

## TEACHING TOWARDS A NEW PROFESSIONALISM: CHALLENGING LAW STUDENTS TO BECOME ETHICAL LAWYERS

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### Introduction

Moving beyond lip-service to ... the development and promotion of ethically aware legal education and training (a transformative model) in the face of longstanding resistance or complacency, is therefore a profound challenge... Law students must come to see legal practice as socially situated and hence as ethically complex.<sup>3</sup>

The challenge of how best to generate a “deep appreciation of ethical standards and professional responsibility” in law students is the subject of extensive discussion.<sup>4</sup> In Australia, this discussion is bound up in an ongoing debate about the role of the legal profession in the provision of legal services and the meaning of legal professionalism.<sup>5</sup> The importance of educating for ethical legal practice has been recognised in this debate and the challenge thrown up to law schools to address the perceived gap in the curriculum in innovative ways.<sup>6</sup>

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<sup>3</sup> A. Goldsmith, & G. Powles “Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia” in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford Hart Publishing 1998) p119.

<sup>4</sup> For a discussion of the various issues see Kim Economides,(ed), *Ethical Challenges to Legal Education and Conduct* (Oxford Hart Publishing 1998.)

<sup>5</sup> The debate has been fuelled by a series of government initiated inquiries and most recently by the organised profession. See eg, New South Wales Law Reform Commission, *First Report on the Legal Profession*, 1982; Law Reform Commission of Victoria, *Access to the Law: Restrictions on Legal Practice, Report No 47*, 1992; Senate Standing Committee on Legal And Constitutional Affairs, *Cost of Legal Services and Litigation* Discussion Papers No 1-7 and Final Reports 1 and 2.1991-1994; Trade Practices Commission, *Study of the Professions – Legal*, Final Report 1994; Access to Justice Advisory Committee, *Access to Justice - an Action Plan*, 1994, *Reforming the Legal Profession - Report of the Attorney General's Working Party on the Legal Profession* (Vic), August 1995; Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system* (“ALRC Report”) AGPS 2000; Law Council of Australia, *2010: A Discussion Paper: Challenges to the Legal Profession*

<sup>6</sup> See eg: *ALRC Report*, *ibid*, Chapter Two “Education, Training and Accountability”

In this article we describe how we are responding to this challenge. As academics and legal practitioners concerned about access to justice issues, we teach a course, which encourages students to see “legal practice as socially situated and hence as ethically complex”. We also accept that as teachers we are role models and we continue to reflect on and communicate to our students what we consider constitutes professional responsibility.

We begin by briefly outlining the nature of the Australian legal profession and the issues confronting it as conveyed by a long line of inquiries into the cost of accessing justice in Australia and the operation of the legal profession. A significant result of the repeated public questioning and criticism of the legal profession has been to highlight the tensions in lawyers’ roles and ethical duties and by implication, about their professional identity. We argue that these questions go to the heart of the meaning of professional responsibility.

The article then considers the place of legal education within the current debate and the nature of the educational challenge raised. We discuss the appropriateness of clinical legal education to enhancing students’ awareness of professional responsibility issues and describe the course we have developed. Finally we put forward our suggested attributes of a professionally responsible practitioner.

### **The Australian Legal Profession**

The Australian legal profession is regulated on a State and territory basis<sup>7</sup>. The present

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<sup>7</sup> The federation of Australia consists of seven states and territories.

structure of the Australian legal profession and legal education has its origins in the traditions and characteristics of the English legal profession. The State Supreme Courts exercise ultimate jurisdiction over admission to the profession and discipline of legal practitioners although the bulk of regulatory responsibilities rest with the various professional associations. Some states maintain the division between barristers and solicitors whilst others have a fused profession.<sup>8</sup>

The training of legal practitioners has three components: academic training at a university; subsequent practical training (either as articles or in an institutional setting); and continuing education.<sup>9</sup> As the number of law schools across Australia increased from 12 in the early 1980s to 30 in 2001, law student numbers have continued to expand. In May 1999 the total number of law students was 26,095 and the proportion of law students to practitioners was almost 72:100.<sup>10</sup> 56 % of these students were women.<sup>11</sup> Australia wide, the total number of legal practitioners at May 2000 was 36,348.<sup>12</sup>

The typical law firm has fewer than 4 persons employed (including principals) whilst the large firms (with employment of over 100) account for less than 1 per cent of all firms. These large firms generate 25% of industry turnover. Despite the fact that more than 50% of law graduates are women, only 12% of partners/principals were women. Although the dominant image of a lawyer is a person engaged in advocacy work before the court, only

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<sup>8</sup> I. Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* 3<sup>rd</sup> ed. (Butterworths Australia, 2000) at p. 75.

<sup>9</sup> Report of the Committee of the future of Tertiary Education in Australia (1964)(the "Martin Committee") as quoted in D. Weisbort, *Australian Lawyers* ( Longman Cheshire 1990) at p.124.

<sup>10</sup> Ross, above n.8 at p. 79

<sup>11</sup> Ross, above, n 8 at p 68. See also Australian Bureau of Statistics *Legal Services Industry Australia* #8667.0 (August 2000)

<sup>12</sup> Ibid quoting Law Council of Australia figures.

about 20-25% of practitioners hold themselves out as courtroom  
advocates<sup>13</sup>

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<sup>13</sup> ALRC Report, above n 5, p 207

## **The Challenge of Professional Responsibility**

At the same time as the demographics of the legal services industry are changing other challenges also confront the Australian legal profession. The place and role of the legal profession in society is being questioned. What it means to be professionally responsible is subject to debate. Regulation of the legal profession is high on the reform agenda including the push for a national profession. The legal profession is subject to growing competition from other disciplines and globalisation and is considering new methods of delivering legal services such as multi-disciplinary practices. Other concerns include the continuing gender imbalance within the profession. These challenges are not unique to the Australian legal profession but affect legal professions around the globe.<sup>14</sup>

Within the Australian context and in the past two decades, as mentioned above, there have been numerous inquiries related to the legal profession.<sup>15</sup> The types of changes recommended by the reports include: the removal of restrictive work practices within the legal profession; separation of regulatory and representative functions of the professional organisations; change in admission requirements to facilitate national recognition; growth in non-lawyers doing legal work in areas like conveyancing and probate; elimination of a divided profession; greater specialisation within the profession; abolition of fee scales; introduction of contingency fees; competition principles (*Trade Practices Act*) to apply to regulation and delivery of legal services<sup>16</sup> and abolition of Queens Counsel.<sup>16</sup> Some reports suggested a freeing up of the monopoly over provision of legal services but no report proposes that the monopoly of right of appearance in court should be removed.

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<sup>14</sup> See papers from W G Hart Legal Workshop 2001 *The Changing Work and Organisation of Lawyers: Educational Implications*, London, June 2001: <http://www.ssrn.com/link/W.G.-Hart.html>.

<sup>15</sup> see above n. 5

More generally, a number of the reports concluded that the way the legal profession was organised and how it delivered legal services contributed to the inaccessibility of the legal system. The conclusion was that the legal profession and how it operates was partly responsible for the crisis in access to justice confronting the Australian community.<sup>17</sup>

Additionally there has been increasing focus on the concept of professional responsibility and in particular the perceived lack of professionalism amongst many legal practitioners. Commitment to public service is said to be one of the distinguishing characteristics of a profession. In Australia the organised legal profession draws on this service ideal in different ways. It is used to encourage the individual practitioners' commitment to pro bono work. Practitioners also publicise their service work and their commitment to the service ideal as a way of improving their public reputation. Finally the legal profession uses the public service ideal as a justification for the privileges of monopoly and self-regulation.<sup>18</sup>

But we believe that the profession's reliance on this service ideal in these ways only highlights its inability to grasp onto the serious issue that "the moral authority of lawyers is in crisis".<sup>19</sup> The reaction to the challenges has been at the micro level and there has been a lack of debate about a (new) vision of lawyers' role in society – about the meaning of professionalism.

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<sup>16</sup> Many of these changes are encapsulated in the *Legal Practice Act* (Vic) 1996

<sup>17</sup> Senate Standing Committee on Legal And Constitutional Affairs, *The Cost of Justice – Foundations for Reform* (Canberra 1993) p 17-19

<sup>18</sup> J. Dickson, "Clinical Legal Education in the 21<sup>st</sup> Century: Still Educating for Service?" (2000)1 *International Journal of Clinical Legal Education* 36

<sup>19</sup> Goldsmith & Powles, above n 3 at pp119-120.

This view is supported by the periodic calls made by judges and commentators for a return to 'professionalism'. In the words of Mr Justice Michael Kirby of the High Court of Australia:

The great debate for lawyers in the coming century will not be whether a separate profession of advocates will survive. It will not be whether competition and consumer pressure will improve the delivery of some legal services. Still less will it be whether some lawyers will wear wigs. These are not the vital questions. What is vital is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of service beyond pure economic self-interest, will survive. But whether it survives or not is up to the lawyers of today.<sup>20</sup>

The issue of what constitutes professional responsibility clearly should be on the legal profession's agenda. More recently those involved in educating future legal practitioners have been challenged to also address this issue.

### **Educating for Professional Responsibility**

Traditionally in Australia, the teaching of professional responsibility was not part of the university curriculum. With some notable exceptions, it was usually taught either as part of formal practical legal training or as a separate module.<sup>21</sup> In 1997, the Australian Law Reform Commission noted that "the practice in many Australian law schools has been to defer responsibility for this subject area until the Practical Legal Training stage of legal education."<sup>22</sup> This was despite previous recommendations that professional conduct be taught as part of the academic law curriculum.<sup>23</sup>

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<sup>20</sup> M. Kirby, "Billable Hours in a Noble Calling?" (1996) 21 *Alternative Law Journal* 257 at 261

<sup>21</sup> University of New South Wales has had a compulsory course since 1974; Ross above n.8 at p 3.

<sup>22</sup> Australian Law Reform Commission, Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training*, p61.

<sup>23</sup> Recommendations of the Consultative Committee of State and Territorial Law Admitting Authorities (the "Priestley Committee") in *Uniform Admission Requirements: Discussion Paper and Recommendations*

As part of its recent major inquiry into the (Australian) federal civil justice system, the Australian Law Reform Commission examined the role of academic legal education “in shaping the ‘legal culture’”.<sup>24</sup> Its final Report included the Recommendation that:

In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility<sup>25</sup>

In reaching this (and other recommendations), the Australian Law Reform Commission considered approvingly the approach of the MacCrate Report<sup>26</sup> in the United States in 1992. The MacCrate Report contains a “Statement of Fundamental Lawyering Skills and Values”.<sup>27</sup> It makes it clear that professional responsibility is more than adherence to the Rules of Professional Conduct and that education in professional responsibility must address professional values as well as rules.

The Fundamental Values stated in that Report are: Provision of competent representation; Striving to promote justice, fairness, and morality; Striving to improve the profession; Professional self-development<sup>28</sup>

One of the Fundamental Skills argued for in the Report was “Recognizing and Resolving Ethical Dilemmas”.<sup>29</sup>

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(Centre for Legal Education Sydney 1992). See also, New South Wales Law Reform Commission (NSWLRC) Report 70 *Scrutiny of the legal profession: Complaints Against Lawyers* (NSWLRC Sydney 1993), para 5.21 “...the study of legal ethics and professional responsibility should be an integral part of any law school program...”

<sup>24</sup> See above n 6 pp113 - 114

<sup>25</sup> Ibid p 142

<sup>26</sup> Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap Legal Education and Professional Development – An Educational Continuum*, (American Bar Association July 1992) (the “MacCrate Report”)

<sup>27</sup> Ibid, Chapter Five pp135 -221

<sup>28</sup> Ibid, p 140-141

This view of ethical decision-making as a fundamental skill echoed the view of the New South Wales Law Reform Commission (in its influential 1982 Report on the complaints system in New South Wales).<sup>30</sup> The New South Wales Law Reform Commission (“NSWLRC”) took the view that

...it is inadequate to teach legal ethics and professional responsibility as if these are matters of etiquette...Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional practice, which necessitates a *process* or *problem-solving* approach to the subject...<sup>31</sup>

A similar discussion has been taking place in Canada, with recommendations from the Canadian Bar Association’s Task Force that law school curriculum include the compulsory study of ethics and that ethics courses should include consideration of “issues relating to obligations of lawyers regarding human rights and inter-personal relationships”<sup>32</sup> In the United States during the 1980s, the American Bar Association initiated a wide-ranging examination of professionalism in the practice of law resulting in many recommendations dealing with education.<sup>33</sup>

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<sup>29</sup> Ibid, p140

<sup>30</sup> NSWLRC, above n 5

<sup>31</sup> Ibid, para 5.24

<sup>32</sup> See, Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report *Attitudes-skills-knowledge: proposals for legal education to assist in implementing a multi-option civil justice system in the 21<sup>st</sup> century* Discussion Paper, (Canadian Bar Association Ottawa August 1999), at p 48. In the U.K. see, The Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (London, ACLEC, 1996) also dealt with ethics education in law schools.

<sup>33</sup> See American Bar Association *In the Spirit of Public Service: A Blueprint for the Rekindling of Professionalism* (1986). See also, Robert L. Nelson, David M. Trubek, & Rayman L. Solomon, (eds) *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Cornell University Press 1992)

In contrast in Australia, the organised legal profession has, until very recently, failed to raise questions of professional responsibility for debate within the wider context of change and reform in the practice of law in Australia.<sup>34</sup> Unlike in the United States where the American Bar Association has taken the lead in confronting the meaning of professional responsibility,<sup>35</sup> in Australia as discussed above, government initiated inquiries have intervened to challenge lawyers' practices as negatively impacting on access to justice.<sup>36</sup> The most recent reports state unequivocally that ethics is part and parcel of legal practice and professional obligations and that ethics should be incorporated into the core curriculum of a law school programme.<sup>37</sup> Unfortunately, these recommendations have not led the Australian professional organisations to redirect their approach to dealing with change or to actively engage with legal educators.

Recently,<sup>38</sup> this need for law school curricula to include substantial and imaginative teaching of legal ethics has become a focus of considerable academic discussion, especially in writing by teachers of legal ethics.<sup>39</sup> In Australia, Goldsmith and Powles argue strongly that law schools have not done enough to promulgate and promote

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<sup>34</sup> This contrasts with the publicly expressed concern expressed by the judiciary, See, eg. M. Kirby, above n 20, D. Dawson, (1996) "The Legal Services Market." 5 *Journal of Judicial Administration* 147-154, and J. Gobbo, "Idealism under stress – legal practice in Victoria" (2000) 74 *Law Institute Journal* 85

<sup>35</sup> Ibid

<sup>36</sup> See n 5 above

<sup>37</sup> Senate Standing Committee on Legal & Constitutional Affairs, Discussion Paper No.5 *Legal Ethics* (1992). See also *Legal Practice Act (Vic)* s 64. See also, G. Powles, "Taking the Plunge: Integrating Legal Ethics in Australia" (1999) 33 *The Law Teacher* 314-321

<sup>38</sup> This is a longstanding discussion in academic writing, particularly in the United States. However, it is notable that it is a relatively recent topic of academic interest in Australia. For a recent US symposium, see (1995) 58 *Law and Contemporary Problems*

<sup>39</sup> See, eg, a recent Australian journal edition dedicated to the teaching of legal ethics, (2001) 12 (Nos 1 & 2) *Legal Education Review*, and the collection of articles (both Australian and international) contained in, M.J. Le Brun, *Improving the Teaching and Learning of Legal Ethics and Professional Responsibility in Australian Law Schools: Workshop Materials*, July 1999 [The materials developed under a National Teaching Fellowship Award]. See also, Kim Economides, (ed), *Ethical Challenges to Legal Education &*

substantive conceptions of professional responsibility. They are critical of professional bodies for not concerning themselves with this issue and argue that those bodies must engage with the question of how professional and ethical standards can be raised through educational processes.<sup>40</sup>

How a law teacher teaches professional ethics and responsibility is now the critical question. How does one go beyond the teaching of a series of rules to be applied in standard situations? If, as governments and law reform commissions have suggested, ethics is integral to legal practice, we, as teachers, surely need to ground our ethics courses in the realities of that practice.

The Law Council of Australia suggests: “At its heart, ethics is about finding the best possible answer to the question ‘What ought one to do?’ Ethics can therefore be thought to come before the law”<sup>41</sup>. In order to answer this question, law students (and lawyers) need to be challenged to analyse the legal system in which lawyers work, to examine the moral nature of lawyering, to consider the responsibility and role of lawyers and to be guided to a recognition of the necessary interrelationship between the values of the legal system as encapsulated in the ethical rules and their own personal moral values. In a sense, the teaching of legal ethics demands that the teacher lead students on a path of self-discovery.

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*Conduct*, (Hart Publishing Oxford 1998) & J. Giddings, “Teaching the Ethics of Criminal Law and Practice” (2001) 35 *The Law Teacher* 161 and see (1999) 33 (3) *The Law Teacher*.

<sup>40</sup> Goldsmith & Powles, above n 3, p 120. The recent Discussion Paper of the Law Council of Australia, 2010: *A Discussion Paper: Challenges for the Legal Profession* September 2001, at p 87 does indicate some new thinking along the lines of ethics being ‘interwoven with all aspects of the practice of law’ and therefore than an integrated approach to its teaching in law schools is to be encouraged. Nevertheless the Paper does not list professionalism as one of the ‘challenges’ facing the profession.

Primarily, lawyers need to develop the ability to recognise a question of professional ethics and the skills, knowledge and insight to resolve the situation.<sup>42</sup> However, they need more than those technical skills if they are to become “responsible in the practice of law”.<sup>43</sup> They need to know that ethical issues provoke tension and conflict and are frequently difficult to solve. They need to and can learn to appreciate that there is a moral content to law and practice.<sup>44</sup>

An issue for law teachers is how to engage the student in the learning process? How do we enable the students to appreciate the relevant principles, issues and complexities and prepare them for resolving ethical dilemmas they may face in practice? How do we encourage students to think of ethical conduct in the context of justice? How do we produce “critical and creative law graduates who are self-reliant, self determining, and self -motivating individuals who can communicate well and work co-operatively as well as independently”?<sup>45</sup>

In an attempt to achieve at least some of these goals, we have adopted one particular method of legal education, namely, clinical legal education.

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<sup>41</sup> Law Council of Australia, above n 32 at p 125, citing apparently with approval the Australian Corporate Lawyers Association, *Ethics for In-house Counsel*.

<sup>42</sup> See MacCrate Report above n 20 and NSWLRC above n 18 at para 5.24

<sup>43</sup> H. Lesnick, “The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law” (1986) 10 *Nova Law Journal* pp633-44

<sup>44</sup> Ross above n. 8 ; M. LeBrun, & R. Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (LBC 1994). See also, T. Greenwood, “Ethics and avoidance advice”, (1991) 65 *Law Institute Journal* 724.

<sup>45</sup> LeBrun & Johnstone, above n 36xiii

## Clinical legal education and professional responsibility

In Australia there is a long history of clinical legal education in a small number of universities.<sup>46</sup> In the last decade there has been an increasing interest in developing additional clinical legal education programmes.<sup>47</sup> The term clinical legal education is used to describe a range of undertakings.<sup>48</sup>

In this article we define clinical legal education as a legal-practice based method of legal education in which law students assume the role of a lawyer and are required to take on the responsibility, under supervision, for providing legal services to real clients. These characteristics of clinical legal education were first articulated by Gary Bellow in 1970<sup>49</sup> and have been adopted and endorsed in Australia as a starting point for discussion of the method.<sup>50</sup>

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<sup>46</sup> M. Noone, "Australian Community Legal Centres - The University Connection" in J. Cooper & L.G. Trubek, *Educating for Justice: Social Values and Legal Education* (Aldershot, Dartmouth Publishing Company Limited 1997) pp 257-284

<sup>47</sup> J. Giddings, "A Circle Game: Issues in Australian Clinical Legal Education" (1999) 10(1) *Legal Education Review* 33

<sup>48</sup> For example, field placement programmes where students are placed in organisations outside the university and supervised on site by the host organisation. (commonly called 'externship' programmes). It is also used to describe programmes of simulation. It also of course includes 'live client' programmes. In all these ventures academic credit is awarded and there is a classroom component. There is a vast literature particularly in the United States. For an historical sample, see *Clinical Education for the Law Student: Legal Education in a Service Setting* (1973) Working Papers prepared for the CLEPR National Conference June 6-9, 1973; (1980) 29 *Cleveland State Law Review* 'Symposium Edition on Clinical Legal Education'; (1997) 64 (4) *Tennessee Law Review* 'Symposium: Fifty Years of Clinical Legal Education'. See also eg, A. Boone, M. Jeeves, & J. MacFarlane, "Clinical Anatomy: Towards a Working Definition of Clinical Legal Education" (1987) 21 *The Law Teacher* 61-71. For Australia see, eg, J. Giddings, above n 47, M.A. Noone, above n 46, J.A. Dickson, above n 18

<sup>49</sup> Gary Bellow, "On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology" in *Clinical Education for the Law Student: Legal Education in a Service Setting*, *ibid*, p374.

<sup>50</sup> See, eg, Simon Rice, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (1996), 9-15.

In our work, we see the educational goal as multi-faceted. First, it is to use the practice of law to introduce law students to the way in which legal rules and processes impact upon ordinary people. Secondly, our aim is to encourage students to reflect upon their practice and to consider alternatives to the conventional rules and procedures. Thirdly, of course, in pursuing the above two goals students are expected to acquire practical legal skills. Traditionally the legal services of the clinical programme are provided to poor and disadvantaged people in the community.<sup>51</sup> In this way, community service is an element of our definition of clinical legal education and should be seen as integral to the achievement of the educational goals described above. This is the traditional and most common Australian model.<sup>52</sup>

The Australian model also is characterised by the presence of a clinical supervisor who is both a currently licensed legal practitioner and a member of academic staff of the university law school.

It should be clear that this model of clinical legal education offers students opportunities and benefits different from those normally available in a traditional university education. Theoretical discussions of law in context take on additional dimensions when students have the opportunity to reflect on their own personal experience of legal practice, the legal profession and the values and dynamics of the legal system. The realities of legal practice in the community based model of a clinical programme, ensure that issues of public policy, law reform, social and moral questions and the provision of legal services

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<sup>51</sup> We agree with Rice, *ibid* p51, that many people cringe from using the term 'poor people'. We think, however, that to avoid the term is to avoid the reality of many people's lives and resort to euphemistic phrases such as 'those without the resources to afford private legal services'.

in the public interest will arise, confront teachers and students and demand reasoned solutions.<sup>53</sup>

This bridging of the gap between the academic study of legal rules and principles and the operation of those rules and principles in practice was the most critical characteristic of the 'legal clinic' to early advocates of clinical education in law schools. The study of law (and indeed the practice of law) without understanding of and attention to its effect on society or of the role lawyers play in the social and economic system seemed a sterile exercise.<sup>54</sup>

Additionally clinical legal education offers students the chance to integrate theoretical knowledge of law, based largely on appellate decisions learnt in the classroom, with the everyday experience of legal practice and the legal system. Students discover that there may be no appropriate legal solution or that a legal solution may not be available to a client for a variety of reasons including cost, unavailability of legal aid, delay, lack of evidence or enforceability.<sup>55</sup>

As a method of teaching legal ethics and professional responsibility, clinical legal education offers abundant opportunities. Certainly, legal educators in the United States in the 1970s embraced the clinical method for this purpose. They saw it as offering the hope

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<sup>52</sup> See M. Noone, above n 46 for a discussion of the link between law school clinical programmes and community legal centres in Australia.

<sup>53</sup> Community legal centres in Australia have a history of law reform. Their clients also come from some of the most disadvantaged groups in Australian society.

<sup>54</sup> See, eg, Jerome Frank, "Why Not a Clinical-Lawyer School?" (1933) 81 *University of Pennsylvania Law Review* 907. See also the writings of William Pincus contained in *Clinical Education for Law Students: Essays by William Pincus*, CLEPR 1980

of instilling in law students a conception of professional responsibility that went beyond mere knowledge and application of rules or (Rules) and which encompassed obligations of service and commitment to justice including law reform<sup>56</sup>

Why is this so? One answer is that the clinical setting constantly gives rise to spontaneous and various ethical questions which challenge and test students. This spontaneity may be called 'randomness', and thereby disconcert conventional teachers.<sup>57</sup> It is however the very nature of the challenge of dealing with ethical issues that they arise unexpectedly in even the most legally straightforward of matters.

The clinical literature, confirms that this unexpectedness, this randomness, provides golden opportunities for teachers and students to work through the meaning of ethical lawyering. Gold<sup>58</sup> describes how a spontaneous offer of legal assistance by a clinic student to an unrepresented litigant resulted in a complaint to the local Bar Association. He then describes the range of issues that he as teacher, with the students, had to address and work through. They included narrow legal ones such as 'what are the Rules?' 'do they apply here?' 'what are the implications of a breach for the student, the clinic, the teacher/supervisor?' and interpersonal issues such as 'why didn't you (the teacher) tell me I shouldn't do this'? They also included, however, questions such as 'why is this

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<sup>55</sup> S. Campbell, 'Blueprint for a clinical program' (1991) 9 (2) *The Journal of Professional Education* 121 at 122

<sup>56</sup> The Ford Foundation funded the Council on Legal Education in Professional Responsibility (CLEPR) in 1968 with William Pincus at its head. Pincus had a strong commitment to the awakening of lawyers to obligations to work for justice. CLEPR funded law schools to develop clinical programmes. See also, Mark Spiegel, "Theory and Practice of Legal Education: An Essay on Clinical Education" (1986-87) 34 *UCLA Law Review* 577, and Douglas A. Blaze, "Déjà vu all over again: Reflections of Fifty Years of Clinical Education" (1997) 64 *Tennessee Law Review* 939, 950-54.

<sup>57</sup> Rice above n 50 at p 21

person unrepresented?’ and the belief of the students that justice requires that everyone have access to legal services. So – how did the ‘ethical’ rule shape up against that latter criterion?

The collaboration of the clinical teacher with the students in the process of debate and decision-making in the ethical arena is the most powerful element of the clinical method. As Gary Blasi writes, “...in these areas [of ethics, morals and justice] our example can be absolutely critical.”<sup>59</sup> As law teachers, and particularly as clinical teachers who are legal practitioners, we necessarily provide a model to our students of professional responsibility in action.<sup>60</sup>

Our decision to adopt the clinical method to teach the legal ethics (‘professional conduct’) course was motivated by the recognition of the opportunities it offered. The types of issues arising in the practice would be sufficiently certain to enable an academic class discussion in advance, but the clinical experience was an environment that would test students' command of ethics like no other. Students in a clinical setting feel keenly their competing duties and have to reconcile subjective and objective considerations in resolving issues, as they would in practice.<sup>61</sup>

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<sup>58</sup> Neil Gold, “Legal Education Law and Justice: The Clinical Experience” (1979-80) 44 *Saskatchewan Law Review* 97-122

<sup>59</sup> Gary Blasi, “Teaching/Lawyering as an Intellectual Project” (1996) 14 *Journal of Professional Legal Education* 65, 73.

<sup>60</sup> Carrie J. Menkel-Meadow, “Can a Law Teacher Avoid Teaching Legal Ethics?” (1991) 41 *Journal of Legal Education* 3. See also American Bar Association *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986) 16.

<sup>61</sup> Rice above n 51 at p 21. See also, Margaret Castles, “Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia” (2001) 12 *Legal Education Review* 81, 95-100.

### **La Trobe University's approach**

The School of Law and Legal Studies at La Trobe has historically had a strong commitment to access to justice issues and a commitment to the study of law in context. The School is closely involved with the provision of legal services to the surrounding community and many staff are engaged in professional activities, such as providing services within government and non-government organisations.

One of the distinctive aspects of the School has been its long involvement in clinical legal education. Since 1978, the School has enabled students to participate, under supervision, in both the legal and community work of various legal aid agencies. In this way students provide service to the local community whilst enriching their understanding of legal theory through their practical experience. As mentioned above, assisting poor people to access the legal system has been a longstanding characteristic of clinical legal education programs in Australia and this intertwining of service and education is a continuing feature of the programs developed by the School of Law and Legal Studies at La Trobe University.<sup>62</sup>

### **The Legal Ethics subject - *Legal Practice and Conduct***

When the new Bachelor of Laws degree was being developed in 1991, it was mooted that the School's clinical experience could be utilised to address the area of professional

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<sup>62</sup> In 1978 the then Department of Legal Studies established what was the second Australian clinical legal education programme in the newly formed West Heidelberg Community Legal Service. See D. Neal, "The New Lawyer Bloke" (1978)3(4)*Legal Service Bulletin* 148. This programme continues to run with law

responsibility and expand the current offerings in clinical legal education. A unique subject, *Legal Practice and Conduct* combining both a clinical component and classroom teaching was designed. It was first taught in 1994.

*Legal Practice and Conduct* is a third year, one semester length subject. It carries double credit in recognition of the workload involved. The subject contains two components, the clinical legal education programme and a weekly three-hour seminar.

#### *Seminar sessions*

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students providing legal services and engaging in community relevant law reform activities. For a general discussion of Australian clinical programs and community legal centres see: Noone above n 46.

The underlying theme of the course is what constitutes ethical legal practice? The primary focus is the study, exploration and analysis of the areas of knowledge stipulated by the Council of Legal Education (admission authority) under the heading “Professional Conduct”.<sup>63</sup> This includes professional and personal conduct in respect of the practitioner's duty to the law, the courts, clients and fellow practitioners. The context for this study is the issue of access to justice and proposals for reform to the legal system including in particular, the ongoing challenges to the practices of the legal profession and the concept of professional responsibility.

In the classroom sessions, professional responsibility and ‘law of ethics’ is studied. The weekly clinical experience of the students feeds into classroom discussion to give it a real life application. The spontaneity of the clinic overflows into the classroom, so that, for example, examination of the rules against conflicts of interest can raise heated debate about resultant exclusion of a person from access to legal aid services.

Similarly, a student can find that the examination in the classroom of the fiduciary relationship between lawyer and client and the duty to obey instructions, can the next day be played out in the clinic when a non-English speaking father comes in for advice with his son as interpreter. How does the student-lawyer ensure that they are obtaining the father/client’s instructions when the son does all the talking? What should the student-

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<sup>63</sup> These are known as the ‘Priestly’ eleven and are named after the judge who chaired the committee that agreed on the areas of knowledge. Recommendations of the Consultative Committee of State and Territorial Law Admitting Authorities (the “Priestley Committee”) in *Uniform Admission Requirements: Discussion Paper and Recommendations* (Centre for Legal Education Sydney 1992). The areas of knowledge are Criminal Law and Procedure, Torts, Contracts, Property both Real and Personal, Equity(including Trusts), Administrative Law, Federal and State Constitutional Law, Evidence, Company Law, Civil Procedure and Professional Conduct (including basic trust accounting).

lawyer do to ensure they are communicating directly with their client and how does their conduct reflect their ethical obligations?

*Structure of the clinical programme*

The clinical legal education component of the course is based in a local office of Victoria Legal Aid.<sup>64</sup> Students are directly involved in legal practice in a legal aid environment. Students become (and are so called by staff) “student-lawyers”. They observe and are encouraged to reflect on the way a practitioner's duties and ethics are relevant to daily legal practice as well as on the efficacy of law, the legal system, the legal aid system, the legal profession and the nature of justice. Students spend a minimum of one full day per week for ten weeks in the clinic and under supervision perform a variety of work.<sup>65</sup> Consistent with the educational priority, students are supervised on site by a member of the School’s full-time (and permanent) academic staff, who is also a current legal practitioner.

The practice of the legal aid office is primarily criminal and family law. However, advice and assistance is also given in areas as diverse as motor vehicle accidents, civil debt, social security and employment.

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<sup>64</sup> Victoria Legal Aid is an independent statutory organisation established pursuant to *Legal Aid Act 1978(Vic)*. See [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

<sup>65</sup> In reality students spend considerably more time in the clinic. The realisation that they have responsibility for their clients’ cases and that work on these can’t always ‘fit around’ student life, is a major shock for many students.

Situated as it is within the legal ethics subject, it is clear to students that the clinical programme is 'about ethics'. To reinforce this focus, the written objectives of the clinical programme include the following:

- To give students the opportunity to observe and consider the lawyer/client relationship and issues of personal and professional ethics in the context of a legal practice.
- To discuss issues of professional responsibility, ethics and conduct in the context of the students' experience of the lawyer/client relationship.<sup>66</sup>

The programme operates (formally) three days a week at the VLA office. There are three teams each of four students (total intake of 12 per semester). Students are assigned a specific day. The team aspect of the work is one of the ancillary benefits of the programme, contrasting markedly with the individually competitive nature of law school generally.

Student work in clinic is in two main areas:

First, students work with the legal aid lawyers both on their client files and at court. The office provides a duty lawyer service for two local Magistrates' Courts and the students 'clerk' for the duty lawyers at court.<sup>67</sup> This involves preliminary interviewing of people waiting to see the duty lawyer, organising adjournments, ringing around for witnesses etc. They also assist the lawyers on individual client matters. This may include researching specific legal issues, analysing evidence including listening to taped Records of Interview and writing memoranda back to the lawyer, drafting letters of advice,

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<sup>66</sup> *Legal Practice and Conduct* course outline handed out to students.

<sup>67</sup> Victoria Legal Aid provides the bulk of duty lawyer services in Victoria. Unrepresented defendants in criminal matters and unrepresented respondents in intervention order proceedings may seek the advice of the duty lawyer. There is no means test although priority is given to people in custody. Advocacy on the day may be provided in a guilty plea or the matter adjourned for further preparation see Victoria Legal Aid Handbook at [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au). A typical day at the relevant local Magistrates' Court could involve

instructing in court at trial etc. This aspect of clinic gives students the opportunity to observe several different lawyers in action. They soon notice the variety of styles of lawyering adopted by the various practitioners. As well, the differences and similarities in approaches to ethical issues is highlighted. Again we have noticed the powerful impact of role models on students.

Secondly, a student clinic – ‘the La Trobe Clinic’ – runs during the program. Clients are booked in (with their consent) to see a student. The students conduct all interviews, advise and refer to relevant agencies, or assume conduct of the client’s matter. This work is of course again all performed under the supervision of the School of Law and Legal Studies supervisor. However, the students assume the responsibility for the primary conduct and management of these files. The clients are and remain clients of Victoria Legal Aid and all work is ultimately approved by a VLA practitioner. Clients are always informed of the supervision and oversight of (two) qualified legal practitioners but experience shows that for them, the student is their lawyer.<sup>68</sup>

The structure of the clinic day itself is designed to focus attention on ethical issues. These might appear to range from narrow questions of the application of a particular duty to a specific situation, to wider questions of lawyers’ professional responsibility. While students obviously gain a range of legal skills during the clinic, the focus in the clinical legal education program is on analysing and reflecting upon what constitutes ethical conduct, not upon skill acquisition.

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the duty lawyer seeing up to 20 people. Currently, the office sends two duty lawyers and one lawyer for ‘remands’.

Client interviews are conducted mostly in morning sessions. Generally, two students go to court and two remain in the office to see clients. Four clients are booked into the clinic and appointments are made for one hour. This time period recognises that students are learning lawyering skills. The aim of the clinic is not volume legal services. It is education for ethical practice. It is important therefore that students have the time to give the clients quality service. The student introduces themselves as a student-lawyer and wears a badge identifying them as such and with their name.

[Why a badge? Apart from making it easier for clients to remember ‘their lawyer’s’ name, the badge is a practical reminder to students that they are not yet admitted to practice and that their work must be supervised by a practitioner.]

At the outset of the interview the student explains to the client the interview process. This is that the student –lawyer will interview the client and at the point when, hopefully, they have the full story, they will leave the client for a short time and go to discuss the problem with their supervisor. Students are encouraged to do some quick thinking and research before coming to the supervisor. For example, finding the relevant legislation and thinking of a preliminary approach to the problem. In the discussion with the supervisor, the aim is to develop advice to take back to the client. This will often be very preliminary advice with the need for further research.

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<sup>68</sup> The clinical supervisor rarely meets the client.

Clearly, in the situation where the client is waiting, there is only slight scope for discussion of deeper ethical issues. However, it is often apparent that they lurk within the situation. Certainly, as the weeks pass, students increasingly draw them to the supervisor's attention.

Once the decision is made together as to the advice, referral and/or ongoing representation of the client, the student returns to the client and continues the interview.

After the interview is completed and the client gone, student and supervisor talk over the interview. Students are often very keen to get on with their work and can resist further discussion at this point. However, we have found that it is possible to use the need to develop an action plan for the client's case as the catalyst for examination of a multitude of what we identify as ethical issues. These might include: language barriers, cost barriers, lack of an easily accessible legal remedy, lack of availability of legal aid in the particular case, the frequent combination of mental illness and drug issues and the implications for the lawyer and the client, possibility of referral to community agency etc.

When confronted with their own client's situation students find it easy to see the link between competence and ethical conduct. Acting in one's client's best interests is easily translated into the need to do thorough research, to focus on effective communication, to use one's imagination in considering legal and non-legal options, to ensure there is no conflict of interest, to preserve confidentiality etc etc.

The structure of the day, while including planned and spontaneous discussion between student and supervisor also includes a team session. This takes place over afternoon tea – a time honoured and very popular break in the day that sometimes allows for some competitiveness in the edibles!

We leave the hot keyboard and gather around the food to talk about the day. It is a chance for students to share their experiences with one another and also to draw out some of the broader implications of the client work for ethical practice, justice and the legal system. This time refocusses our attention on the objectives of the programme. The range of situations that students are commonly confronting and discuss in these sessions include:

- How does a duty solicitor ensure confidentiality and establish a trust relationship with the client when they have to conduct an interview in the police lock-up with the client behind bars in a cell with other defendants and police officers hovering in the background?
- How much does a lawyer have to tell the court when it becomes apparent to the duty solicitor that the defendant's recent charges/prior convictions are not on the police record? What is their responsibility to the court and to their client?
- How far does a lawyer let their own biases and inclinations affect their work? What is the explanation for individual solicitors acting differently with similar clients; reflected in the differing amount of work solicitors are prepared to do for particular clients.
- How does a lawyer deal with the access to justice issue in a conflict of interest when it is discovered that two clients are involved in the same criminal proceedings and must be referred out to private practitioners but only one will qualify for legal aid.

In these discussions, students and supervisor collaborate to work out ways in which, in our practice we can serve both a particular client's interests and perhaps the wider interest of community justice.

A recent example illustrates this. In the state of Victoria, there is a group of 'transport police' called Ticket Inspectors whose job it is to patrol trains and trams checking that passengers have current and appropriate tickets. Since the introduction of ticket machines on train stations and on trams and the abolition of tram conductors actually on the trams selling tickets, there has been a rapid increase in fare evasion. One real explanation for this is the frequent malfunction of the ticket machines and resultant inability of passengers to actually buy tickets. There have been ongoing public complaints about this and about the use of unreasonable force by Ticket Inspectors.

The clinic had a client charged with fare evasion but also with assaulting two Ticket Inspectors. She instructed that she had not bought a ticket because she was annoyed at the cost of the fare. However, she told the student-lawyer that she was abused by two Inspectors when this was discovered, that she was forcibly removed from the tram and surrounded on the pavement by those two and two additional Inspectors. Our client was a young slight woman and her story that she was afraid and disoriented by the situation rang true. While she admitted that she had struggled against the Inspectors and had spat at them, (technically an assault), she said she was frightened she was going to be hurt and wanted to get away. (Her offer to pay the fare was refused).

The prosecution brief was more or less consistent with her story and there seemed a reasonable possibility of mounting a defence to the assault charges. However, our client was firm. Upset though she was at her treatment, her main concern was to avoid a conviction. A programme for certain first offenders to divert them out of the criminal justice system on acknowledgment of guilt and on certain conditions (in her case a written apology to the Inspectors for her actions) was available to her and she instructed us that she wished to go that way. For her, that was in her best interests. She would avoid a criminal history and could put the whole event behind her.

For the clinic student and for the team as a whole, however, the situation was yet another example of abuse of power and an opportunity to bring this abuse to public attention in an attempt to curb it. Over afternoon tea, we examined the duty to the client and the duty to follow her instructions after giving her the best advice possible. The question also was: if this individual client were not prepared to contest the charges was there some other way we could ethically use the information from her case to try to prevent further abuse of power? Did we, as lawyers, have a positive ethical obligation, a professional responsibility to look at our casework with a broad vision?

One option, it was decided, was to write a submission to government on the conduct of the ticket inspection system including the actual conduct of ticket inspectors. Our client's situation could be used, anonymised, in this submission (or we could ask her permission to be more specific). In this way, the team felt, we were not simply working as legal

technicians but were using our professional skills and knowledge gained from our practice, in the interests of wider justice.<sup>69</sup>

### *Assessment*

Performance in the clinical programme accounts for 40% of the student's total mark in the subject. A further 10% is attached to a compulsory weekly journal. The journal is marked on a quantitative basis. That is, students are required to submit ten journal entries. They are encouraged to do so on a weekly basis so that the supervisor can provide written feedback. However, provided ten are submitted, ten marks are gained. If only three are submitted only three marks are gained.<sup>70</sup> Students have two other written assignments, one of which is a case study based on a situation with which they have dealt during the clinic.

The assessment criteria for the clinic performance are set out in the written material given to students at the beginning of the course. The criteria are centred around the objectives of the programme and are expressly linked to those objectives. Skills related tasks (interviewing, research, letter writing etc) are listed but under the umbrella of "knowledge and understanding of ethical obligations to client, court and community".

### **Professional Responsibility - Challenges to teachers and students**

This programme, therefore, is not a clinical legal education program that by necessity deals with professional conduct. This is a professional responsibility course where the

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<sup>69</sup> See Goldsmith & Powles, above n 3 referring to lawyers as 'local heroes' when acting in this way to 'ameliorate localised injustices' p121

students are involved in a clinical component. The fact that the issues raised involve live clients and need prompt resolution forces the students to confront the issues raised. Not only must they identify the ethical duties in an intellectual way but they must also grapple with the interpretation of the rules of conduct and the common law principles as well as the practical consequences of acting ethically.

Additionally a clinical legal education programme based at a legal aid office, where 89% of assisted applicants in 2000-2001 had incomes below the poverty line and the majority are living in rental accommodation and have very few assets<sup>71</sup> provides an opportunity for the students to study the impact of the legal system on the poor and to critically analyse how the legal system addresses the needs of the poor

The legal aid office also offers students a different experience of legal practice than private practice. The legal aid nature of the clinical experience raises starkly issues of access to justice, poor level of legal aid funding, the absence of appropriate or any remedy for certain injustice and the treatment of clients in the criminal justice system. Issues of professional responsibility, including the role of practitioners in ensuring equality before the law, are most evident in a legal aid practice. Students are also exposed to the workings of a large bureaucracy delivering legal aid services the policy issues surrounding the granting of legal aid as well of course, as the usual management issues that arise in a big legal practice.

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<sup>70</sup> J.P. Ogilvy, "The Use of Journals in Legal Education: A Tool for Reflection" (1996) 3 *Clinical Law Review* 55 discusses the use of journals and assessment of them.

<sup>71</sup> Victoria Legal Aid, *Sixth Statutory Annual Report* 2001 at p12

It is for these reasons that we consider clinical legal education is a most appropriate method to teach professional responsibility and legal ethics. Our advocacy of the clinical legal education methodology is based on our recognition that it places the student and teacher in a situation that depends on their confronting ethical questions and attempting to resolve them.

An evaluation of the pilot programme in early 1995 disclosed a high degree of student awareness of the goals of the programme.<sup>72</sup> Student comment both through their journals and in their 'exit' interview at the completion of the clinical programme repeatedly focuses on a new awareness of the way ethics is bound up in everything lawyers do. In a recently completed round of these interviews, one student said that she felt she now had an ingrained sense of her obligations as a lawyer. She went on to say that whenever, in practice, she had to decide what she ought to do, she would think about the clinic discussions and thought she would be guided in the right direction.<sup>73</sup>

While perhaps that student showed a particularly highly developed ethical sense, and we certainly do not claim, either for ourselves or for our students, that we have all the answers in this programme, we are confident that it is one of the best available methods of giving students and future lawyers the opportunity to develop a vision of themselves as ethical lawyers.

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<sup>72</sup> J. Dickson & M.A. Noone, *Report of Clinical Legal Education Pilot Program at Legal Aid Commission of Victoria- Preston, Second Semester 1994* (1995)

<sup>73</sup> Adrian Evans at Monash University in Melbourne is currently conducting a large scale research project into the values of Australian lawyers with a component directed at graduates of clinical programmes and this one in particular. See also, Adrian Evans, "The Values Priority in Quality Legal Education: Developing a Values/Skills Link through Clinical Experience" (1998) 32 *The Law Teacher* 274-286

In this course, the clinical experience provides students with insights into professionalism, the role and responsibility of legal practitioners as well as the nature of the relationship with clients. Questions of where does/should the power lie in a lawyer/client relationship and what do you do if you do not like your client or their cause are discussed.

As teachers within this clinical environment and in the classroom component we see our job as encouraging students to be questioning, analytical and reflective. We challenge the students to consider the role lawyers and the legal profession play in our society and of the responsibility that goes with the privilege of being a legal practitioner.<sup>74</sup> The types of issues raised for discussion are: should lawyers simply be paid mouthpieces for their clients? should lawyers perform work that conflicts with their own personal values? is working within the rules of the profession irrespective of whether this activity conflicts with ordinary concepts of morality/justice acceptable practice? The various paradigms of legal practice are discussed including the adversarial lawyer, the responsible lawyer and the merchant lawyer<sup>75</sup>

In discussing the formal rules and duties relating to the practical conduct issues identified, students are encouraged to assess the rationale of the current rules and duties; whose interests are served by the duty or rule; is the rationale appropriate in all circumstances; and is it an outdated rationale.

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<sup>74</sup> M.Gleeson, "Honest and liberal practice" (1999)73(7)*Law Institute Journal* 78

<sup>75</sup> D.Buckingham, J.Bickenback, R.Bronaugh & B.Wilson, *Legal Ethics in Canada Theory and Practice* (Harcourt Brace Canada 1996)

One of the objectives of the course is to encourage students to evaluate alternatives for ethical conduct in a practical context using a range of frameworks. They “come to see legal practice as socially situated and hence as ethically complex”<sup>76</sup> and have the opportunity, within the luxury of an educational environment, to begin to reflect on and develop their own frameworks for handling ethical dilemmas.

We suggest that the students consider the following frameworks when deciding a course of action in legal practice:

- the professional rules of conduct;<sup>77</sup>
- the legal practitioner’s own moral/ethical framework;<sup>78</sup>
- the legal practitioner’s responsibility to law and administration of justice *in a manner conducive to advancing the public interest*<sup>79</sup>; and
- the profession’s commitment to serving the community<sup>80</sup>

We encourage students to consider “*whether one can be a good lawyer and a good person at the same time*”<sup>81</sup> and to reflect on what their own ethical framework is so that they might choose areas of work that will not be constantly confronting and stressful.

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<sup>76</sup> Goldsmith & Powles above n3, p.149

<sup>77</sup> Section 64 *Legal Practice Act* 1996 (Vic); *Professional Conduct and Practice Rules* 2000 (Victoria)

<sup>78</sup> Ross above n.8 at p. 11

<sup>79</sup> Section 64 (I) *Legal Practice Act* 1996 (Vic)

<sup>80</sup> Ross above n.8 at p. 56; G. E. Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand* (Law Book Company 1996) at p.7

<sup>81</sup> Monroe Freedman, “Personal Responsibility in a Professional System”(1978) 27 *Catholic University Law Review* 191 and Kim Economides, “Legal Ethics-Three Challenges for the Next Millenium” Introduction to Kim Economides (ed), *Ethical Challenges to Legal Education & Conduct* above n 4, ppxxvii-xxx.

### **Towards a new professionalism**

Having outlined why we chose a clinical setting to teach ethics and the approach we take to discussing professional responsibility, we return to a theme we have explored before, the law teacher as role model.<sup>82</sup>

Within a short period of teaching *Legal Practice and Conduct* it became clear to us that we could not engage the students in discussions about the 'crisis in professionalism' and call on them to be professionally responsible and ethical practitioners without overtly stating what criteria we considered necessary for a legal practitioner to be professionally responsible. Obviously, this message is conveyed by example in the clinical environment but on reflection we decided that we needed to make a clear statement to the students.

This approach is not one that suits all law teachers<sup>83</sup> (and we have been criticised for it). But in a climate of change to the legal profession and the concept of professionalism more generally and increasing awareness of the fact that "the law has been more than inaccessible and unfair to some groups, but has been an active agent of oppression and discrimination",<sup>84</sup> we considered it was our professional responsibility to do so.

The criteria we currently consider to be minimum requirements for a legal practitioner to be considered professionally responsible are:

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<sup>82</sup> J. Dickson, & M.A. Noone, "The Challenge of Teaching Professional Ethics" in *Skills Development for Tomorrow's Lawyers: Needs and Strategies* (The Australasian Professional Legal Education Council, Sydney 1996)

<sup>83</sup> See discussion in Ross above n 8 at pp. 24-29

- fulfils the duties attached to a fiduciary relationship;
- is competent in the work they perform;
- communicates often, openly and clearly with their client;
- does not encourage the use of law to bring about injustice, oppression or discrimination;
- identifies, raises and discusses ethical issues with current/potential clients;
- seeks to enhance the administration of justice; and actively engages in serving the community.

Additionally we encourage students to strive to be able to reconcile their own code of ethics/morals with the work they do.

In developing our definition of a professionally responsible legal practitioner we have drawn on the frameworks we describe above including our own work experiences and values. We make this clear to the students when we present our criteria to them. We encourage them to reflect on the criteria in the context of their own clinical experiences. We stress that the concept is one for ongoing reflection.

## **Conclusion**

The challenge to generate a “deep appreciation of ethical standards and professional responsibility”<sup>85</sup> is a profound one. In describing the course *Legal Practice and Conduct* we have outlined how we have begun, in a small way, to address this challenge. Additionally we are beginning to confront the task of defining what professional

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<sup>84</sup> Access to Justice Advisory Committee, above n 5, para 2.4

<sup>85</sup> ALRC Report above n 5, Recommendation 2, p.142

responsibility means in the 21<sup>st</sup> century. We put forward our definition in the spirit of encouraging discussion about the concept and welcome comments on our definition, so that we can continue to work towards a concept of professionalism that is relevant to legal practice in this new century. We are working towards a concept of professionalism that encompasses a vision of legal practice based on the pursuit of justice and that enables the legal practitioner to reconcile “being a good lawyer with being a moral person”.<sup>86</sup>

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<sup>86</sup> Ross, above n.8 at p53; R. Nelson, D. Trubek, & R.Solomon, (Eds), above n 33