Malcolm Allan, "Lifeplace learning for effective professional development in industry and business" (2010) 24(2) *Industry & Higher Education* 135 at 137, discussing the model at Glasgow Caledonian University.

⁷⁶ Giddings (n 28) 81-84.

⁷⁷ On constructive alignment, see John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the Student does* (3rd edn, SRHE/Open University Press 2007).

⁷⁸ Giddings (n 28) 158.

⁷⁹ Nicolson (n 61) and Donald Nicolson, "From South Africa to Scotland: the University of Cape Town Legal Aid Legacy" paper to Access to Justice Conference, University of Kwazulu-Natal, Durban, South Africa, 10-12 December 2012.

⁸⁰ The exact form of that assessment would be a matter for individual consideration, but there is an argument that it should not be an exam, given the apparent preference of arts and humanities students for forms of assessment other than exams: Joelle Adams and Nicole McNab, "Understanding arts and humanities students' experiences of assessment and feedback" (2013) 12 *Arts and Humanities in Higher Education* 36 at 45.

⁸¹ Nicolson (n 17) 170.

the course for a Teaching Award for Excellence. (The prize was ultimately awarded to another (non-law) discipline).⁸²

Whilst this model might not fit neatly within some definitions of CLE if the academic course is considered in complete isolation from the *pro bono* activities that students already undertook and continue to undertake,⁸³ it does form a starting point for future development and study, while also providing a potential model for introduction to an existing extra-curricular *pro bono* activity. Aberdeen has been fortunate enough to foster student approval for the introduction of a sympathetic teaching programme as a mutualistic adjunct to their existing *pro bono* initiative and to benefit from a positive reception to the intra-curricular element on its introduction. When combined with the arguments threaded through this paper, that goes some way towards illustrating the introduction of an academic course can contribute to student development without having any detrimental impact to existing social justice goals or the ethos of a clinical programme.

Conclusion

It has been noted that students who participate in the clinical experience find “it is the most meaningful experience they have in law school”.⁸⁴ To ensure that is in fact the case, clinicians have a key role to play as stewards of programmes that can inspire and educate students whilst making a difference to their community. The introduction of an intra-curricular model of CLE to that exercise will involve a consideration of situational factors and will be influenced by the model and scale of clinical programmes that exists at any given time. This means that practical experience of implementation and course delivery will bring its own insights to clinicians in a manner that this article, or any article, may not. Subject to that very important caveat, this paper should go some way to show that there are benefits to the introduction of a credit-bearing CLE course, whilst highlighting some considerations that need to be borne in mind in that process. Integrating a clinic experience within the curriculum might bring challenges, with care needed to ensure that such a programme does not clip the wings of volunteers who are actively trying to make a difference to their community, but those challenges do not mean it is not worth the effort.

⁸² There were nineteen nominations for the prize across the College of Arts and Social Sciences at the University of Aberdeen.

⁸³ Consider Boone, Jeeves and Macfarlane (n 15).

⁸⁴ Tarr (n 15) 41. See also Elaine Campbell, ““Do something for free?!”: Why engaging with pro bono legal work might be the best thing you ever do at law school” (The Student Lawyer, 16 April 2014) thestudentlawyer.com/2014/04/16/something-free-engaging-pro-bono-legal-work-might-best-thing-ever-law-school/ accessed 16 June 2014.