

# Re-imagining the clinician profile

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There is a wealth of commentary on the benefits of Clinical Legal Education (CLE) to the stakeholders that engage with it. The student benefits through engaging in experiential learning<sup>2</sup> and being exposed to the delivery of access to justice in a very real sense, including the added element of ethics which may not form part of their law school curriculum. They can also benefit from the opportunity to develop and further their employability skills.<sup>3</sup> The latter would also be of benefit to graduate employers, who will see an improvement in the 'soft skills' of their potential new recruits. Local communities benefit from the provision of pro bono legal services in the wake of cuts to legal aid under the Legal Aid Sentencing & Punishment of Offenders Act 2012 and assistance can be provided on a number of matters from students advising on form filling to tribunal representation.<sup>4</sup> Charities too benefit from collaborating with student law clinics, where assistance can include the development of bespoke legal services.<sup>5</sup> The universities<sup>6</sup> under whose mantle the law clinics operate benefit from advancing their corporate social responsibility agenda, with added benefits coming through increased student recruitment<sup>7</sup> and publicity within their community. However, when the focus is turned on the academic clinicians who are involved in CLE there is a gap in the current literature. This chapter seeks to address this gap by exploring the evolving role that these clinicians play in HEIs and also the unique challenges they face, by offering some insights into how these clinicians can contribute to educational theory and ultimately assist in their career development. This re-imagining will all be examined in the context of the changes that

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<sup>2</sup>See generally: L Wortham, A Scherr, N Maurer and SL Brooks, *Learning From Practice: A Text for Experiential Legal Education*, 3rd edn (West Academic Publishing, 2016), 9-13, for a discussion on experiential learning.

<sup>3</sup> For the purposes of this chapter, the definition of "employability" is taken from the Higher Education Funding Council for England (HEFCE): "The transferable core skills that represent functional and enabling knowledge, skills, and attitudes required in today's workplace. They are necessary for career success at all levels of employment and for all levels of education." available at: [www.hefce.ac.uk/glossary/#letterE](http://www.hefce.ac.uk/glossary/#letterE)

<sup>4</sup>The free representation unit works in partnership with Nottingham Law School.

<sup>5</sup> An example would be Cerebra's legal advice research project with Cardiff Law School: [www.cerebra.org.uk/practical-help/legal-advice-research/](http://www.cerebra.org.uk/practical-help/legal-advice-research/)

<sup>6</sup> To be referred to throughout this chapter as Higher Education Institutions (HEIs)

<sup>7</sup> It could be argued that having an established and sustainable clinic provision may be a recruitment benefit for those staff coming from legal practice.

HEIs and academics are facing on an economic and regulatory perspective. The focus in this chapter will be clinicians who are employed within HEI law schools to either specifically deliver CLE or end up delivering it by virtue of their backgrounds in legal practise as a solicitor. They will be employed on an academic contract with an expectation to undertake scholarship but not all will produce research that will contribute to the Research Excellence Framework (REF).

Part one of this chapter will re-imagine the identity of these clinicians within HEIs. This will be achieved by first discussing the reasons for the increase in recruitment of clinicians within law schools<sup>8</sup> by analysing the 'clinical boom' of 2006 onwards.<sup>9</sup> Together with reasons why this increase can be problematic for clinicians by discussing the current terminology used to describe clinicians and whether this has a perceived effect on the wider academic staff and students. The section will conclude with introducing the argument that clinicians are under a duty to develop their research profile in CLE to avoid marginalisation.

Part two will explore the area of Clinical Legal Scholarship (CLS), including what is meant by CLS and how this field can be developed by clinicians through engaging with the provision of CLE. Particular focus will be given to how the delivery of CLE in HEIs could help develop the academic careers of clinicians that may have previously been restricted, had they engaged in the delivery of a purely theoretical or doctrinal study of the law. The argument for these former (or still current) solicitors engaging in CLE will be explored including how they can draw upon their lived experience to contribute to a growing educational theory and avoid being marginalised within the academy and advance their academic careers.

Part three will examine the reality of the role of clinician, by describing and discussing what threats and pitfalls there are to clinicians from engaging in CLS. This will be done by examining the role these clinicians have in university law clinics and the professional and educational duties placed on them. The subtle difference between clinical education and clinical experience will also be analysed in order to fully understand the demands on the clinician and how this may differ from other academics in the law school. Finally, the duties that the clinician owes to both the student and the client will be examined in the context of a duty to the employer to engage in scholarship.

Part four will examine what opportunities outside of CLS are available to clinicians. For example, whether engaging in CLE as a teaching methodology can reinforce a clinician's

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<sup>8</sup> Figures detailing the number of clinician working within Law Schools and or Law School Clinics were not available at the time of writing.

<sup>9</sup> See specifically D Carney, F Dignan, R Grimes, G Kelly, and R Parker, 'The LawWorks Law School Pro Bono and Clinics Report' 2014 (Lexis Nexis) [www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014](http://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014). 4

position within the law school. Specific examination of the seismic developments within the legal education sector; the Teaching Excellence Framework (TEF) and the Solicitors Qualifying Exam (SQE) will be undertaken from the perspective of the clinician.

Throughout this chapter, focus will return to the duty these clinicians owe to their HEIs through their employment; the duty owed to their students to provide the best educational experience; the professional duty owed to their law clinic clients and also the scholarly duty they owe to the CLS community and how this shapes the clinician profile.

### 1. Reimagining the clinician identity

In the UK, clinical programmes started in the 1970s and have flourished periodically at a significant number of law schools.<sup>10</sup> Throughout the 1980s and 1990s, there was sporadic development however numbers really boomed mid-way through the new millennium.<sup>11</sup> One of the reasons attributed to this growth were the many higher education reforms in the UK that advocated experiential and practice-orientated learning together with promoting problem-solving and a diversity of learning methods.<sup>12</sup> In 2006, 46 per cent of all law schools were doing pro bono work. This figure rapidly increased by 33 per cent in 2010 and more steadily by 5 per cent in 2014<sup>13</sup>, presumably because of the high numbers of law schools already involved.<sup>14</sup> Whilst not every HEI that was engaged in clinic or pro bono work over this boom period would require (or even have the resources to recruit) clinicians, these figures not only demonstrate the growth of clinic in the UK but also the *potential* growth in the opportunity for clinicians.

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<sup>10</sup> J Giddings, R Burridge, S.A.M. Gavigan and C.F.Klein 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford, 2011), 6

<sup>11</sup> K Kerrigan 'What is clinical legal education and pro bono?' in K Kerrigan and V Murray (ed), *A Student Guide to Clinical Legal Education and Pro Bono* (Palgrave MacMillan, 2011), 10

<sup>12</sup> J Giddings, R Burridge, S.A.M. Gavigan and C.F.Klein 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011),10

<sup>13</sup> D Carney, F Dignan, R Grimes, G Kelly, and R Parker, 'The LawWorks Law School Pro Bono and Clinics Report' 2014 (Lexis Nexis) [www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014](http://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014), 4 These figures should be treated with an element of caution, as they relate to the number of responding law schools as opposed to the actual number of law schools.

<sup>14</sup> Bloch makes an interesting point in that more clinical programmes may have developed and flourished in the UK, were it not for the success of the vocational postgraduate programmes organised with the Solicitors Regulation Authority and the Bar Standards Board. 14

However, the increased recruitment of clinicians brings with it issues regarding identity and what role they play within the law school. This is not problematic if they are recruited with the sole remit of clinic supervision and no requirement to teach and engage in scholarship.<sup>15</sup> However, clinicians recruited on an academic contract will also have to engage in a degree of scholarship, alongside their teaching commitments which may entirely consist of vocational or skills subjects. Even though a conscious choice has been made to enter academia, they will find themselves in a different place from a career point of view, then when in practice. To illustrate, it is common practice in HEIs for any new lecturing staff to hold a PhD and the same is true of many law schools.<sup>16</sup> There are, however, some exemptions for candidates who are professionally qualified, such as solicitors, which is how a number of clinicians satisfied the qualification criteria of a new lecturer. If a solicitor does not hold a doctorate, they will still bring a wealth of educational experience with them, through their route to qualification and post qualification experience (PQE).

Whilst some clinicians have been recruited without a PhD, there may be an expectation (actual or implied) that doctoral level study will be undertaken to a successful completion at some stage of their academic career. Thus leading to a perceived devaluation of their professional qualifications which sets them apart from their academic peers. This absence of a PhD not only highlights the lack of a highly respected academic qualification; it also highlights a vast difference in experienced culture between HE and the practicing legal profession. Indeed, clinicians themselves can contribute to this perceived identity crisis. Too many still identify themselves professionally first as 'lawyer' despite the fact their primary employment stems from teaching students and not representing clients.<sup>17</sup>

This begs the question 'what, if any, equivalency is awarded to the skill set and or PQE of a solicitor entering HE?'. The very simple and crude answer to this question, would appear to be none. This is not overly surprising, seeing as legal practice and HE are two separate professions and whilst there will undoubtedly be some element of skill transferability, both professions require a discrete, learned and experienced skill set. For

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<sup>15</sup> Whilst it is acknowledged that clinicians are involved in HEIs in numerous different contexts, such as delivering the Legal Practice Course (LPC) or other skills based offerings, the focus will be on the role of these clinicians in CLE.

<sup>16</sup> Although the QAA clearly states that 'effective student learning is facilitated by interaction with appropriately qualified, supported and developed teaching and support staff' QAA, *UK Quality Code for Higher Education, Part B: Assuring and Enhancing Academic Quality, Chapter B3: Learning and Teaching*, <http://www.qaa.ac.uk/assuring-standards-and-quality/the-quality-code/quality-code-part-b>, 6.

<sup>17</sup> DF Chavkin 'Spinning Straw into Gold: Exploring the legacy of Bellow and Moulton' (2003) 10 *Clinical Law Review* 245, 256.

example established academics<sup>18</sup> spend their resources and time focusing on research projects; from securing funding to having research published in an effort to obtain a 4\* REF rating<sup>19</sup>. Contrast with solicitors who have spent their resources on drafting bespoke contracts and agreements, negotiating complex settlements and representing clients at hearings.<sup>20</sup> Both sets of activities are highly specialised and respected in their own particular field. There is no questioning that qualified and practising solicitors are a highly educated and resourced body of individuals. It is also relatively straightforward to understand how they fit and operate in their natural habitat of a law firm, but not so they are now lecturers in the new setting of a law school, with a differing set of expectations and targets.

Even the terminology used to describe the role of a clinician is problematic and has potential in itself to illustrate the lack of integration this body of staff can experience with the wider law school faculty. The current literature includes a myriad of terminology to describe those engaged in CLE: clinician<sup>21</sup>, clinical teacher<sup>22</sup>, clinical law teacher<sup>23</sup>, clinical legal educator<sup>24</sup> to name a few; with 'clinician' having the edge over the rest. What is apparent from this, albeit brief, list is the common and uncontroversial use of clinic or clinical. What is striking though is the use of "teacher" or "educator", as opposed to researcher. Given the value placed on research outputs through the REF, the current terminology implies that "clinicians" are not research-focused academics, and are thus somehow less valuable to law schools than the latter group.<sup>25</sup> The non-research background of those engaged in CLE provides a possible explanation for the way in which clinicians are perceived. Certainly, whilst the type of research that a solicitor undertakes in legal practice differs to the research

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<sup>18</sup> The term academic applies to someone whose education and qualifications reflect a desire to critically analyse and discuss the law, rather than being engaged in either the practice of law or the delivery of vocational legal programmes.

<sup>19</sup> Discussion on the REF to follow in this chapter.

<sup>20</sup> See G Bellow and B Moulton *The Lawyering Process: materials for clinical instruction in advocacy* (Foundation Press, 1978) for a detailed examination on the role of lawyers; a US text but still relates to a similar set of skills to that espoused by a solicitor in England and Wales.

<sup>21</sup> J Hall and K Kerrigan, 'Clinic and the wider law curriculum' (2011) 15 *International Journal of Clinical Legal Education* 15

<sup>22</sup> DF Chavkin 'Spinning Straw into Gold: Exploring the legacy of Bellow and Moulton' (2003) 10 *Clinical Law Review* 245

<sup>23</sup> L Curran J Dickson and MA Noone 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programmes to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104

<sup>24</sup> MA Noone, 'Time to rework brand CLE?' (2013) 19 *International Journal of Clinical Legal Education* 341

<sup>25</sup> This theme could also be extended to if students perceive the terminology used and are clinicians seen as somewhat non-academic given the terminology used.

conducted in HE, the skill does not and using the term 'practical legal research' to describe this research leads one to conclude that if something is practical it is non-academic<sup>26</sup>

Whilst clinicians might not object to the expectation of contributing some form of research output<sup>27</sup>, without a doctrinal research background the dilemma may be on what subject to focus. A sensible starting point would be to look at the discipline practised prior to entering HE and engage in traditional doctrinal subject specific research. For example, former criminal law specialists may decide to write about the law of Joint Enterprise; former conveyancers may look at the suitability of the Land Registration Act 2002 and former Personal Injury solicitors may decide to analyse the finer nuances of medical negligence law. Whilst these examples may be slightly tongue in cheek, they do make a valid point. These solicitors (whatever their PQE) will be well versed in the procedural and practical side of the law they practised, however their lack of tangible doctrinal research will place them virtually back to square one when it comes to developing a research portfolio. They lack the academic network and community that a newly appointed lecturer fresh from a PhD viva would have. In this instance, the clinician will need to closely examine exactly what their role is and how best they are to develop into the role of a legal scholar.

Even though the subject specialist doctorate (PhD) is still the most common form of doctorate in the UK,<sup>28</sup> the clinician would be wise to consider the developing Professional Doctorate as a suitable alternative to a PhD. Since the early 1990s, a range of 'professional' or 'practice-based' doctorates have emerged in response to the needs of differing professions.<sup>29</sup> The aim of the professional doctorate is to 'make a significant original contribution to professional practice through research.'<sup>30</sup> The number of institutions providing the professional doctorate has grown over the last five years, with the provision currently in four

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<sup>26</sup> This question does lend itself to the larger discussion on the perceived conflict between the liberal law educators and legal practice educators, as most prominently addressed in A Bradney, 'Ivory Towers & Satanic Mills, Choices for University Law Schools' (1992) 17 *Studies in Higher Education* 5. However this could now be contrasted with Cownie's assertion that HE is now forming its closest ties with legal practice and the discipline of law has left behind its purely doctrinal legal, see F Cownie 'Legal Academics, Culture & Identities' (Oxford, Hart Publishing, 2004) p 198 as cited in J Guth and C Ashford 'The Legal Education and Training Review: regulating socio-liberal legal education?' (2014) 48 *The Law Teacher* 5, 10

<sup>27</sup> See also F Bloch, 'The case for clinical scholarship' (2004) 4 *International Journal of Clinical Legal Education* 7, 21 'clinical teachers are academic lawyers and scholarship should be what they do'

<sup>28</sup> QAA 'Doctoral degree characteristic statement' 6

<sup>29</sup> *Provision of professional doctorates in English HE Institutions*. Report for HEFCE by the careers research and advisory centre, January 2016, 1

<sup>30</sup> *Provision of professional doctorates in English HE Institutions*. Report for HEFCE by the careers research and advisory centre, January 2016, iii

main areas: education, business, psychology and health & social care.<sup>31</sup> With the research focus of the Professional Doctorate being practice based rather than knowledge based, this allows the clinician the opportunity to achieve a doctoral qualification by using their lived experience and perhaps also, reimagining the view of clinicians held by other members of the legal academic community. Engaging in this practice based research allows the clinician to form their own networks and research communities of not only fellow clinicians engaged in practice based research but also colleagues from other disciplines. The hope being here that more collaborative research on clinical practices will be produced.

Where there is not the same duty placed on the clinician by the HEI to engage in such scholarship, the result will can contribute to the marginalisation of these clinicians , they can be side-lined as ‘skills teachers’, who are not been afforded the same opportunities as their research colleagues to develop a research profile and enjoy career progression down the reader/professor route.<sup>32</sup> However, the focus of this chapter is on those clinicians who do have a duty<sup>33</sup> to engage in scholarship and many will face the pressure of ‘publish or perish’,<sup>34</sup> but will struggle to know how to develop a research strategy and publication record and to find the correct outlet for their skills and experience. However, the author proposes by re-imagining their role and identity, clinicians can still fulfil the duty owed to their employers to engage in research by embracing the viable alternatives, such as clinical legal scholarship<sup>35</sup> (CLS) rather than subject specific doctrinal research. This allows the clinician to used their lived experience and current skill set but also to contribute to the indelible research culture of HEI.

## 2. Reimagining Clinical Legal Scholarship

*‘The importance of scholarship to the careers of law teachers is difficult to overestimate. Hiring, promotion, collegial recognition, societal*

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<sup>31</sup> *‘Understanding professional doctorates’*

[www.hefce.ac.uk/news/newsarchive/2016/Name,1073151,en.html](http://www.hefce.ac.uk/news/newsarchive/2016/Name,1073151,en.html)

<sup>32</sup> See later comments on the Teaching Excellence Framework

<sup>33</sup> See later discussion on the duty to engage in CLS.

<sup>34</sup> Reflected in a cartoon taken from the New Yorker magazine in 1996. Two professors watch as a third is about to be executed by a firing squad: ‘Its publish or perish and he hasn’t published’,

<sup>35</sup> For the purpose of this chapter, scholarship shall include ‘conventional research (discovery of new knowledge), innovative application or integration of existing knowledge. QAA, *UK Quality Code for Higher Education, Part B: Assuring and Enhancing Academic Quality, Chapter B3: Learning and Teaching*, 14

*prominence and intellectual satisfaction is mainly a function of the production of scholarship.*<sup>36</sup>

From as far back as the 1930s, scholars have been discussing the merits of CLE<sup>37</sup> and there is not much dissent to the claim that CLE is an effective teaching methodology.<sup>38</sup> So whilst the benefits to the clinical stakeholders are apparent and well documented, this leads to the central theme of this chapter: what opportunities arise (if any) to clinicians in engaging in CLE and more specifically CLS?<sup>39</sup> Is there a clear advantage to be gained by engaging in, teaching, writing about, publishing on the CLE movement?<sup>40</sup> Or are the beliefs that CLE lacks academic or intellectual rigour<sup>41</sup> so deep-rooted in HE that even the most valiant attempt to engage in CLS will be viewed as merely lawyering skills development? In order to attempt to answer these questions, an analysis of the forms that CLS takes, the opportunities available for clinicians to engage with such scholarship, and whether clinicians are even duty-bound to engage will be explored. However, before that it would be prudent contextually, to discuss integration or lack of integration with CLE and the curricula of UK law schools.

Proponents argue that whilst CLE has been included within law schools, either on an intra or extracurricular basis, it has never truly been accepted. Indeed Hall and Kerrigan surmise that clinics are valued and recognised, but are still seen as ‘something apart from regular law curriculum’.<sup>42</sup> Arguments for this can differ depending upon what country or jurisdiction a clinic is based but in the UK this seems to stem from the division of legal training into academic and vocational.<sup>43</sup> In the UK, law is distinct from other graduate professions in that around half

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<sup>36</sup> JS Elson, ‘The case against legal scholarship, or If the Professor Must Publish, Must the Profession Perish?’, (1989) 39 *Journal of Legal Education* 354

<sup>37</sup> See J Frank ‘Why not a Clinical Lawyer School?’(1933) 81 *University of Pennsylvania Law Review* 907

<sup>38</sup> MM Coombe, ‘Selling Intra-curricular legal education’, (2014) 48 *The Law Teacher* 281, 286

<sup>39</sup> Gold and Plowden describe Clinical Legal Scholarship as ‘scholarship that is undertaken by students, supervising lawyers and law lecturers that is observational, empirical or theoretical and focused on professional skills training, experiential learning and the teaching of professional responsibility and social justice’ N Gold and P Plowden, ‘Clinical Scholarship and the Development of the Global Clinical Movement’ in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 311

<sup>40</sup>F Bloch, ‘The case for clinical scholarship’, ‘The case for clinical scholarship’, (2004) 4 *International Journal of Clinical Legal Education* 7, Bloch has repeatedly used the term ‘movement’ to describe the advance of CLE within HE globally

<sup>41</sup> MA Noone, ‘Time to rework brand CLE?’ (2013) 19 *International Journal of Clinical Legal Education* 341, 345

<sup>42</sup> J Hall and K Kerrigan, ‘Clinic and the wider law curriculum’ (2011) 15 *International Journal of Clinical Legal Education* 15, 25

<sup>43</sup> From 2020, for an individual to be admitted as a solicitor, they would need to pass a new centralised exam, SQE, although at the time of writing the final detail of these exams is unknown. The graduate route referred to earlier in this chapter will no longer be an option. For further discussion on the SQE see part four of this chapter.

of those who study law at undergraduate level do not intend to enter the legal profession<sup>44</sup>. As a result, commentators have referred to the 'widespread disdain' that is felt by certain areas of academic lawyers for legal practice as it is viewed as a distraction from the intellectual mission of undergraduate scholarship.<sup>45</sup> Perhaps unsurprisingly, the work of clinicians have become more theoretical and conceptual as they seek a place of respect and importance within the academy.<sup>46</sup>

CLS began to develop at pace in the United States during the 'second wave of CLE' between the 1960s and 1990s.<sup>47</sup> This relatively recent blossoming of such research and scholarship lead to the formation in the US of the Clinical Law Review in 1994 by the Association of American Law Schools (AALS), the Clinical Legal Education Association (CLEA) and New York University School of Law, followed by in 2000 the creation of the International Journal of Clinical Legal Education (IJCLE) based at Northumbria University in the UK. While there are now peer-reviewed outlets for clinicians to publish their clinical scholarship, what does CLS mean? Whilst it is clear that 'the mere fact an article is written by a clinical teacher does not mean it is clinical scholarship'<sup>48</sup>, debate has long reigned over what direction clinical scholarship should take. These questions were posed by Peter Hoffman in the inaugural edition of the Clinical Law Review nearly 25 years ago, namely<sup>49</sup>:

- *'are there characteristics of clinical scholarship which distinguish it from other legal scholarship?'*
- *'is there a form or style peculiar to clinical scholarship?'* and
- *'is clinical scholarship confined to particular subject matter?'*

Whilst these questions will not be directly answered, the lack of any real definition for CLS demonstrates a real opportunity for the clinician. CLS can take the form of doctrinal, empirical, socio-legal, theoretical and/or comparative research and it is for the individual clinician to decide on which research methodology best suits.

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<sup>44</sup> Whilst this statistic is rather anecdotal, Hardee does refer to it within her 2014 report, which also reveals that between 70-80% of students enrolling on a law degree do so with the intent on entering a career in the legal profession. M Hardee, 'Career expectations of students on Qualifying Law Degrees in England and Wales Interim report: comparing the first year of the cohort study in 2012-13 with the UKCLE study March 2012' (The Higher Education Academy 2014), 35.

<sup>45</sup> J Giddings, R Burridge, SAM Gavigan and CF Klein, 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' FS Bloch (ed), *The Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 17

<sup>46</sup> N Gold, 'Clinic is the basis for a complete Legal Education: Quality Assurance, Learning Outcomes and the Clinical Method' (2015) 22 *International Journal of Clinical Legal Education*, 84, 132

<sup>47</sup> MM Barry, JC Dubin and PA Joy, 'Clinical Education for this Millenium' (2000) 7 *Clinical Law Review* 7, 12

<sup>48</sup> PT Hoffman, 'Clinical Scholarship & Skills Training' (1994) 1 *Clinical Law Review* 93, 93

<sup>49</sup> PT Hoffman, 'Clinical Scholarship & Skills Training', (1994) 1 *Clinical Law Review* 93, 93

Argument then rages over whether CLS may be about 'skills, public interest practice or CLE itself'.<sup>50</sup> Yet even when clinicians choose which form their CLS will take there are concerns that it will not gain recognition from the wider academic community. Bloch, commenting in 2005, stated 'articles or even books that address CLE are not valued in the same way as traditional academic scholarship.'<sup>51</sup> To examine why not, further analysis of the substance of CLS is required. In their 2005 study, Ogilvy and Czapanskiy looked at not only the range of journals that hosted clinical writing but also the weight of the contributors concerns.<sup>52</sup> What it revealed was the writing was firmly inclined toward the pragmatic: how to set up clinics; consideration of teaching and assessment methods, to name a few. There was less focus on the theoretical, whether in the context of pedagogic or cultural theories or reflections on the scholarship itself.<sup>53</sup> This finding may be key to analysing the sustainability of a research portfolio based on CLS.

At this point in the discussion, acknowledgement should be given to how the research outputs of UK academics are assessed. Thirty years ago, the UK became the first country to undertake an assessment on the quality of research undertaken in Universities.<sup>54</sup> The four UK HE funding bodies<sup>55</sup> allocate around £2 billion per year of research funding to UK universities.<sup>56</sup> The original (and current) objective of the research assessment was to inform the allocation of funding.<sup>57</sup> Under the REF, the quality of research is referenced by the allocation of funds; accountability for public investment; promotion of benchmarking and the establishment of reputational yardsticks.<sup>58</sup> REF assesses research quality on the basis of

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<sup>50</sup> FS Bloch, 'The case for clinical scholarship', (2004) 4 *International Journal of Clinical Legal Education* 7, 11

<sup>51</sup> FS Bloch, 'The case for clinical scholarship', (2004) 4 *International Journal of Clinical Legal Education* 7, 16

<sup>52</sup> N Gold and P Plowden, 'Clinical Scholarship and the Development of the Global Clinical Movement' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 314

<sup>53</sup> N Gold and P Plowden, 'Clinical Scholarship and the Development of the Global Clinical Movement' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 315

<sup>54</sup> These assessments have been known as the Research Selectivity Exercise, the Research Assessment Exercise and since 2014, the Research Excellence Framework. See '*Building on Success and Learning from Experience: An independent Review of the Research Excellence Framework*' also known as the 'Stern Report' (2016) Department for Business, Energy and Industrial Strategy 8

<sup>55</sup> Higher Education Funding Council for England, Scottish Funding Council, Higher Education Funding Council for Wales and Department of Education in Northern Ireland.

<sup>56</sup> [www.hefce.ac.uk](http://www.hefce.ac.uk), Around £2 billion was allocated in the year 2015-2016.

<sup>57</sup> '*Building on Success and Learning from Experience: An independent Review of the Research Excellence Framework*' (2016) Department for Business, Energy and Industrial Strategy, 8

<sup>58</sup> See specifically: [www.ref.ac.uk/](http://www.ref.ac.uk/)

output, impact and environment.<sup>59</sup> Submissions by HEIs to the REF are currently made in 36 units of assessment (UoA), with Law being UoA 20. The 2014 REF has been criticised for being both time consuming and vastly expensive and critics also allege the REF stifles innovation.<sup>60</sup> With the focus on CLS, one of the failings of the REF is the 'impact' assessment criteria.<sup>61</sup> The REF defines impact as 'any effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life beyond academia.'<sup>62</sup> The introduction to this chapter highlighted that one of the stakeholders to benefit from engagement in CLE is the local community and this engagement has an impact on that community. But crucially this does not equate to impact under the definition of the REF. So definition of what is viewed as research for REF purposes will affect the type of clinical scholarship undertaken by clinicians.<sup>63</sup>

However, looking forward to the next REF in 2019, the Stern Report has recommended that 'impact case studies should not be narrowly interpreted and not solely focused on socio-economic impacts but should also include impact on government policy, on public engagement and understanding on cultural life, on academic impacts outside the field and impacts on teaching.'<sup>64</sup> This would certainly go towards addressing the stated criticisms that clinicians have had about REF. Yet are there any other reasons apart from 'publish or perish' why clinicians should develop their clinical scholarship? It is acknowledged that the clinician will be under a duty from their employer to develop their clinical scholarship, the argument can also be made that they are under a duty to their fellow clinicians to engage in CLS.

There is a vocal movement of clinicians, headed by Bloch who maintain that it is a clinician's duty to write about their subject:

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<sup>59</sup> Output equates to 65 per cent of the overall outcome awarded to each submission. Research submitted is assessed for 'originality, significance and rigour' with reference to international research quality standards. Impact carries a weighting of 20 per cent. The 'reach and significance' of impacts on the economy, society and or culture that were underpinned by excellent research conducted in the submitted research. Research environment is assessed in terms of its 'vitality and sustainability', and carried a weighting of 20 per cent.

<sup>60</sup>See specifically: D Sayer: 'Five Reasons why the REF is not for purpose', [www.theguardian.com/higher-education-network/2014/dec/15/research-excellence-framework-five-reasons-not-fit-for-purpose](http://www.theguardian.com/higher-education-network/2014/dec/15/research-excellence-framework-five-reasons-not-fit-for-purpose),

<sup>61</sup> William Twining refers to the 'sophisticated sense of the elusiveness of "impact"' for those involved in the REF: W Twining, 'LETR: the role of academics in legal education and training: 10 theses' (2014) 48 *The Law Teacher*, 94, 98

<sup>62</sup> [www.ref.ac.uk/](http://www.ref.ac.uk/)

<sup>63</sup> Although the newly announced Teaching Excellence Framework (to be discussed later) may well recognise teaching innovations not admissible under the REF

<sup>64</sup> *Building on Success and Learning from Experience: An independent Review of the Research Excellence Framework* (2016) Department for Business, Energy and Industrial Strategy, 23

*'Clinical law teachers have a duty to write about the academic side of their work, whether on the lawyering process, law and society, or legal education reform. Indeed, having both the responsibility for and the opportunity to write clinical scholarship is a key to establishing clinical education's rightful place in the legal academy.'*<sup>65</sup>

His argument in favour of CLS goes further than the albeit very persuasive funding argument that is advanced by REF participation. His argument about engaging in CLS goes to the heart of the acceptance and integration of CLE in law schools. If all clinicians developed a clinical research profile that advanced the subject, this would contribute to combatting the 'lack of recognition which law schools give to the value of practice based knowledge'<sup>66</sup> and that they are merely skills teachers with no academic merit. This is a self-fulfilling prophecy that strikes at the core of clinic sustainability concerns. However, *should* this be the case for CLS and clinicians? Giddings argues that law schools may be expecting too much from their clinicians in relation to research.<sup>67</sup> Even though his focus is on Australian CLE, the argument he makes is analogous when discussing clinician's obligations towards the REF. His argument does not focus on the substance of the research, but rather the capacity on clinicians to produce research. When clinicians also engage with the local legal profession and local communities, the expectation that they should also meet similar research obligations to those of other academics starts to appear unrealistic.<sup>68</sup>

Even if clinicians *can* develop a research profile and even contribute to the REF by engaging in CLS, their duty to the clinic and clients can greatly affect both their ability or capacity. Clinicians who are involved in supervising clinic activities on any level, from full service clinics to advice only drop-in clinics, will also have teaching and administrative workloads to also deal with. In addition, clinic duties and responsibilities cannot be measured neatly by the number of hours a clinician is expected to undertake. Reality dictates that some client matters are long, protracted and time pressured. It is clear that adding a duty (from whichever source) to engage in CLS adds a greater workload on the clinician than experienced

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<sup>65</sup> FS Bloch, 'The Case for Clinical Scholarship', 'The case for clinical scholarship', (2004) 4 *International Journal of Clinical Legal Education* 7, 17

<sup>66</sup> J Giddings 'Why no clinic is an island: the merits and challenges of integrating clinical insights across the law curriculum' (2010) 34 *Washington University Journal of Law and Policy* 261, 288

<sup>67</sup> J Giddings 'Why no clinic is an island: the merits and challenges of integrating clinical insights across the law curriculum', (2010) 34 *Washington University Journal of Law and Policy* 261, 276

<sup>68</sup> J Giddings 'Why no clinic is an island: the merits and challenges of integrating clinical insights across the law curriculum', (2010) 34 *Washington University Journal of Law and Policy* 261, 276

by non-clinicians. For this greater workload not to become a burden on clinicians, support needs to be given by the HEIs in order to sustain and advance the CLS movement. This will surely benefit all parties involved as the HEI has a greater pool of research capable of being submitted under the REF; the clinical movement is advanced through CLS that perhaps focuses more on the methodology of CLE rather than simply descriptive articles on clinic activity and the clinician benefits by advancing their own career progression.

### 3. Reimagining the reality

*'The life of a clinical law teacher is quite different from that of his or her traditional academic counterpart. There is the stress and on-going responsibility that goes with handling real cases and there is tremendous time demands of one-to-one teaching/supervision/critique required for just about any type of clinical course.'*<sup>69</sup>

At present there is no set regulation for the provision of legal advice in university law clinics and it is commonly accepted that students participating in clinic do so under the supervision of practising solicitors. One of the ways in which clinical programmes can be delivered in HEI is by an in-house, advice only clinic, which will be the focus of this discussion.<sup>70</sup> In this model, clients attend an interview conducted by the student advisors, who would be under the supervision of a practising solicitor<sup>71</sup>. After the interview has concluded, the students would then undertake relevant practical legal research, to assist in formulating their advice.<sup>72</sup> Finally, the students are responsible for writing up the advice to the client with the supervising solicitor acting as a co-signatory. This will occur within a prescribed time limit, such as 10 working days from the initial interview.

The above succinctly details the student's involvement in the process but not the supervising clinician. The term supervisory, in this circumstance is misleading as it implies a

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<sup>69</sup> F.S.Bloch, 'The Case for Clinical Scholarship', (2004) 4 *International Journal of Clinical Legal Education* 7, 21 but see also KE O'Leary 'Evaluating Clinical Teaching – suggestions for Law Professors who have never used clinical teaching methods' (2002) 29 *Northern Kentucky Law Review* 491, 511

<sup>70</sup> See generally K Kerrigan, 'What is clinical legal education and pro bono?' in Kerrigan and Murray, *A Student Guide to Clinical Legal Education and Pro Bono* (Palgrave MacMillan, 2011) for examples of differing clinic projects.

<sup>71</sup> The solicitor may or may not be in the interview room with the students

<sup>72</sup> Some clinics may draw on the faculty resources to help the students draft advice on conceptual point of law or to discuss possible policy changes

'light touch'. Indeed when contrasted to the other supervisory aspects of HEI such as post graduate research, supervising at clinic is extremely time and resource intensive: students may have to advise on an area of unfamiliar law or they may be weak in ability.<sup>73</sup> If allowance is made on workloads for supervision, a clinician may get an allowance for a certain number of supervisions per semester or academic year based (altogether reasonably) on a notional figure. What this does not take into account, is the demand for one solicitor's specialism over that of another.<sup>74</sup> Staff members who are also qualified solicitors will probably be in the minority within the majority of law schools, so the pool of potential clinic supervisors itself is limited to start. Apart from the issue of resources, however, there is another very subtle difference which compounds this issue for clinicians; whether they are engaged in providing students with a clinical legal education or a clinical experience.<sup>75</sup>

University law clinics can provide a clinical experience but that may not extend to clinical education.<sup>76</sup> Further, by looking deeper into the distinction between a clinical education and a clinical experience a further potential disadvantage for clinicians is revealed. For the experience of a student law clinic to be fully educational for the purpose of CLE, the student must 'learn through participation in real and realistic interactions coupled with reflection on that activity.'<sup>77</sup> As Coombes reminds us, we must be keen to remember that raw experience is not the same as education.<sup>78</sup> A student may be participating in realistic interactions but the lack of reflection and obvious educational benefit to the student prevents this clinical experience from being classed as a clinical education.<sup>79</sup> The student has to come away from their time in clinic having undergone a deep learning experience.<sup>80</sup>

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<sup>73</sup> Indeed, research carried out in 2000 found that those HEIs that did not run clinics thought the set up and running costs would be the main difficulty. Yet, those who were already engaged with clinic saw the amount of staff time taken up by clinic as a major cause for concern. R Grimes, 'Learning by doing in law' (2002) 1 *International Journal of Clinical Legal Education* 54,56

<sup>74</sup> For example, a clinic may have experience a glut of family law clients and only a handful of property issues but both clinicians may have the same workload allowance.

<sup>75</sup> Just as there are several ways to describe those who engage in CLE, likewise there are several definitions for what CLE is and this paper will rely on the definition referred to earlier in K Kerrigan, 'What is clinical legal education and pro bono?' in K Kerrigan and V Murray, *A Student Guide to Clinical Legal Education and Pro Bono* 8

<sup>76</sup> : K Kerrigan, 'What is clinical legal education and pro bono?' in K Kerrigan and V Murray, *A Student Guide to Clinical Legal Education and Pro Bono*, (Palgrave MacMillan, 2011),7

<sup>77</sup> K Kerrigan, 'What is clinical legal education and pro bono?' in K Kerrigan and V Murray, *A Student Guide to Clinical Legal Education and Pro Bono*, (Palgrave MacMillan, 2011), 5

<sup>78</sup> MM Coombe, 'Selling Intra-curricular legal education', (2014) 48 *The Law Teacher* 281,283

<sup>79</sup> See Brayne H, Duncan N & Grimes R, *Clinical Legal Education: Active Learning in your Law School* (Blackstone Press Limited, 1998) 'The main focus of universities and their staff should be on the provision of education and not legal services' 5

<sup>80</sup> For a greater discussion on experiential learning see DA Kolb, *Experiential Learning: experience as the source of learning and development*, 2th edn (Pearson, 2015)

Likewise, this distinction between education and experience whilst suitable does influence the reality experienced by the clinician. If a clinician were engaged in a law clinic (with the onus on the experience rather than the education), arguably their primary duty would be the provision of the service to the client rather than the educational needs of the student.<sup>81</sup> For example, if a lengthy re-write of a student advice letter was required, if the students were simply engaging in clinic for the experience, the clinician may simply amend or correct the students' work with limited explanation or discussion as to why. If the clinician was engaged in providing a clinical education, their focus is on providing the student with the opportunity to adequately reflect. The student would undergo a deeper learning experience if the letter were not corrected and the clinician redirects the research or written style in a way that forces the student to understand and engage with the subject matter. Indeed it is this style of experiential learning which is recognised for 'promoting more effective, deeper and contextualised learning'.<sup>82</sup> Compounded to this though, the clinician, who is also a solicitor, has a professional duty to 'act in the best interests of each client and provide a proper standard of service to the client'<sup>83</sup>. In the majority of cases complying with these two principles and meeting the educational duty owed to the students will not cause a conflict. However, a clinician will always have to bear in mind the extra regulation that applies to them as a result of their profession and there may be times when the educational needs of the student is forsaken, even when the focus of the clinic is education rather than experience.<sup>84</sup>

However, the time constraints this contextualised learning places on the clinician is great. The supervising solicitor is against a deadline to comment on the advice within a particular time and will have other teaching, marking or administrative responsibilities to contend with. Then add to this, the duty to engage in recognised CLS. Here lies the eternal conflict of clinicians as they need to decide which duty is paramount: Client, student, faculty

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<sup>81</sup> The Pro Bono Protocol, sets out that the standard of work provided by any pro bono activity must be equivalent to that provided to a paying client: K Kerrigan, 'What is clinical legal education and pro bono?' in K Kerrigan and V Murray, *A Student Guide to Clinical Legal Education and Pro Bono*, (Palgrave MacMillan, 2011), 4

<sup>82</sup> K Clubb, 'Masters of our Destiny – The integration of law clinic into post graduate Masters provision' (2013) 19 *International Journal of Clinical Legal Education* 395,397

<sup>83</sup> Respectively principles 4 & 5 of the SRA Principles 2011 contained within SRA Handbook (version 18), 2016. The 10 SRA principles are mandatory and apply to all equally with no hierarchy. See also principle 2.2 'if any of the principles are in conflict, the principle which takes precedence is the one which best serves the public interest in the particular circumstance'.

<sup>84</sup> An example would be if a client sought advice regarding a time sensitive issue, that needed urgent action. In this instance, the usual 2 week turnaround period would need to be dispensed with and the student may play a reduced role. The student would still be having a clinical experience but not truly engaging with CLE.

or scholarship? In essence, is this specific work burden felt by those engaged specifically in CLE detrimental?

As has already been mentioned, it is arguable that unless a clinician has been employed with the sole remit of supervising in clinic matters, clinic only forms *part* of the clinician's workload.<sup>85</sup> Indeed, a clinician may be obliged to run clinic provisions through non-teaching times, such as summer. This time for non-clinicians may be spent engaging in scholarship and research but the clinician owes a duty to their clients and simply cannot cease acting until students return from holidays. Engaging in clinic work is resource intensive and requires a greater allocation of resources from all stakeholders. However, it is evident that a rich source of CLS will come from the clinicians who are also engaged in CLE rather than delivering a clinic experience. However regardless of whether the involvement is education or experience, if the clinician is also supervising the advising of clients by students they will be open to conflicts, deadlines and regulations that non-clinician staff would not experience. Clearly, whilst clinicians have a duty to engage in CLS, there is a real danger that they simply do not have the capacity.

#### 4. Reimagining the Legal Education Landscape

'In the world of teaching, the practitioners are amateurs'<sup>86</sup>

Whilst it is acknowledged that scholarship and academia go together like gin and tonic, do they exist together in a vacuum? For our focused clinician, the answer is no. This chapter has already detailed the opportunities for clinicians in engaging in CLS, however focus will now turn to the other career benefits for clinicians engaging in CLE. One positive outcome of engaging in CLE, especially for new clinicians, is the exposure to an experiential teaching methodology.<sup>87</sup> The Quality Assurance Agency for Higher Education (QAA)<sup>88</sup> in their subject benchmark statement for law in 2015 advocate that students experience a wide gamut of

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<sup>85</sup> See : DF Charkin, 'Spinning Straw into Gold: Exploring the legacy of Bellow and Moulton' (2003) 10 *Clinical Law Review* 245, 247 'Clinicians are asked to serve more students, often for more credits and often with increasing collateral demands to participate in governance, to be the visible presence of the law school in the external legal community and to produce scholarship'.

<sup>86</sup> Legal Education and Training Review, Literature Review, Chapter 2, 'Legal education, professional standards and regulation' [www.letr.org.uk/wp-content/uploads/LR-chapter-2.pdf](http://www.letr.org.uk/wp-content/uploads/LR-chapter-2.pdf) 6

<sup>87</sup> For a discussion of experiential learning within CLE see Karen Clubb 'Masters of our Destiny – the Integration of law clinic into post graduate Masters provision', (2013) 19 *International Journal of Clinical Legal Education* 395, 397.

<sup>88</sup> The body who is responsible for monitoring the and advising on standards and quality in UK HE.

teaching methods throughout their law degree and specific mention is made of experiential learning.<sup>89</sup> The benefits of experiential learning for students have been well documented and will not be repeated for the purposes of this argument, however what will be explored is whether engaging in this particular teaching methodology put clinicians ahead of their ‘chalk and talk’ counterparts.<sup>90</sup> In fact there are some ‘legitimate critiques which go as far as suggesting that traditional teaching methods might be actively harming some students in their development.’<sup>91</sup> Whilst this hypothesis may be extreme to some, the point still stands that clinical teachers can also serve as a huge resource in helping other law lecturers learn more interactive methodology during efforts to introduce more flexibility or more critical thinking among students.<sup>92</sup> Whilst there is no data to suggest that clinicians are any more innovative than other non-clinician colleagues, delivering CLE compels them to use more interactive and action based teaching. Those clinicians who are also engaging in CLS, will be well versed in the current literature on clinical legal teaching, which again can help innovate and develop curriculum delivery. Indeed, legal education reform reports on both sides of the Atlantic have advocated the benefits of experiential and practice-orientated clinical teaching<sup>93</sup> and ‘the underdeveloped area of legal pedagogy’<sup>94</sup>.

Clinicians who have recently moved from legal practice to academia may perhaps be more inclined to engaging in clinical teaching techniques as they can draw on their real life lived experience. Indeed with a student body which is more vocationally focused than many other cohorts and in an economic climate in which graduate jobs are more scarce, it is hard to see how students would not opt for those courses and modules which they perceive to give them the best chance of securing a job.<sup>95</sup> The very nature of students learning from those who have actually practised the doctrine they are now teaching<sup>96</sup> has the potential to make clinical

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<sup>89</sup> Quality Assurance Agency, ‘Subject Benchmark Statement: Law’, July 2015, [www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf](http://www.qaa.ac.uk/en/Publications/Documents/SBS-Law-15.pdf), 8

<sup>90</sup> See specifically: R Havelock, ‘Law Studies and active learning: friends not foes?’ (2013) 47 *The Law Teacher* 382, ‘The signature pedagogy of law is the “blackboard” lecture coupled with the “casebook method”, 383

<sup>91</sup> MM Coombe ‘Selling Intra-curricular legal education’, (2014) 48 *The Law Teacher* 281, 282

<sup>92</sup> J Giddings and J Lyman, ‘Bridging Different Interests: The Contributions of Clinics to Legal Education’ in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 302

<sup>93</sup> See generally: Lord Chancellor’s Advisory Committee on Legal Education and Conduct, First Report on Legal Education and Training (1996)

<sup>94</sup> WM Sullivan, A Colby, J Welch Wegner, L Bond & LS Schulman, ‘*Educating Lawyers: Preparation for the Profession of Law*’ (Jossey Bass, 2007), 24

<sup>95</sup> J Guth and C Ashford ‘The Legal Education and Training Review: regulating socio-liberal legal education?’ (2014) 48 *The Law Teacher* 5, 14

<sup>96</sup> N Duncan and SL Kay, ‘Addressing Lawyer Competence, Ethics and Professionalism’ in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 187

teaching an attractive methodology to be involved with.<sup>97</sup> Indeed, clinical teachers 'stand in a unique position with a unique privilege at the intersection between theory and practice' and as such this position should be capitalised upon by clinicians.<sup>98</sup> The benefits of clinical teaching assist not only those students whose graduate aspiration is the legal profession but they are highly transferable to other graduate careers.<sup>99</sup> This is of significance seeing as one argument used against integrating or developing CLE into the further legal curriculum, is that only around 50 per cent of law graduates enter the legal profession,<sup>100</sup> 'in UK Law Schools, law represent a choice of discipline for higher education rather than a commitment to enter into the legal profession.'<sup>101</sup>

Whilst this is sounding positive for the clinician, there are also two 'sea-change' moments on the horizon for legal education at the time of writing, that could bring further opportunity to the clinician engaging in CLE. The first is the introduction of the Teaching Excellence Framework (TEF)<sup>102</sup>. The TEF was introduced with the intended purpose of providing students with better information about the quality of degree programmes, especially given that all English HEIs now charge the maximum tuition fee amount, leading to concerns that these flat fees masked large differences in the degree programme quality.<sup>103</sup> The exercise is based on the voluntary participation of English HEIs and those that do, receive either a gold, silver or bronze award 'reflecting the excellence of their teaching, learning environment and student outcomes.'<sup>104</sup> Whilst the TEF will not result in the allocation of specific funds such as the REF, the Government has previously indicated that HEIs that have a TEF award will be able to increase their tuition fees in line with inflation. The TEF will seek to redress the imbalance that is seen in HE between teaching and research.<sup>105</sup> One of the ways

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<sup>97</sup> There are long running discussions as to the draw backs of clinics; one of the main being its resource intensive nature, which will not be discussed in this chapter.

<sup>98</sup> David F Charkin 'Spinning Straw into Gold: Exploring the legacy of Bellow and Moulton' (2003) 10 *Clinical L Rev* 245, 256

<sup>99</sup> Please see the chapters by King and by Thomas elsewhere in this collection on this point.

<sup>100</sup> M Hardee, 'Career expectations of students on Qualifying Law Degrees in England and Wales Interim report: comparing the first year of the cohort study in 2012-13 with the UKCLE study March 2012' (The Higher Education Academy 2014), 35

<sup>101</sup> FS Bloch, 'The Case for Clinical Scholarship', (2004) 4 *International Journal of Clinical Legal Education*, 7,9

<sup>102</sup> The TEF was developed by the Department for Education in England and was introduced in the Success and a Knowledge Economy White Paper and at present only covers undergraduate teaching,

<sup>102</sup> 'Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice', Department for Business, Innovation and Skills

<sup>103</sup> [www.timeshighereducation.com/news/teaching-excellence-framework-tef-results-2017](http://www.timeshighereducation.com/news/teaching-excellence-framework-tef-results-2017)

<sup>104</sup> [www.hefce.ac.uk/lt/tef/whatistef](http://www.hefce.ac.uk/lt/tef/whatistef)

<sup>105</sup> Indeed, the imbalance between research and teaching is one of the factors that can lead to the marginalisation of clinic and CLE in law schools. 'There is still a privileging of certain type of academic legal writing, a tendency to associate the abstract with the scholarly and an accompanying tendency

in which this imbalance was evidenced was through the allocation of funds. HEIs have received funding based on excellent research since 1986 and it has taken over 30 years for a comparable exercise in teaching to be established.<sup>106</sup> The government has acknowledged that teaching has 'been funded on the basis of quantity and not quality'. Further 'this is in sharp contrast to research, with its quality-driven funding stream allocated through the REF. Teaching has become the poor cousin of research.'<sup>107</sup> It is expected the TEF will result in a net financial benefit of around £1.1 billion.<sup>108</sup> Whilst it is still in its infancy, the TEF is expected to build a culture where teaching has equal status with research, with 'great teachers enjoying the same professional recognition and opportunities for career and pay progression as great researchers.'<sup>109</sup> Perhaps now there will be the ability for clinicians to flourish under both frameworks.

However, with great opportunity can sometimes come threat. If clinicians now have the opportunity to develop under both frameworks, arguably they could be obliged to participate in both. Clinicians could find themselves having to deliver increasingly innovative and excellent teaching, in order to achieve/maintain a coveted gold award. Given the link between the TEF and income generation through fees, clinicians who have long heralded their innovative teaching methodologies may come under increasing pressure to extend their clinical education programmes by designing and running new clinical courses or community engagement projects. Whilst this is an opportunity to develop CLE as a teaching methodology, for this to be a true opportunity for clinicians HEIs must pledge to fully resource and fund clinical teaching otherwise the demands on the clinician will be too great.

The next change is more specific to legal educators, in particular to those who train the next generation of solicitors.<sup>110</sup> In March 2015 the SRA published the 'statement of

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to treat writing which focuses on the practice of lawyering as lower value, N Gold and P Plowden, 'Clinical Scholarship and the Development of the Global Clinical Movement' in FS Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, 2011), 316

<sup>106</sup> It is acknowledged that any financial benefit received by a HEI as a result of the TEF will be due to increased tuition fees rather than the receipt of centrally allocated funds such as REF.

<sup>107</sup> 'Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice', Department for Business, Innovation and Skills, 43

<sup>108</sup> 'Higher Education and Research Bill Impact Assessment', Department for Business, Innovation and Skills, 4. Note however that this is still considerably less than the amount allocated yearly under REF.

<sup>109</sup> [www.timeshighereducation.com/news/teaching-excellence-framework-tef-everything-you-need-to-know](http://www.timeshighereducation.com/news/teaching-excellence-framework-tef-everything-you-need-to-know)

<sup>110</sup> Discussion could also turn to the very recent development in 2016 of Solicitor Apprenticeships, which is another way the SRA trying to open up the routes to qualification (along with the Graduate Route and the equivalent means route). Under this model apprentices will work and study at the same time for a period of 5/6 years and they will then undergo the SQE. Given the apprentice would already be in work and may never have experienced the Socratic method of HE teaching, they may be more perceptible to clinically delivered content. Thus also benefitting the clinicians

solicitor competence' which reviewed the education and training of solicitors to better assure their competence.<sup>111</sup> One of the matters reviewed is the way in which solicitors qualify. The current graduate route of qualification has already been discussed but this should be contrasted with the SQE which as at the time of writing, will operate as from late 2020.<sup>112</sup> The reason for the change in assessing qualifying solicitors is to address the current issue of inconsistency and the degree of variance between course providers.

The SRA state that candidates should be able to identify and apply core legal principles to client based and ethical problems encountered in practice.<sup>113</sup> Indeed the SRA advocate the use of student law clinics to facilitate a period of recognised training for students in between SQE 1 and SQE 2.<sup>114</sup> Whilst the makeup of undergraduate law curriculum may still be under review, the very nature of the SQE 1 with centralised exams at the end of a three year programme, could dictate that teaching methodologies that espouse surface or rote learning will have a reduced role to play as they will not arm the students with the necessary skill set to successfully pass the SQE1. In order for students to retain knowledge from subjects they may have studied up to four years previous, teaching methodologies such as CLE could be effectively employed as they 'promote deep, long lasting and aligned learning'.<sup>115</sup> Whilst it is acknowledged that students may have to take refresher course prior to taking the SQE, the argument is if students are engaged in deeper, experiential learning throughout their academic and vocational legal training, they will have a greater understanding of the subject which will take less time to revise prior to undertaking SQE 1 and lead to more successful completions.<sup>116</sup> Given the direction that legal education is taking, clinicians are a serious resource in any law school, regardless of their research profile.

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<sup>111</sup> <http://www.sra.org.uk/solicitors/competence-statement.page>

<sup>112</sup> For more information on the SQE see 'Solicitors Qualifying Examination: Draft Assessment Specification' Solicitors Regulation Authority, October 2016 <http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page#download>

<sup>113</sup> SQE: Draft Assessment Specification' 4

<sup>114</sup> Although the length of time would remain at between 18/24 months and this is likely to be out of reach of most university curriculums.

<sup>115</sup> N Gold, 'Clinic is the basis for a complete Legal Education: Quality Assurance, Learning Outcomes and the Clinical Method' (2015) 22 *International Journal of Clinical Legal Education*, 84, 124

<sup>116</sup> See generally: R Hyams, S Campbell and A Evans, 'Practical Legal Skills: Developing your clinical technique', 4th edn, (Oxford, 2014). The authors discuss the issue of students comprehending and understanding the content that is delivered to them 'if the goal is learning comprehension, teaching method is as important as content.' 12

## 5. Re-imagining the opportunities

The actual opportunity for clinicians to develop their research profile is apparent and should not be ignored. However, the writer is very alert to the fact that ‘within HE there is a need for good teachers and good researchers and not all academics are suited to both.’<sup>117</sup> Whilst arguments can be made about the lack of a research profile of clinicians contributing to the marginalisation of clinic, if Nicholson’s statement is examined in light of the TEF and the increased consumerism of the HEI market; student attitudes and expectations may render the need for a research profile a moot point. All academics now work in the era of tuition fees and without caps on student numbers. Further the Consumer Contracts Regulations 2013 affords students the benefit of consumer protection against HEIs.<sup>118</sup> Whilst these changes are much lamented, this approach looks to be the ‘new normal’ for UK HE.

This increase in the commoditisation of HE will have a direct link to the employability of the graduate market. It seems prima facie straightforward, that a student who will acquire nearly £30,000 of student loan debt will want to attend a HEI that gives them the best chance of getting a job upon graduation. Indeed, the employability agenda is high up on the government’s list of priorities too. The Destination of Leavers from Higher Education Survey (DHLE) requires that all HEIs survey their graduates six months after graduation. Further HEIs have been subject to a number of measures including employment outcomes based on their DHLE results. The recent white paper that introduced the TEF also highlighted the skills shortages that employers are suffering, which further adds to the increased air of commoditisation by stating that ‘graduates should get the best return on their investment.’<sup>119</sup>

Whilst the educational benefits of CLE are well documented and for the purpose of focus will not be repeated in this conclusion, a happy side effect of this learning experience is the increase in employability skills that students develop whilst being engaged in clinic activities. These ‘soft skills’<sup>120</sup> are developed so subtly, perhaps even without the student noticing until they are asked to reflect as per is required in CLE. Time spent in clinics, even those that include an element of simulation can still be classed as work experience for the purposes of a graduate CV. And when this is coupled with the importance that both the Government and the SRA

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<sup>117</sup> A Nicholson, ‘Research-informed teaching: a clinical approach’ (2017) 17 *The Law Teacher* 40, 46

<sup>118</sup> Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 SI 2013/3134

<sup>119</sup> ‘*Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice*’, Department for Business, Innovation and Skills, 42

<sup>120</sup> A non-exhaustive list could include skills such as initiative, teamwork, problem solving, communication, time management, commitment and empathy.

place on work experience, CLE and clinicians can have a direct role in the competitiveness of UK law schools.

An effort has been made in this chapter to demonstrate the change that the HEIs and academics are facing on an economic and regulatory perspective and how this can re-imagined the profile of the clinician. Whilst the traditional view of a university academic could be one who engages in research in order to secure promotion to reader or professor, if we are truly entering an era where research and teaching are viewed and resourced on an equal footing, the express duty imposed on clinicians by HEIs to engage in CLS may disappear, with the duty instead being on delivering excellent inter-curricular clinical teaching. That does not mean that clinicians should simply abandon the CLS baton, as this wrongly assumes that clinicians only engage in CLS because they *have* to, rather than because they *want* to.

One of the ways in which subjects and disciplines remain current and relevant (and to use the language of the day) competitive is by the research and innovation of those involved. Without research and innovation, the underlying merit of CLE will just be student lawyering skills, with no real educational benefit being obtained. Empirical research will need to be conducted to ascertain whether this would be viewed as a negative, positive or neutral factor. Indeed, to return to Bloch's question, do we not have a duty to engage in such scholarship to further the subject, rather than advance a clinician's own personal career agenda? Being part of a subject which is constantly evolving and reactive to changes around it and giving those who engage with it a perceptible competitive edge in light of proposed changes, is surely the greatest opportunity to clinicians engaging in CLE and CLS. Indeed, clinicians do not have to confine their scholarship solely to the legal arena. The very nature of clinical legal education allows for collaboration with a varying range of subjects, such as nursing, medicine and psychologists<sup>121</sup> and there is huge opportunity for future growth of CLS through such collaboration and comparative research. Hopefully, given the opportunities available through the REF, TEF and the SQE in the every changing HE legal education landscape, the distinctive make up of this body of legal academics will see them placed squarely in the centre of every UK law school.

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<sup>121</sup>J Giddings and J Lyman, 'Bridging Different Interests: The Contributions of Clinics to Legal Education' FS Bloch (ed), *The Clinical Movement: Educating Lawyers for Social Justice*, 304