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Establishing An International Human Rights Clinic in the New Zealand Context

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Introduction

Whilst clinical programmes are an established and core feature of legal education in the USA, and play a significant role in various other jurisdictions, they are essentially absent from New Zealand. The existence of a marked difference is itself a reason to investigate whether experiential learning should have a place in the curriculum of New Zealand's law schools. This is done by examining briefly the growth of clinical legal education in order to illuminate its purpose; and then considering whether structural differences mean that this does not resonate as much in New Zealand. It is suggested that there are indeed some reasons for caution, in particular that there is a concern around having a two-tier system of legal provision. But it is also suggested that an international human rights clinic could surmount these reasons for caution; and a prospective design for such a programme is developed and its ability to secure the needs of students and clients is assessed.

A. The Purposes and Extent of Clinical Legal Education

1. The Return of Clinical Legal Education in the USA

It is worth considering the renaissance of clinical legal education in order to understand its purpose. A brief review of legal education in the USA over the last 150 years¹ shows that it was originally entirely experiential through apprenticeship to a practitioner and then became a law school experience of reviewing appellate judgments through the Socratic method to discern legal

¹ See the account by James Moliterno in *Legal Education, Experiential Education and Professional Responsibility*, (1996) 38 *Wm and Mary Law Review* 71.

principles.² This “library law” process of learning was gradually modified by the recognition of the importance of factors beyond legal principle in the practice of the law, and which might indeed be obscured by reading appellate judgments;³ and of the need for law students to have some practical skills in negotiation, advocacy and legal writing to equip them for their roles.⁴ It is the expansion of these practical skills courses, together with the building of an infrastructure to support and validate clinical legal education,⁵ as part of what Moliterno has described as “a well-balanced preparation for entry into the legal profession”,⁶ that has been the feature of the last generation.

A second development is relevant, which is the growth of cause-based lawyering, namely by using the law to promote particular goals. At the outset, this was the somewhat amorphous idea of promoting access to counsel by those unable to pay. So, one of the benefits said to accrue from having students involved in more practical matters was that the process could secure access to legal advice for those who could not otherwise afford it (which would benefit students by allowing them to come into contact with the “human side of the administration of justice”).⁷ This sowed important seeds for what would happen in the 1960s, when philanthropic money began to “provide grants to law schools to establish legal clinics to serve the poor”.⁸ Hurwitz emphasises that acceptance of funding for this second iteration of the growth of practical education within the law school setting was linked to the social justice mission exemplified by the constitutional cases

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- 2 This is the Langdellian method, so-called after the Harvard Law School professor, Christopher Langdell, associated with its development: *ibid*, 72; see also Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham L Rev 1929, (2002) Yale Faculty Scholarship Series. Paper 1843 (available at http://digitalcommons.law.yale.edu/fss_papers/1843, last accessed 22 May 2013), at 1930-1931.
 - 3 See in particular the critique by Jerome Frank, starting in *Why Not a Clinical Lawyer-School?* 1933) 81 U. PA. L. Rev. 907, in which he called for practical learning of the art (rather than science) of the law, because many more factors than legal principle were relevant to what happened in practice.
 - 4 Moliterno, 38 Wm and Mary Law Review 71 at page 75.
 - 5 The infrastructure consists of organisations such as the Clinical Legal Education Association (CLEA) and peer-reviewed journals such as the Clinical Law Review; these are replicated transnationally by journals such as this one.
 - 6 Moliterno, 38 Wm and Mary Law Review 71 at pages 76-77. The need to ensure that American law schools prepare people to enter the legal profession has been a recurrent theme of recent decades: see the MacCrate Report of 1992 (*Legal Education and Professional Development: An Educational Continuum*, the Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, chaired by Robert MacCrate) and the Carnegie Foundation Report of 2007 (*Educating Lawyers: Preparation for the Profession of Law*. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman. San Francisco: Jossey-Bass, 2007, being the report prepared for the Carnegie Foundation for the Advancement of Teaching).
 - 7 Frank, (1933) 81 U. PA. L. Rev. 907 at 917-920. He noted that whilst medical schools relied to a large extent on free clinics at which eminent physicians gave of their time, the legal aid societies were staffed by poor quality lawyers and able practitioners did not assist: law school-based clinics could remedy this. See also Giddings et al, *The First Wave of Modern Clinical Legal Education in The Global Clinical Movement, Educating Lawyers for Social Justice*, Frank S Bloch (Ed), OUP, New York 2011, pp4-5, where the authors credit legal aid clinics within university law schools, starting in 1893 at the University of Pennsylvania, as providing a model for further such clinics that developed in the late 1920s.
 - 8 Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham L Rev 1929, 1933, noting the activities of the Ford Foundation-funded Council on Legal Education for Professional Responsibility.
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being taken at that time.⁹

So, three motivations seem apparent in the support for an experiential component to the law school education. One is ensuring that students learn the skills they will need in their professional careers, which will involve inter-acting with clients and recognising that many things beyond knowing legal principle are required for success in legal practice. A second is assisting in the provision of legal services for indigent people, thereby promoting access to justice, which seems a self-evident good. And a third is cause-based advocacy, reflecting an idealised obligation of lawyers to assist society; this could also benefit law schools by ensuring that they are exciting places to study.

These different motivations can be seen in the wide range of legal clinics that now exist in US law schools.¹⁰ In the Handbook for New Clinical Teachers (5th ed)¹¹ a taxonomy of clinics by lawyering activity notes that they may involve:

(i) Litigation: ie formal advocacy, whether before a court (either at trial level or appellate level) of before administrative agencies;¹²

(ii) Dispute resolution: ie negotiation, mediation or arbitration, with the student acting in the role as mediator etc;

(iii) Judicial: ie acting as a judicial clerk;

(iv) Advocacy of various other forms – (a) community organising: advocating for community groups; (b) legislative advocacy: ie calls for legislation to be developed; (c) ombudsman or other informal advocacy;

(v) Transactional: this can have many different forms, depending on the nature of the transaction, which can include regulatory or legislative rule-making as well as individual transactions.

(vi) Other sorts of work, such as counselling, offering assistance to clients who represent themselves.

In terms of the purposes of clinical education, students can learn real-life skills in all these areas, clients without resources can be assisted in most of them, and cause-based legal work can be carried out in particular under categories (i) and (iv), though it could also be that campaigning organisations are the beneficiaries of legal services in the other areas.

It is also possible to make a rough estimate of the relative importance of the three purposes

9 Deena Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, (2003) 28 Yale J Intl Law 505 at 523. The central figure was Arthur Kinnoy, whose article *The Present Crisis in American Legal Education* (1969-1970) 24 Rutgers L Rev 1 included the call that law schools “reflect the reality of these exciting “new frontiers” of the legal profession”, rather than simply training technicians for corporate and government operations (ibid at page 5).

10 A 2010-2011 survey by the Center for the Study of Applied Legal Education, to which 163 of the 194 accredited law schools replied, revealed 1036 clinics that had clients and 1393 “field placement programs”; this grew from the 2007-2008 survey, which had 145 replies from 188 law schools, and identified 809 clinics based in the school and involving direct access to clients and 895 external clinics. See <http://www.csale.org/> (last accessed 22 May 2013).

11 Available at <http://www.cleaweb.org/new-clinicians> (last accessed 22 May 2013).

12 Note that students may in some states be apprentice members of the bar with rights of audience: for example, Guideline 15 of the Professional Guidelines of the Virginia State Bar (available at <http://www.vsb.org/pro-guidelines/index.php/bar-govt/third-year-student-practice-rule/>, last accessed 22 May 2013).

behind clinics. A recent survey of clinics¹³ notes that the most common forms of clinic – whether in-house or involving external placements – deal with typical lawyering skills (litigation and typical commercial practice areas such as wills and trusts and intellectual property). Cause-based clinics are present, though in smaller numbers. As for the more general cause of access to justice, the suggestion made from this recent survey is that law students are giving some 1,800,000 hours of free legal advice per annum:¹⁴ not all of this will involve indigent clients, but much of it may well secure services that would otherwise be beyond the means of clients.

2. Clinical Legal Education in Other Jurisdictions

The US experience is not matched elsewhere in terms of extent, but clinical programmes do exist in other jurisdictions. In the United Kingdom, clinics have been established since the 1970s at Kent University, and there are now several programmes after an expansion in interest around the turn of the century.¹⁵ These have similar objectives to those in the US, namely the development of skills that would be of benefit in practice but also public service motives (albeit that the “cause-based” lawyering does not seem to be an overt feature beyond securing access to justice).¹⁶

Similarly, in Australia, clinics have been operating since the 1970s, and expanded in the 1990s as several new law schools opened.¹⁷ There are now legal clinics at many law schools.¹⁸ They tend to be general in nature, though, as Campbell and Ray describe in *Specialist Clinical Education: An Australian Model*,¹⁹ some attempt to concentrate on a particular area, noticeably family law. Again, the rationale seems to be a mixture of the development of useful skills for students and the need to secure access to legal assistance for those who could not afford to pay privately.²⁰

Clinics also exist in many jurisdictions, both of the common law and civil law tradition, in the Americas, Asia, Africa, Europe, with similar motivations.²¹ So the worldwide network, the Global Alliance for Justice Education, emphasises the value of clinical education of law students as a way of ensuring that those who chose to enter a legal career are aware of the potential for lawyers to promote access to justice.²²

13 The CSALE survey of 2010-2011, in fn 10 above.

14 CSALE survey of 2010-2011, fn 10 above, page 20.

15 See Richard Grimes and Hugh Brayne, *Mapping Best Practice in Clinical Legal Education*, UK Centre for Legal Education, October 2004, available at <http://www.ukcle.ac.uk/projects/past-projects/clinic/> (last accessed 22 May 2013); and Marson et al, *The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective*, (2005) 7 Int'l J Clinical Legal Educ 29.

16 Grimes and Brayne, *Mapping Best Practice*, pp14-15.

17 Jeff Giddings, *Clinical Legal Education in Australia: A Historical Perspective*, (2003) 3 Int'l J Clinical Legal Educ 7.

18 See the Clinical Legal Education Guide (9th ed, for 2009-2010), Kingsford Legal Centre at the University of New South Wales, <http://www.law.unsw.edu.au/centres/faculty-centres/kingsford-legal-centre/students> (last accessed 22 May 2013).

19 (2003) 3 Int'l J Clinical Legal Educ 67.

20 So Campbell and Ray, op cit, note that more specialist clinics were developed at Monash University to allow students “to develop ... skills ... to a more sophisticated level” and that the some clinics developed in particular response to the reduction in legal aid as part of government policy: (2003) 3 Int'l J Clinical Legal Educ 67 at 67-68.

21 *The Global Clinical Movement, Educating Lawyers for Social Justice*, Frank S Bloch (Ed), OUP, New York 2011, Part I.

22 See its mission statement: <http://www.gaje.org/about-gaje/mission-statement/> (last accessed 25 May 2013).

3. Clinical Legal Education in New Zealand

New Zealand, however, has not followed its neighbour across the Tasman.²³ For example, and accepting that the implication from this must be a matter of caution, the Membership Directory of the Australasian Law Teachers' Association reveals only a handful of New Zealand-based members of the Clinical Legal Education group.²⁴ A manual review of law school prospectuses or online lists of course offerings indicates no clinical legal course, save that the University of Auckland Faculty of Law allows students to earn credit from a 75-hour community placement accompanied by a reflective essay²⁵ and to obtain credit towards the compulsory legal research course from a 40-hour community placement.²⁶ In the past, the Law School at the Victoria University of Wellington had offered an internship opportunity for Honours and LLM students, but this was not available in 2013;²⁷ and similarly the University of Canterbury Law School has in the past offered a legal internship, but not in 2013.²⁸ On anecdotal evidence, however, it is possible that some work that is clinical in nature is achieved under the guise of individual supervised research projects. Moreover, it is also understood that interest about developing a clinical experience, which may lead to programmes being announced imminently.

The lack of formal clinical courses thus far does not mean that students do not engage in practical work during their degrees (excluding from this the mooted and similar competitions that do not involve real problems): rather that there is limited such work done for credit. Opportunities are provided for students to be involved in legal centres and other community work. For example, the University of Otago is involved in the Dunedin Community Law Centre (established by students in 1980 and currently having four solicitors and other full time staff supplemented by 120 students and 80 other lawyers).²⁹ Similarly, law students at the University of Canterbury may volunteer for the Community Law Canterbury law centre³⁰ and those at the University of Waikato may volunteer for the Hamilton Law Centre.³¹

Equally importantly, students have formed their own social justice organisations. Students at the University of Auckland formed the Equal Justice Project, which is involved in various pro

23 It is not the only jurisdiction to be conservative in the take-up of the model: see Lawrence Donnelly, *Irish Clinical Legal Education Ab Initio: Challenges and Opportunities*, (2008) 13 Intl J Clinical Legal Educ 56, describing the nascent programme at the National University of Ireland, Galway.

24 See <http://alta.edu.au/membership-directory.aspx> (last accessed 25 May 2013): 5 of 131 members.

25 University of Auckland Faculty of Law Undergraduate Handbook 2013, pages 57 and 94 (course LawGenrl 447 – Community Law Project).

26 Handbook, pages 76 and 94.

27 See <http://www.victoria.ac.nz/law/study/courses/laws-459> (last accessed 25 May 2013).

28 See <http://www.canterbury.ac.nz/courseinfo/GetCourseDetails.aspx?course=LAWS382&year=2013> (last accessed 25 May 2013). Note also that the University of Canterbury developed a community engagement course for undergraduate students as part of the response to recent earthquakes: <http://www.canterbury.ac.nz/courseinfo/GetCourseDetails.aspx?course=CHCH101> (last accessed 25 May 2013).

29 See <http://www.dclc.org.nz/modules/content/index.php?id=21> (last accessed 25 May 2013) and the University of Otago Faculty of Law Handbook 2013, page 83.

30 University of Canterbury School of Law Undergraduate Handbook 2013, page 24; there is also a useful guide for courses students might want to take if they wish to have a career in community law (page 6 of the Handbook).

31 University of Waikato Te Piringa Faculty of Law Undergraduate Handbook 2013, page 67; there is a member of staff designated as Director of Clinical Legal Education and Competitions.

bono projects, including working at community law centres.³² A similar body, the Wellington Community Justice Project has been established recently by students from Victoria University of Wellington.³³ No doubt these reflect similar motivations of securing wider access to justice whilst learning useful skills.

B. Concerns as to the Extension of Clinical Legal Education in New Zealand

The mere fact that there has been a growth of experiential learning in other jurisdictions does not mean that it is a good idea for New Zealand law schools, even presumptively so. However, it does suggest that there is good reason to investigate and assess the value of adopting experience from overseas to New Zealand. The following major questions arise, which may impact on whether a clinical programme should be developed and, if so, the form it should adopt:

- (i) Is the structure of legal education different, such that there is less call for university law schools to be involved in experiential learning?
- (ii) Are there legal or ethical reasons (relating both the interests of students and of clients) why university law schools and their students should not be concerned with the provision of legal advice and services?

1. Structure of Legal Education

Part of the rationale for clinical legal education, noted above, is the value of experiential learning as part of the move from being a student to being a practitioner. However, that does not mean that a university law school should use clinical courses, because there is a distinct question of where practical skills should be learned. In other words, is it primarily the job of the legal academy or of the profession (including the bar examiners) to ensure that students turn into good practitioners?

A number of factors may be relevant to answering the question of the extent to which degree-conferring law schools should be a place for learning practical skills. For example, if a significant number of students undertake a law degree because it gives them an understanding of legal structures so that they are equipped to work in policy-related areas – the concept of a law degree as a good general degree – the introduction of practical skills may be of limited value to that proportion of students. Similarly, if the arrangements for admission to the legal profession include a significant period of training before a graduate is admitted to practice before the courts, the legal academy may suggest that its role is to concentrate on teaching doctrine, with more practical skills left to post-degree processes.

In this context, it is worth noting that in New Zealand law is an undergraduate degree, with those who want to enter practice taking a further professional qualification.³⁴ However, this does not rule out experiential programmes. At most, it means that the construction of the law degree can proceed in the knowledge that there are other places in which a law student could be required to demonstrate practical skills essential for practice. Clinical learning would only be excluded from

³² University of Auckland Faculty of Law Undergraduate Handbook 2013, page 95.

³³ <http://wellingtoncjp.org/> (last accessed 25 May 2013).

³⁴ See http://www.nzcle.org.nz/about_us.html (last accessed 25 May 2013) and the various regulations referred to there: there is a requirement for graduates to undertake a Professional Legal Studies course.

the law degree if it was shown that it is not possible to teach doctrine other than through typical university-style lectures and seminars. It is worth noting that the different jurisdictions in the UK have undergraduate law degrees, followed by a professional training course; this has also been the case in Australia (though some law schools now offer post-graduate law degrees). This has not prevented clinical legal education developing.

Of course, it can also be said that the possibility of entry to the profession shortly after obtaining a law degree does not justify giving a priority to practical lawyering skills at the degree stage. After all, those who control admission to the bar can always insist on a wider course of training before admission or take such steps as requiring an apprenticeship period or supervised practice before direct responsibility for client work or solo practice is permitted, thereby ensuring supervised learning of practical skills.³⁵

Accordingly, the structure of legal education at both degree and bar examination level is a largely neutral feature in determining the advisability or otherwise of including a clinical programme: the only proviso to this is whether a clinical course can be used to teach students properly, which introduces the ethical component of the question.

2. Legal and Ethical Concerns

The propriety of clinical legal education involves the need for pedagogical soundness to satisfy the needs of students. As clients are involved, there must be suitable safeguards to secure professionalism and competence. Furthermore, it may also be relevant to examine more systemic matters such as the level of access to justice, which can cover both the needs of those without funds who need fairly typical legal services and also the needs of those who want to use the law to promote a perspective. In short, the legal and ethical concerns reflect the purposes that have been put forward for experiential programmes.

(a) The Student Perspective

There are many ways in which tuition can be offered to a student: what works best may depend on the learning style of the particular student and the teaching abilities of the particular academic. As Stuckey notes, the experiential approach is one that “integrates theory and practice by combining academic inquiry with actual experience”.³⁶ The essential idea – interactions between students and “real” clients, moderated by the academic – can clearly involve genuine inquiry that furthers the purpose of education and academic study. It happens to do so in the context of a real situation that is developing rather than a past situation that is being described in a case report or text. There is no reason to suggest that this cannot be done in a pedagogically valid manner. There may be practical points, such as whether it is more difficult to organise or requires additional resources: but if those points can be resolved, it becomes a matter for the faculty to ensure academic validity. Accordingly, a student’s needs can be satisfied.

35 For example, the English Bar’s Code of Conduct provides in Rule 203 that a barrister cannot exercise rights of audience unless he or she has been in practice for three years other than as a sole practitioner (available at <http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-ii-practising-requirements/> (last accessed 25 May 2013)). And in New Zealand statutory regulation requires that someone has 3 years’ legal experience in New Zealand in the previous 5 years: regulation 12 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, SR 2008/188, as amended.

36 Roy Stuckey, *Best Practices for Legal Education*, CLEA, Columbia, 2007, p121.

(b) The Client Perspective – Fair Trial and Equality Rights

It goes without saying that an appropriate level of service provision that meets standards of professionalism is necessary. There is, however, a wider perspective to consider, namely the adequacy of access to justice for clients as a group. Clinical legal education is linked with a premise that a level of unmet need requires philanthropy through law schools. So, for example, Harvard Law School's Legal Services Center describes itself³⁷ as having been established in 1979 "with a commitment to combine education and service in the study of law". Its purposes are set as:

"to educate law students for practice and professional service in a fully functioning law office; to harness the energies and efforts of those law students to meet the legal needs of a *diverse, urban clientele*; to *experiment* with approaches to increase access to legal services; and to study and understand the public policies and institutions that most directly affect *lower income individuals and families*."

Different readers may find different implications from the emphasised words. A positive reading is that the aim is to allow students to become aware that there are laws which particularly affect these sections of society (housing law, welfare rights etc) and so students should be aware that law is not just a tool used by business (that being the main job market for students from the top law schools). A less positive reading is that students will benefit from seeing how a law office works and might as do so not at the expense of corporate clients and the law firms they employ but by practicing on "diverse, urban" and poor clients; since such clients do not have corporate law problems, the students will have to learn practical skills in the context of the areas of law relevant to the clients.

These implications are on a spectrum involving the interests of the student rather than the client. If the focus is on the interests of the client, it becomes a matter of benefitting from the 'noblesse oblige' concept that those who have the good fortune to be entering a lucrative career should donate some of their time and ability to those less fortunate in society.³⁸ But there may be a tension here with the human rights standards for access to justice. In short, a right to a fair trial can be found in international human rights law,³⁹ which may require legal aid for those who cannot afford the costs of a lawyer.⁴⁰ However, what is essential is that there is adequate provision in a state, not whether there is adequate provision by a state: the obligation of the latter is to intervene when there is a gap in provision. The Australian experience is worth reiterating here: part of the growth of clinical legal programmes in the 1990s was that government funding was provided as an

37 See www.law.harvard.edu/academics/clinical/lsc/ (last accessed 25 May 2013).

38 See the discussion of the benefits of pro bono work by Michael Kirby, a former Justice of the High Court of Australia, in his forward to Keyzer et al (ed), *Community Engagement in Contemporary Legal Education: Pro Bono, Clinical Legal Education and Service-Learning*, Halstead Press, Canberra 2009.

39 For example, Article 14 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

40 The express guarantee of legal aid in relation to criminal matters (see Article 14(3) ICCPR) does not exclude it in civil matters if it is necessary to secure fairness: see, for example, *Airey v Ireland* 2 EHRR 305, which decided that Article 6 of the European Convention on Human Rights (4 November 1950, 213 UNTS 222 (or CETS No 5), entered into force 3 September 1953), which is similar to Article 14 of the ICCPR, required legal aid for judicial separation proceedings in light of their complexity.

alternative to legal aid in family law cases.⁴¹ Of course, this may give rise to a significant tension between the Law School and the local profession.⁴² Nevertheless, securing adequate provision via legal clinics is both better than having no legal assistance and may be adequate to ensure that trials are fair.

Fair trial rights, however, are only one part of the rights-based framework. The systematic provision of legal aid in the Legal Aid and Advice Act 1949 (UK) followed the Report of the Committee on Legal Aid and Legal Advice (the Rushcliffe Committee) of 1945.⁴³ Its starting point was that “Legal aid is not a charity stemming out of private philanthropy but is a right which the state has a duty to foster and protect”.⁴⁴ So legal aid in the form of paying private lawyers’ fees was part of the series of reforms, including the creation of the National Health Service, that were designed to be pillars of the more egalitarian society that was to be created out of the destruction of the first part of the Twentieth Century. In short, socio-economic status would not condition access to necessary professional services, whether from doctors or lawyers.

This introduces a new motif: it is not the obligation to ensure a fair trial (which might well be secured through philanthropy, including pro bono service provision by lawyers or law students), but the right to be treated equally. This right is central to the ICCPR: Article 2 prevents discrimination in relation to other fundamental rights (including that to a fair trial, a part of which is access to legal advice)⁴⁵ and Article 26 goes further and provides a free-standing right to the equal protection of the law, and so not to be discriminated against in relation to any legal right, whether fundamental or otherwise. It is not necessary to reach a final conclusion as to how far this obligation goes: for present purposes, it is sufficient to say that it provides a solid reason for caution about two-tier systems of legal provision. Given the state’s obligation to ensure access to legal services irrespective of socio-economic status, this should mean advice from a practicing lawyer, since that is what is enjoyed by those who have the wherewithal to fund such access.

(c) The Regulation of Legal Advice

There is also a specific issue, at least in the New Zealand context, of the lawfulness of students seeing clients; clearly, a university-based clinic would not wish to breach any legal regulations. The Lawyers and Conveyancers Act 2006 (NZ) makes it a criminal offence to provide legal services or describe oneself in a manner that suggests one is providing legal services unless one is qualified as

41 Campbell and Ray, *Specialist Clinical Education: An Australian Model* (2003) 3 Intl J Clinical Legal Educ 67 at 68: instead of responding to arguments that legal aid be restored from where it had been cut in 1996, the government turned to other options. “One such measure was the discovery by the government of clinical legal education, with its use of students as “free labour” and its connection with Universities, which might be expected to contribute to the costs of programs. In its 1998 budget the government allocated funding for new clinical legal education projects “to maximise service delivery to disadvantaged clients and co-operation with universities”.”

42 See Giddings et al, *The First Wave of Modern Clinical Legal Education in The Global Clinical Movement, Educating Lawyers for Social Justice*, Frank S Bloch (Ed), OUP, New York 2011, pp10-11. This may be a major concern, given the imperative of finding jobs for graduates and raising funds for the academic mission.

43 Cmd 6641.

44 See Alex Elson, *The Rushcliffe Report*, (1946) 13 U Chicago L Rev 131 at 134: Elson called for the Supreme Court or the Attorney-General of the United States to establish a committee to consider the shape of similar proposals in the USA. He noted that if nothing was done and the legal profession remained indifferent, the consequence would be that “Injustice and deprivation will be the toll, and our practices will continue to fall far short of our preachments”. (Ibid, p144)

45 This is also secured by Article 14 of the ECHR for Council of Europe members.

a lawyer and holds a current practising certificate.⁴⁶ A somewhat convoluted journey through the definitions in section 6 of the Act is necessary to understand what is actually proscribed. First, legal services are “carrying out legal work for any other person”. Secondly, there is a definition of legal work: it includes “(a) the reserved areas of work: (b) advice in relation to any legal or equitable rights or obligations: (c) the preparation or review of any document that— (i) creates, or provides evidence of, legal or equitable rights or obligations; ...”. Thirdly, there is the following definition of the “reserved areas of work” as:

“work ... (a) in giving legal advice to any other person in relation to the direction or management of— (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or (ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or (b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or (c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; ...”

Accordingly, the “reserved areas” are limited to work in front of New Zealand courts and tribunals. As such, any experiential work relating to domestic law has to be done under the supervision of someone with a practicing certificate. However, it is worth noting, as a precursor to the next section, that a clinic operating in international human rights law does not present such practical issues: that is not a reserved area and the other component of what is defined as legal work – referring as it does to “legal or equitable rights or obligations” – does not seem apt to cover rights arising under international legal treaties that are not directly enforceable in the New Zealand’s dualist legal system.⁴⁷

C. The Value of an International Human Rights Clinic

1. Introduction

Thus far we have a number of propositions. First, clinical legal education supports various purposes, including worthwhile training for future practitioners and social justice purposes, including extending access to justice and introducing lawyering for causes. As to its application to New Zealand, the imperative that clinical education complies with domestic legal and ethical requirements as to the provision of legal services requires supervision by someone with a practicing certificate except in relation to international human rights work. Moreover, even if law schools are able to secure this, there remains the concern about whether the existence of clinical education amounts to or supports a two-tier service provision that is problematic from an equal access to justice perspective.

46 Lawyers and Conveyancers Act 2006 (NZ), s21; there are exceptions in relation to overseas lawyers who hold themselves out only as able to practice in relation to the overseas jurisdictions (s25) and various situations such as working for a community law centre (which offer various services under contract to the Ministry of Justice, which can include advocacy, regulated by the Legal Services Act 2011) or appearing when a court permits it (s27). The practising certificate is issued by the New Zealand Law Society on it being satisfied that fees are up to date and the person remains a “fit and proper person” to be a lawyer: ss39-42.

47 A caveat is that “legal work” is said to “include” the various elements set out and so it might be argued that other areas could be covered, including advice and action in the international legal sphere.

This section outlines why an international human rights clinic presents fewer concerns from the unequal access to justice perspective and provides significant opportunities for both student-learning and meeting unmet needs.

2. The Purposes and Practices of Human Rights Clinics

A recent survey of clinics in the USA⁴⁸ indicates that there are 30 in-house human rights clinics in USA law schools and 20 that involve field placements. For example, the University of Virginia Law School clinic⁴⁹ involves placing students to work on projects with NGOs in the USA and abroad, though not undertaking direct work for lay clients. Hurwitz, who directs the Virginia clinic, has noted of human rights clinics that “Students learn many of the same skills in a human rights clinic as they would in traditional clinics – with the added dimension of transnationalism”.⁵⁰ She provides a useful list of skills that should be acquired in all clinics, including a human rights clinic: research (in domestic and international law), writing skills (legal, factual and advocacy), oral communication, critical thinking, problem solving, integrating theory and practice, professionalism, competence, collaborative working and working effectively under pressure.

Indeed, Hurwitz points out that there may be an additional dimension, because of differences in terms of “the client, the lawyering process and the fora”.⁵¹ As such, there may be additional experiences that can be secured from a human rights clinic. It is worth considering these further.

(a) The Client

The client may often be not an individual or typical corporate client but an organisation in civil society:⁵² indeed, the relevant human rights standard might be viewed as the client in the sense that there is work that might involve seeking to promote access to justice or to give practical effect to equality standards.⁵³ In this way, a human rights clinic is one that can illustrate to law students that there are career opportunities in cause-based lawyering and in functions such as building capacity within a society to operate in a rights-compliant fashion, where legal skills may be particularly useful. If one criticism of a typical law school curriculum is that it might create too narrow impression that the practice of law is all about resolving disputes between two parties, which is the paradigm suggested by an emphasis on reviewing decided cases, then a clinic that focuses on human rights work may be particularly valuable in expanding the horizon.

(b) The Lawyering Process

48 The CSALE survey for 2010-11: fn 10 supra.

49 <http://www.law.virginia.edu/html/academics/practical/ihrclinic.htm> (last accessed 25 May 2013).

50 (2003) 28 Yale J Intl Law 505 at 532.

51 (2003) 28 Yale J Intl Law 505 at 533.

52 Hurwitz notes an exception to this in that a clinic with a focus on refugee work will often have real clients: (2003) 28 Yale J Intl Law 505 at 534-6. The CSALE survey for 2010-11 lists asylum as a separate area, having 22 in-house clinics and 11 field placement clinics. The concern expressed in this article about not allowing clinics to undermine situations when there ought to be proper funding to secure access to a practitioner is one that applies to refugee work, which may involve clients with real vulnerabilities and issues that require experienced advocacy.

53 For example, the relevant clinic at Harvard Law School involves both work in Cambridge and travelling with supervisors “to promote respect for the rule of law” as well as documenting human rights abuses: <http://www.law.harvard.edu/programs/hrp/ihr.html> (last accessed 25 May 2013).

Hurwitz comments that the lawyering process is different because the subject-matter may be in a state of flux (which often means that work may be on the cutting edge), and it rarely involves the standard legal process of obtaining a judgment and then enforcing it.⁵⁴ So there are contrasting positives (of securing progress) and negatives (the obstacles to enforcement), which students benefit from understanding by experience.

The examples given by Hurwitz involve collecting evidence through field-work. Other features contribute to this state of flux: in the first place, international human rights standards, arising from treaties, other international standards and jurisprudence, is relatively novel and so is developing as new issues arise for consideration. In addition, new mechanisms are being added: for example, the African Court of Human Rights started its operation in November 2006.⁵⁵ Moreover, more established bodies, such as the European Court of Human Rights and the Human Rights Committee of the United Nations, have accepted that human rights treaties are to be interpreted as living instruments, such that there is no strict concept of precedent: there are countless examples of these bodies departing from previous rulings in light of their view that it is time to move the standard forward.

(c) *The Fora*

As to the fora being different, this is a reference to the mechanisms available within the international human rights framework. Using the United Nations as an example, its obligation to “achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”⁵⁶ has led to the development of mechanisms through its Human Rights Council,⁵⁷ and through the bodies established pursuant to each of the nine main human rights treaties to monitor the implementation of each treaty.⁵⁸ For example, the International Covenant on Civil and Political Rights 1966⁵⁹ provides in Articles 28 and following for the creation of the Human Rights Committee.⁶⁰

These bodies do three types of work. They all monitor progress in the basic obligation to secure compliance with human rights standards by calling on governments to report on the situation in their country. This is reviewed, the process including the questioning of government officials, and comments and recommendations are made. But it is important to note that the process of review involves input by civil society. So, using the example of the Human Rights Committee, it

54 (2003) 28 Yale J Intl Law 505 at 536-538.

55 See <http://www.african-court.org/en/index.php/about-the-court/brief-history> (last accessed 25 May 2013).

56 Charter of the United Nations, 26 June 1945 (available at <http://www.un.org/en/documents/charter/>, last accessed 25 May 2013).

57 Established in 2006 as a subsidiary organ of the General Assembly to replace the Commission on Human Rights: General Assembly Resolution 60/251. See <http://www2.ohchr.org/english/bodies/hrcouncil> (last accessed 25 May 2013).

58 A summary of the treaties, their monitoring bodies, and lists of the additional treaties and standards, is compiled by the Office of the High Commissioner for Human Rights at <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last accessed 25 May 2013). For a list of the main human rights standards, see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> (last accessed 25 May 2013); see also <http://www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx> (last accessed 25 May 2013).

59 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

60 A Committee of 18 individuals of “recognised competence in the field of human rights”.

encourages states to involve members of civil society in the compilation of their reports, and also allows separate “shadow” reports which comment on the government report.⁶¹ In addition, the Human Rights Council has a reporting mechanism, the Universal Periodic Review, which judges states against all human rights standards; it also calls for involvement by civil society.⁶² Naturally, successful participation in a shadow-reporting process calls for research-based advocacy, a core legal skill.

In addition, UN bodies may be able to initiate inquiries, typically into allegations of serious or systemic abuses of human rights. For example, the Committee Against Torture and the Committee on the Elimination of Discrimination Against Women may carry out such investigations in states that have accepted their jurisdiction to do so; the trigger is the receipt of reliable information.⁶³ Similarly, the Human Rights Council has a “Special Procedures” process,⁶⁴ pursuant to which investigations may be carried out into the human rights situation in a particular country or into a theme. Naturally, civil society groups can play a role in invoking these processes, which again will benefit from research-based and well-drafted calls for investigation.

The Special Procedures processes may also lend themselves to raising situations affecting individuals, which is akin to the more typical situation of representing a client seeking a solution to a specific problem. Similarly, various of the treaty monitoring bodies may consider individual complaints alleging a breach of a particular right. For example, complaints to the Human Rights Committee by individual victims are permitted if the state has adopted the First Optional Protocol to the ICCPR.⁶⁵ Although the procedural rules are relatively relaxed when compared to a typical instance of civil litigation, there are some rules (such as the need to exhaust domestic remedies if they are available and not unreasonably delayed) and persuasive pleading of a case is likely to secure benefits for a client: so, again, core legal skills come into play.

It is also worth noting that there might be instances in which third parties can intervene in cases before international tribunals. For example, the European Court of Human Rights allows interventions by third parties, pursuant to Article 36 of the European Convention on Human Rights.⁶⁶ For example, in *Kiss v Hungary*,⁶⁷ which involved a successful challenge to the disenfranchisement of those placed under guardianship. The applicant was represented by a legal officer of the Mental Disability Advocacy Center, a transnational NGO that works in particular in various parts of Eastern Europe.⁶⁸ In addition, the President of the Court allowed a written intervention by the Harvard Law School Project on Disability.⁶⁹

61 See Office of the High Commissioner for Human Rights, Fact Sheet No 15 (Rev 1), *Civil and Political Rights: The Human Rights Committee*, available at <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1.en.pdf> (last accessed 25 May 2013).

62 See <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (last accessed 25 May 2013).

63 Article 8 of the Optional Protocol to the Convention on the Elimination of Discrimination Against Women 1979, 1249 UNTS 13, and Article 20 of the Convention Against Torture 1984, 1465 UNTS 85.

64 See details at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last accessed 25 May 2013)

65 16 December 1966, 999 UNTS 171, entered into force 23 March 1976

66 CETS No 005; available at <http://conventions.coe.int/> (last accessed 25 May 2013).

67 appn 38832/06, 20 May 2010.

68 See <http://www.mdac.info/> (last accessed 25 May 2013).

69 <http://www.hpod.org/> (last accessed 25 May 2013).

3. New Zealand's Engagement with the International Human Rights Regime

New Zealand is a signatory to most of the core UN human rights treaties; as such, it participates in the reporting processes of the various monitoring bodies outlined above (and hence there are opportunities for civil society to engage by providing shadow reports). In addition, individual complaints are permissible under the ICCPR, CEDAW and CAT. The mechanisms available by virtue of membership of the UN, namely those that have their basis in the UN Charter, are applicable to New Zealand: these are the Universal Period Review process of the Human Rights Council and its Special Procedures.

However, it is apparent that there is relatively limited engagement with these mechanisms. So, no individual complaints have been taken under CEDAW or CAT. There have been individual complaints taken to the Human Rights Committee under the Optional Protocol to the ICCPR, but only 23 decisions have been made.⁷⁰ Of the last 10 of these, which span a decade, one barrister has taken 7 of them. The obvious implication is that there is not an abundance of lawyers who make active use of the UN complaints mechanisms. In relation to the reporting process, a review of the relevant records reveals that only a handful of shadow reports are typically lodged with the expert body. For example, at the last examination by the Human Rights Committee, in 2010, 5 civil society bodies filed material.⁷¹

4. Designing a Human Rights Clinic

(a) Outline

With these points in mind, what follows is a suggestion for experiential learning in the New Zealand context. A clinical legal education programme can involve placing students in another organisation and/or practitioner, or there can be a cadre of students working within the law school setting: in either form, it is possible that the students will be working with clients, but that is not necessarily so. In the context of international human rights law, the externship opportunity that presents itself is placing students with practitioners or with NGOs that might be involved in taking individual complaints to UN bodies or in drafting shadow reports. As noted above, the model used by the University of Auckland of having students placed somewhere for 75 hours and then required to provide a reflective essay can be used. It can be organised in a systematic fashion, with arrangements made to offer additional capacity for relevant organisations so as to allow them to undertake supplemental projects. As for the model of an in-house clinic, it is possible to put together a group of students who can be involved in the preparation of a shadow report or in taking individual complaints to a UN body.

⁷⁰ As listed on www.bayefsky.com (last accessed 25 May 2013).

⁷¹ 98th Session of the Human Rights Committee, 8-26 March 2010, <http://www2.ohchr.org/english/bodies/hrc/sessions.htm> (last accessed 25 May 2013).

(b) Ensuring Compliance with Ethical Standards

Those designing an international human rights clinic will, of course, wish to ensure that it meets the needs of its students, its clients, and that it complies with any relevant ethical and legal requirements. Looking first at the student perspective, it is clear from the account given of international human rights clinics in the USA that these are well-suited to the learning of skills that are useful for would-be lawyers: research and drafting are at the core of the suggested arrangements, including translating the wishes of the client (which may well be phrased in domestic legal terms) into the international human rights framework. If there is involvement in individual complaints, this is akin to pleading a case in any court context; if there is involvement in preparation of shadow reports, this is akin to the many opportunities for lawyers to be involved in advocacy at the policy level, dealing with systemic issues. In addition to these fully-transferable skills, which students can use in other areas of legal work, they will benefit from knowing about the additional fora in which legal skills come in useful, which may expand knowledge as to career options. From the perspective of the student, therefore, experiential education in international human rights law provides the opportunity to develop appropriate skills for a would-be practitioner and also to do so in a context that has some unique features. Such a clinic will lend itself to the cause-based lawyering that has played a role in the re-emergence of experiential learning in the USA.

From the perspective of the client, whether an individual with a specific problem or an organisation that brings pressure in relation to a particular cause, the need for appropriate professional standards will have to be part of the design for the programme. What of the concerns outlined above of avoiding the governmental obligation to ensure adequate access to justice? It can certainly be suggested that the need for equality of access to justice for individual complainants should extend to making use of international mechanisms. However, whilst the Council of Europe has a legal aid scheme for complaints being taken to the European Court of Human Rights, the UN bodies do not; although individual countries may provide assistance for applications to UN bodies, this is not so in New Zealand and might well be unusual. Accordingly, cases are invariably taken on a pro bono basis if the client is not one who can pay.

In any event, as noted above, there is limited use made in New Zealand of the individual complaint mechanisms. Accordingly, the existence of a clinic that supports such actions is more a matter of building capacity and ensuring that there is some provision made rather than a matter of playing a role in preserving a problematic two-tier structure of legal provision. The proposal is to build capacity to meet an unmet need rather than to be a cheaper, and perhaps less satisfactory, alternative. Further, because it relates to matters of international law, the restrictions outlined above on the giving of legal advice without a practicing certificate do not apply. In any event, it should not be a difficult matter to ensure that a clinic is organised in a manner that involves a practitioner to lead the clinic or, if the cost implications of that are problematic, to act as an adjunct to the faculty, sign any submissions as counsel and be on the record as such. Indeed, given the limited engagement of the legal profession in the process to date, involving practitioners will educate them as to the possible avenue of complaint for clients: this may be a source of work for the clinic.

As for the preparation of shadow reports, this could be done for a client or as an activity of the clinic. If the former, any clients will be a civil society body that is involved in social justice matters and making use of the international human rights mechanisms in this regard. Any offering of legal advice by those involved in the clinic will be analogous to being in-house counsel rather than providing externally-regulated legal services. In any event, non-governmental organisations often have lawyers sitting on their governing boards, offering pro bono advice on legal matters relevant to its operations or being involved in campaigning work. Placing students within such organisations as part of an experiential learning process should be a way of inculcating the pro bono ethic and allowing the organisations and students to form contacts that may be long-standing.

Accordingly, it is to be hoped that an international human rights clinic can benefit clients and society by providing access to international remedies that are currently under-used in New Zealand, whilst at the same time providing students with the benefits of experiential learning in an area of law that will also serve to widen their horizons as to the value that can be secured by becoming a lawyer.