

Getting Them Early

Teaching a Critical Perspective on Legal Ethics and Adversarialism in an Introductory LLB Unit at the Queensland University of Technology

BARBARA HAMILTON*

INTRODUCTION: THE IMPORTANCE OF LEGAL ETHICS AWARENESS TO A LEGAL EDUCATION

A voluminous body of literature attests to failings of the legal system. The legal system fails to provide real equality before the law and, in particular, it fails to provide access to justice for all.¹ These inadequacies are especially tied up with the adversarial nature of the system and the perception that many lawyers operate with a “mercenary mind-set” within it. Carrie Menkel-Meadow, leading US feminist legal scholar, attests:

[S]cholars have criticised modern adversarialism for the ways it teaches people to act toward each other. Although I share some of the critic’s views regarding the incivility of lawyers, I am more concerned that the rhetoric and structure of adversarial discourse prevent not just better and nicer behaviour, but more accurate and open thinking.²

Such failings are bound up with the foundations of a system that has evolved a way to resolve a “contest” rather than search for the ultimate truth.³ Tied up intrinsically with this adversarial culture are issues of legal ethics and whether existing professional ethical codes (and probably the lack of enforcement of the codes) promote this ethos. There is also a strong recognition that education, and legal education in particular, has a pivotal role in turning around this culture, which is one that can well be described as a “gladiatorial arena.”⁴

Menkel-Meadow aptly comments:

To accomplish such a reframing of attitudes and thought processes will require a great deal of re-education and re-orientation; indeed, major cultural, not just ethical, change among lawyers is needed.⁵

It appears that the will for change is most likely to come from those new to, or outside, the profession as it must necessarily be difficult for those operating successfully within the system to have the wherewithal to change a system that works for them.

One eminent judicial commentator who writes extensively about problems and concerns with the legal system has stated,

[I]t is the mind-sets of lawyers and judges which are the greatest impediments to change aimed at increasing its fairness, one of those mind-sets being the belief in the near perfection of our system.⁶

It can also be argued that lawyers should be taught ethics “not just for their own benefit but also the benefit of their clients.”⁷ Sampford refers to the views of former Queensland Law Society President Elizabeth Nosworthy:

Her view is that clients need more than just legal advice. They need, and have been increasingly seeking “whole of business” advice. They have gone beyond merely asking lawyers about legal consequences and are asking: “What do you think I *should* do?” (emphasis added)

In her view, lawyers are the natural profession to whom clients should turn for such advice, so lawyers should be educated accordingly.⁸

Others see the importance of creating “an institutional atmosphere in which awareness of ethical issues and the ethical implications of one’s behaviour is respected.”⁹ It is believed such an institutional ethos will lead to far less undesirable behaviour among students (eg cheating, tearing articles from journals, taking materials out of library reserve when they are placed in the library for the use of all students – doing anything they can, including trying to manipulate lecturers to gain a good result). These arguments about the importance of the institutional atmosphere seem to mirror school educational arguments about the importance of the ethos created by teachers. Those teachers who respect students and see the importance of nurturing students’ self esteem model ethical behaviour, thus teaching students to act considerately towards their other classmates. In short, they demonstrate that bullying is unacceptable behaviour.¹⁰

Many believe that the education, professional training, and on the job training that lawyers receive contribute to this adversarial culture; however, it is also suggested that many students begin law school with a similar mind-set, or at least with a strong sense of competitiveness. These views were cited in the recent Australian Law Reform Commission Report (“ALRC”), *Managing Justice – A Review of the Federal Civil Justice System*.¹¹

The situation is complex, nevertheless. Ross writes:

Students will have been moulded by community values and their individual upbringing. This does not mean that young adults cannot change their ethical values. Recent psychological research has shown that important changes can occur for young adults in dealing with ethical issues.¹²

In this article I explain how a new introductory law unit offered in the Faculty of Law, Queensland University of Technology (“QUT”) has been designed to address some of these concerns.

THE FIRST YEAR SUBJECT IN THE FACULTY OF LAW AT THE QUEENSLAND UNIVERSITY OF TECHNOLOGY: LAW, SOCIETY, AND JUSTICE

Law, Society, and Justice was offered for the first time in 2000. It is taken by all students in the first semester of the LLB degree. Some of the teaching in the unit aims to make students aware from their first day of law school that they are not encountering a perfect legal system. Issues of legal ethics and the way an adversarial system works are highly relevant to dispensing justice. But at the same time, the unit aims in part to make students aware that personal and professional ethics are equally relevant to their own career satisfaction as well as emotional and moral development, for as Ross says,

[T]eaching law to students without a moral framework denies them the opportunities to develop healthy personalities.¹³

As Hass describes,

Acting morally is in your best interest. When we act unfairly or insensitively, we not only hurt another, but we subdue our own natural hunger for justice.¹⁴

Ross also acknowledges the importance of teaching ethics, even if it only addresses students’ emotional development during the course of their legal education.

The separation of law from morals leads to a very narrow view of law, which is corrupting to the human spirit. It is a view of law that is based on power and which may help explain why so many law students find their law courses so inhumane. The effect on the students of their legal education highlights the inhumane nature of the course. A major study done in the United States showed that many students develop personality distortions. They become increasingly anxious and develop feelings of being overwhelmed. This leads to stress and depression.¹⁵

I suggest that the effects of this separation of law from morals in law teaching was demonstrated in a recent problem that occurred at the University of Queensland law school in relation to, of all things, a Legal Ethics examination. After the examination, it transpired that approximately 30 of 300 students had prior access to the exam paper and a marking guide because the paper had been used before. The Unit Coordinator was unaware that a marking guide had been issued to some students and circulated on campus. The matter came to light when other students who took the examination without access to the exam script and answers complained to the law school.

Law school academic adviser Dr Sarah Derrington, when interviewed for the Brisbane newspaper the *Courier Mail*, was quoted as saying that the law

school “believed the students had done nothing wrong by failing to alert the examiners to the fact they had an identical copy of the exam paper and its answers.”¹⁶ She was alleged to have said that some students luckily had access (while others did not); she was alleged to have stated that no marks would be re-evaluated.¹⁷ Interestingly, many students disagreed with this interpretation; they saw the actions of those who had the answers as cheating. One student said, “They’d done nothing wrong until they went into that exam, but they strayed when they did not stand up and say they had the answers.”¹⁸ The law school’s view also contrasts with that of QUT ethicist, Dr Trevor Jordan. Jordan commented that, while it would be unfair to make all 300 students re-sit the examination, the students who had the examination paper and the answers “should have had their marks re-evaluated if it could be shown they had performed better in the exam.”¹⁹ The law school’s view might be seen to be correct from a legalistic standpoint, but the students’ distress at the lack of an ethical or moral perspective to the problem is to be noted.

It is intended (by some academic staff at QUT at least) that this sort of ethical awareness may one day mean that our students will develop an understanding that can lead them to be agents for effective change aimed at reforming the legal system – to produce a system, where the boundaries between “law” and “ethics and morality” are much more blurred, and consequently much more concerned with “justice” than with “law.” It is common knowledge that many ordinary persons, as well as “insiders” (legal professionals), believe that the legal system is about law which they see has little to do with justice.

It is not the intent of the unit developers of Law, Society, and Justice to give students a jaundiced view of law and the legal system, for, indeed, this is a well-balanced course, in my opinion. It focuses on the rule of law, its historical development and philosophy. However, at the same time, the unit is critical of the reality of a fundamental tenet of the rule of law – that of equality before the law. The unit addresses in part how an adversarial system and minimalist and unenforced legal ethical codes can undermine the realisation of equality before the law.²⁰

When QUT law school embarked on an extensive program of curriculum reform, it was felt that it was important to address issues such as those discussed in this article at a basic level from the earliest point of entry in law school, rather than leave them solely to the traditional allotment to a later year specialised unit, such as “Legal Ethics” or as it is currently titled at QUT “Professional Responsibility.”²¹ Justice Kirby advocates this approach. Kirby states that it is not enough to have a

few lectures thrown in at the end of the law course. It is a matter of infusing all law teaching with a consideration of the ethical quandaries that can be presented to lawyers in the course of their professional lives.²²

In developing an integrated program, QUT decided to start this process of ethics awareness from first base, as it were, building on subsequent levels from there. Not all agree that this approach will prove successful, however. Susan Burns points out that

[s]ome existing courses, which are intended to explore legal ethics issues, are introductory law courses, taught in a student's first year of law school. First year students may lack the basic knowledge to grasp the issues being presented to them and will not have the perspective necessary to place ethics issues in their wider context. If legal ethics instruction occurs at a later stage, students may be too cynical to give the course the attention it deserves or may be preoccupied by other courses they perceive to be more important, or preoccupied by the prospect of finding employment.²³

Below I describe how basic legal ethics and attitudinal awareness have been built into Law, Society, and Justice, and I summarise some of the insights that have been gleaned from teaching this material in terms of learning outcomes. To date, no specific survey has yet been done to ask students about their reactions to the material, though this is clearly worthwhile.²⁴

THE QUT LAW FACULTY INTEGRATED SKILLS DEVELOPMENT PROGRAMME

As noted above, Law, Society, and Justice was offered in 2000; however, the unit developed from a former QUT law unit, entitled Law in Context. I had experience with developing the material for Law in Context in my role as lecturer, unit coordinator, and seminar leader. I was also responsible for setting the student seminar discussion and oral team presentation problems. I have worked with and have benefitted from the previous work of other colleagues at QUT.²⁵

Law, Society, and Justice was developed as a group undertaking by a first year curriculum team who developed it in conjunction with the other new first year unit offerings. However, the principal responsibility for the unit's development was undertaken by myself and Paul von Nessen, who lectures in the first segment of the unit (described below).²⁶

Kift and Christensen of QUT Law Faculty have documented QUT's ambitious project to develop and implement a "coherent framework for the teaching of both conceptual knowledge and transferable generic and legal skills" throughout the LLB curriculum.²⁷ The underlying rationale of the approach adopted by QUT is that teaching and assessment must focus on well-identified, necessary skills, the development of which will produce desirable results. This approach embodies the wisdom that legal education should focus on "what lawyers need to be able to do," not just "what lawyers need to know." This focus on skills development was recommended by

Managing Justice and the American McCrate Report, *Legal Education and Professional Development – An Educational Continuum*,²⁸ which was cited in *Managing Justice*.

The aim of the QUT Law Faculty project, taking into account data from a wide range of reports,²⁹ was to develop an authentic learning environment for students through the adoption of: appropriate learning objectives; teaching and learning approaches and assessment methods that take into account the global workplace, and social and ethical values; and the development of lifelong learning skills.³⁰

Six desirable attributes for a law graduate were identified, namely,

- Discipline Knowledge
- Ethical Attitude
- Communication
- Problem Solving and Reasoning
- Information Literacy
- Interpersonal Focus

A table of skills that were considered as likely to develop these attributes was then drafted. Careful attention was paid in developing the new first year curriculum for 2000 as to how these skills should be allocated. The new curriculum divided the skills into four core LLB units.

Students enrolled in the LLB programme at QUT can complete degrees in four years, in a standard two-semester year. However students with existing degrees can complete in three years. Moreover, there is a good deal of flexibility now in the curriculum, and students can accelerate their degrees by electing to take courses in the summer semester. On average, intake into the first year of law at QUT is approximately 600 students, most of whom enroll in combined degrees (eg BBus/LLB), undertaking LLB studies in conjunction with a degree from another Faculty at QUT. The standard combined degree is completed in five years. Students normally take in their first year of study another four elective units from their combined degree (if for instance a Business Law student) or four units of Torts and Contracts if they were “straight” LLB students.

I describe a typical first year LLB course of study below. The core units and allocated skills for 2000 were as follows:

The First Year LLB curriculum

First Semester

Law, Society, and Justice

- Critical Thinking
- Oral Communication
- Ethical and Attitudinal Awareness

Legal Institutions and Methods

- Oral Communication (generally)
 - Comprehension and Analysis
 - Problem Solving
- Second Semester

Legal Research and Writing

- Information Literacy
- Problem Solving
- Written Communication
- Computer Skills

Law and Global Perspectives

- Critical Thinking
- Information Literacy
- Team Work
- Ethical and Attitudinal Awareness

The curriculum is a mix of elements from a more traditional law school curriculum with elements evincing a critical and contextual approach. All units focus on skills development. The unit Legal Institutions and Method focuses on the courts, case development, and the interpretation of legislation. The unit, though at home in a traditional law school curriculum, does not lack a critical perspective. The unit entitled Legal Research and Writing seeks to develop introductory- level research techniques with particular emphasis on computer- based research, focusing on their use in effective written communication. The units Law, Society, and Justice and Law and Global Perspectives examine the critical dimension of law, its historical underpinnings, and its modern development; Global Perspectives particularly, as its title suggests, focuses on human rights and international law.

TEACHING METHODS

Teaching methods differ according to the focus of the relevant unit. While the Faculty of Law is aware that a clinical or experiential approach to legal education provides richer learning outcomes for students, particularly if a principal goal is skills development, resources in the Faculty do not permit the adoption of a pure clinical approach.³¹ It was decided that two of the units, Legal Institutions and Method and Legal Research and Writing, were better able to adopt a more “clinical” approach, so a two-hour tutorial was offered to approximately 20 students per class; an additional one-hour lecture provided an overview and guidance.

It was thought, nevertheless, that as Law, Society, and Justice particularly but also Law and Global Perspectives provide an overview of the legal system from differing perspectives, the lecture format was the most appropriate

principal mode of delivery. It was felt that these subjects required a good deal of “knowledge,” including theoretical perspectives; thus, they could be presented with as much student interaction as is possible with 250 students in a lecture room by experienced lecturers. In the main, this has meant professorial-level staff. Thereafter, approximately 20 students participate in a one-hour discussion or workshop tutorial that is based on discussion problems or questions. The issues raised in the tutorial have been the subject of the lectures. Extensive reading materials included in a cases and materials book (principally literature) are to be read by the students before class; they provide further background, if not answers, to the questions posed.

CURRICULUM CHANGE

It should be noted that this curriculum change was not effected easily, even though a highly consensual approach was sought at all times.

It should also be noted that more work has been done in 2000 to refine the explicit and implicit skills that the law school is seeking to develop. In addition, the Faculty is taking the next step, that of establishing at differing levels of competence the skills that students need to develop in their later years of study. This has raised an awareness that some law school lecturers who have qualified as lawyers not as educators may not themselves have sufficient training to be comfortable with this form of education.³² Most staff can teach legal knowledge, ie “the law,” quite comfortably; however, many are unfamiliar with the concept of teaching that is aimed at developing skills. In part this accounts for some of the resistance that arises when a curriculum of this nature is introduced. To allay anxieties, the law school has identified an experienced member of staff to develop training programmes when individual teaching teams request assistance.³³ Fortunately for our unit, this person is a member of the Law, Society, and Justice teaching team; she has been able to see clearly how the unit is fulfilling its role and has been able to identify which teaching staff might need assistance.

ETHICAL AND ATTITUDINAL AWARENESS AS AN EXPLICIT SKILL

As is noted above, ethical and attitudinal awareness is an explicit skill that has been identified as a learning outcome for Law, Society, and Justice. The *McCrate Report* on legal education in the United States identified this skill early in the legal education literature. It described “Recognising and Resolving Ethical Dilemmas” as one of nine important learning outcomes. Some of the Australian reports³⁴ followed the direction of McCrate. The ALRC stated in its recent report, *Managing Justice*, that

properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and *calculated to inculcate a sense of ethical propriety, and professional and social responsibility.* (emphasis added)³⁵

Kift and Christensen, following the work of the QUT Skills Project team, argue that ethical and attitudinal awareness involves at least the skills of “ethical orientation” and “discipline and ethical knowledge.” More precisely, QUT wishes to produce a graduate: who “is able to value and promote truth, accuracy, honesty, accountability, and ethical behaviour;” who “possesses knowledge of and an understanding of the nature and sources of ethical standards and their enforcement;” and who “recognises and applies possible processes for resolving ethical dilemmas.”³⁶

The QUT Draft Working Document for Assessment Criteria for Skills identifies three levels of student achievement. The learning outcomes of the first year unit, Law, Society, and Justice are set at Level 1. Students should be:

- able to recognise the existence of an issue of a broad ethical nature (moral dilemma); and
- able to comply with student conduct rules.
- The next two levels focus on higher order reasoning, taking students beyond mere compliance with rules of conduct.

The learning outcomes for Level 2 state that a student should be:

- able to resolve an issue of a broad ethical nature (moral dilemma) with guidance and reflect on the process; and
- able to comply with student conduct rules.

At Level 3, one step higher, students should be

- able to independently resolve ethical dilemmas and reflect upon the process;
- able to model in professional demeanor ethical approaches; and
- able to comply with student conduct rules.

LAW, SOCIETY, AND JUSTICE

Law, Society, and Justice runs for 13 weeks. Each segment is offered for three weeks, except the final segment which is offered in four weeks of lectures. Each week there is one two- hour lecture and a one-hour tutorial dealing with material presented in the lecture given the previous week. Each lecturer designs the seminar questions, with some overview by the unit coordinator.

To explain how ethical and attitudinal awareness are interwoven in this course, I refer to the unit overview, the course objectives, and the course

content below.

“Unit Overview

This unit is designed to develop in students an understanding that law does not exist in a vacuum and that it both shapes, and is shaped by, society and its institutions. Consequently the unit seeks to intellectually challenge students to critically think about the law and the larger questions of justice with which the law is inevitably concerned. In doing so the unit encourages students to look beyond their own cultural horizons and to explicitly consider the principles of justice and equality before the law, which our legal system seeks to represent.

Unit Objectives

On completion of this unit students should be able to:

- identify and explain the basic tenets of a democratic liberal legal system, particularly the central concept, the rule of law;
- demonstrate an understanding of the historical and political development of democratic liberalism and the methods by which it has been incorporated into Australian law;
- critically analyse and discuss how law and values intertwine through a consideration of concepts such as of legal personality, family, human rights, and equality before the law;
- critically evaluate and discuss the extent to which there is equal access to the law and whether in its operation it is objective, neutral, and unbiased;
- demonstrate an understanding of ethical issues relevant to the study of law and the operation and practice of law in the wider community; and
- demonstrate a basic level of oral presentation skills and an awareness of how to improve these skills for the future.

Content

- Historical and Philosophical Development of Democratic Liberalism
- Personality and the Common Law
- The Rule of Law and Democratic Liberalism
- Limitations of Democratic Liberalism and the Rule of Law”

INCULCATING ETHICAL AND ATTITUDINAL AWARENESS IN LAW, SOCIETY, AND JUSTICE

Issues of legal ethics, the adversarial system, and access to justice, which are themselves conceptually intertwined, arise under the final topic for Law, Society, and Justice – Limitations of Democratic Liberalism and the Rule of Law.

Each segment of the unit is presented by a different lecturer; the first three are presented by law professors who have different orientations and backgrounds. The topic, the Historical Development of Liberalism and the Rule of Law, is taught by an American professor who has studied in the United Kingdom. This section focuses on the historical development of rights and the rule of law from Magna Carta to date. Personality and the Common Law is taught by an associate professor who adopts a critical perspective and

whose background is in human rights and anti-discrimination law. This section examines at concepts of legal personality and recognition of “family” in law. The topic, the Rule of Law and Democratic Liberalism, is taught from a more traditional perspective by a professor, originally from Scotland, who has lived and taught in New Zealand. This segment concentrates on the essence of the rule of law, particularly its application to the Australian constitutional context. I have a particular interest in feminist issues and access to justice so I teach the topic Limitations of Democratic Liberalism and the Rule of Law. In this segment I look at four areas, which illustrate problems with “true” equality before the law. This segment covers:

- The Gender of Judgments
- Cultural Difference and the Law
- Lawyers and the Adversarial System, and
- Access to Justice

Issues of ethics, the adversarial system, and access to justice form a small part of the overall content; however, the intent is to introduce students to these issues at level one learning outcomes. Ethical behaviour among students is, nevertheless, reinforced in the unit, not just in the inclusion of student conduct rules in the study guide but in some of the ways described below.

Two weeks of two-hour lectures are devoted to the topics Lawyers and the Adversarial System and Access to Justice. I use PowerPoint slides for these lectures to approximately 200-250 students per class.³⁷ I also tape the class for the benefit of external students. The PowerPoint slides are accessible prior to the lecture through an on-line teaching site.³⁸

TEACHING LEGAL ETHICS AND ADVERSARIALISM

I write now of the first time that I delivered a version of these lectures to the Law in Context lecture class (predecessor to Law, Society, and Justice). I come from principally a “black- letter” law teaching background. As a junior member of staff, with little prior knowledge of the unit material, I had trouble with some students accepting some of the propositions that I outlined in these lectures (very large class in a conservative law school). The essence of these propositions might be summarised as follows:

- Law is not neutral and objective
- Law reflects a certain gender bias
- Law reflects a certain cultural bias
- The “culture” of lawyers may frustrate the achievement of equality before the law
- Equality before the law may be defeated by the adversarial system itself
- Unequal access to justice results in inequality before the law.

As a female junior staff member lecturing with male professorial staff, I

knew I had to change my approach to attract student interest. I could tell many students were restless and not “engaged.” I wanted what I had to say to be heard, and I knew there were many students who wanted to listen. This was clear from the students who approached and e-mailed me about their interest in the subject matter and their concerns relating to the behaviour of other students. A number of students who turned out in later years to be among the law school’s most achieving specifically made a point of telling me how much they appreciated the lectures (which were so different from normal law school “fare”). They encouraged me not to be put off by the disruptive behaviour of some of the students in the class.

In subsequent versions of the lectures, I introduced the screening of current affairs programmes relevant to various issues that we were discussing. These programmes seemed to give my lecturing a far greater “air of authority.”

From subsequent student evaluations of the lectures, it is clear that my teaching is now well received by students. I did not conduct formal student evaluations in my first year of teaching; however, in 1999, the student evaluations of my lecturing to the last Law in Context class were above the QUT average for such groups. In 2000 in the first version of the lectures to the Law, Society, and Justice class, the overall teaching rating was much higher than the University average for such a large group.

The videos seem to be an important educational tool. On the one hand, they introduce novelty and a break from the lecture mode. On the other hand, they seem, at least from anecdotal evidence, to touch many students personally and make them passionate about the material being presented.³⁹ In addition, they reinforce points I make by bringing in “authority” from the outside world. They relate “real” experiences of those who have suffered within and from the legal system and give these experiences an authenticity lacking in academic delivery.

THE USE OF VIDEO IN LAW, SOCIETY, AND JUSTICE

The video that appears to have had the most impact was introduced to demonstrate how a lawyer’s duty of zealousness can be abused. It shows a reconstruction from an actual audio-tape of a young boy being brutally cross-examined in a courtroom. It was the subject of a very hard-hitting “Four Corners” programme,⁴⁰ which included interviews from victims, parents, judges, and defence lawyers. Comments about the video have been varied. One male student from an exclusive private school said something along these lines to me after the lecture, “I know the lawyer who was interviewed defending the cross-examining barrister, and I think I’ll think about him in a different light now. If anyone were to do that to my little brother, I’d . . .”

One leading legal ethics teacher to whom the video was shown at the Legal Ethics and Adversarialism Workshop asked me if I thought that the portrayal was too gruesome for a lecture class. I thought about this, but I think the answer is “no.” I noticed no student in the class of 200-250 leave the room while it was shown. The video was compelling. In my view, the best teaching occurs when there is this form of catharsis.

Other videos have set the scene clearly. The title of one explains all – “Justice Australian Style: No Money, No Lawyer.”⁴¹ One video is shown as background for the seminar discussion problem. It is the well-known story in Australia of the encounter of Justice Callinan and a Brisbane law firm with issues of ethics and the legal system.⁴²

I have learned from my experience. I now set the scene in a number of ways. I give lectures about the way the adversarial system works, about lawyers’ ethical duties, and about issues of access to justice. I also offer critical commentary; however, this role in the main is left to the videos.

GRAPPLING WITH ISSUES IN STUDENT TUTORIALS

The ethics tutorial takes place in the form of an oral team presentation every third week when five students present as a team on a topic either chosen or allocated to them. There is then discussion and questions are elicited from and by the class and the tutor.

The problem set for 2001 is reproduced below.

WEEK 13 – ORAL PRESENTATIONS TUTORIAL

Read the following:

“The Ethical Framework” Chapter 2 of Stan Ross, *Ethics in Law*, (2nd ed) (Sydney: Butterworths, 1998)

Students who are presenting should read all materials set out in the study guide for the Week 12 lecture. Other students are encouraged to read these more challenging materials, in particular:

Hon DA Ipp, “Reforms to the Adversarial Process in Civil Litigation – Part I” (1995) 69 *ALJ* 705.

D Luban, “Twenty Theses on Adversarial Ethics” Chapter 9 in Stacy and Lavarch (eds) *Beyond the Adversarial System* (Sydney: Federation Press, 1999).

Some time ago it was reported in the *Courier Mail* that the parents of a school student, who had allegedly been bashed by other students, had allegedly been threatened with defamation action by a perpetrator’s parents, one of whom was a lawyer. Director of the Queensland Legal Reform Group Robert Bond said in the *Courier-Mail*, August 1, 1998:

“Solicitors are doing it all the time, threatening people to withdraw complaints – it’s built into the system. . . . The sole purpose of these legal actions is to suppress

a complaint.

A Federal Court Judge found that Brisbane solicitors “initiated legal action as a deliberate tactic to delay paying a building claim” and then barrister, now Justice Callinan, was “privity to [the solicitors’] purpose and at least acquiesced in it and approved of it.” The finding was confirmed on appeal, without commenting specifically on the actions of Justice Callinan.”

Assuming the facts are as alleged:

- (i) Have these lawyers acted ethically? Have these lawyers acted morally?
- (ii) Is there a difference and should there be a difference?
- (iii) What reforms, if any, should be initiated to deal with these situations?

Feedback from the participants at the Legal Ethics and Adversarialism Workshop suggested that these questions might be too difficult for first year students. However, the Law, Society, and Justice teaching team think that, particularly as the topic is researched by a team of five who by and large chose the topic, the topic has been (and is) effective. Few students who enter law at QUT are school leavers. Indeed many have advanced degrees. Moreover, the video, described above, has been shown to set the scene. Finally, the problem of defamation actions and bullying is known by many students to be real, partly from widespread newspaper reports, and partly from having experienced similar problems themselves. In my classes, this tutorial generated an amazingly high level of discussion, as well almost complete student participation and attention – a predictor of effective learning.

One of the learning outcomes for Law, Society, and Justice is that a student be able to recognise the existence of an issue of a broad ethical nature. It is clear that further work needs to be done to identify when there is such recognition, how it is “developed,” and what measures can be used to determine that students have acquired such recognition.⁴³ The Law, Society, and Justice teaching team acknowledge that we teachers are operating somewhat “by the seat of our pants” in assessing this skill. Nevertheless, considerable work has been undertaken in the Faculty recently on assessment criteria for skills. This contribution will be used by the teaching team of Law, Society, and Justice.

GENERAL ETHICAL AWARENESS SKILLS

The discussion above explains the development of ethical awareness in a “knowledge” sense. The unit also reinforces ethical conduct in a general sense. It requires compliance with general student conduct rules, as does every law school unit. For example, there are rules about behaviour in tutorials. Students should not dominate the class but should be respectful of other students’ right to speak. The unit also seeks to ensure that all students participate and cooperate in teamwork with other students. Appendix B reproduces the declaration that students must sign about their own and other

team members' participation in group work. Few students actually report inappropriate conduct or lack of cooperation on the part of others. It would appear that merely having to sign such a form reinforces the idea that the presentation must be a shared concern and that there are responsibilities that must be assumed in this regard. The forms are taken into account in the assessment; however, they rarely are used to raise or lower a grade. They are taken into account to emphasise the importance of the taking of responsibility.

There is also student peer assessment of group oral presentations.⁴⁴ We stress the need to do this fairly and properly, particularly as group opinion is taken into account in determining the grade. The tutor awards the grade, but the peer assessment of the presentation may be taken into account when determining the grade. In my opinion, students can be quite tough with peer assessment of other student presentations; however, when on occasion a tutor has forgotten to administer peer assessment, there has been upset. Students seem to perceive that the whole process is transparently fairer and more objective when other students' views are taken into account, even though the tutor has the largest input regarding the mark awarded. Thus, overall the tutor takes into account peer assessment of the class (Appendix A) and students' declarations as to team participation (Appendix B); however, the tutor forms her or his own opinion on the overall quality of the written and oral presentation. Each student in the team of five receives an individual mark, based on a standard law school tutorial presentation assessment form (Appendix C). All these forms are contained in the study guide for the unit, and the criteria for assessment are also set out clearly.⁴⁵

CONCLUSION

Few will disagree that a strong sense of ethics is a very important attribute for law graduates. It seems clear at least to me that this quality will be most effectively developed if the process of ethical awareness starts from day one at law school. The QUT Skills Development Project has identified three developmental levels of ethical awareness. The unit Law, Society, and Justice aims to achieve this awareness as a level one outcome. The Project and QUT law school seek to continue higher-level development of the skill in later year law school units. Finally it is hoped that specialised units, such as Professional Responsibility, will develop the skill at a level three outcome.

Many commentators on legal system reform, myself included, see ethics awareness as playing an important part in turning around the culture of lawyers in an adversarial legal system. This culture has many negative qualities. Many argue it results in the denial of true equality before the law. Many, if not all, authors who write about problems and concerns with the legal system mention education as a cornerstone for the occurrence of

effective reform – without a body of persons sensitised to the need for change, there can be no effective reform. The Queensland University of Technology Faculty of Law believes it important to begin the process of sensitising students to issues of ethics at the point of entry to law school before students become immersed in the “culture” itself. The unit Law, Society, and Justice provides one step towards achieving this goal, while at the same time presenting a balanced examination of the role and rule of law and its many strengths.

* Associate Lecturer, Faculty of Law, Queensland University of Technology (“QUT”), Brisbane, Queensland, Australia.

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¹ See, for example: H Stacy & M Lavarch (eds), *Beyond the Adversarial System* (Sydney: Federation Press, 1999), which developed from the 1997 conference, “Beyond the Adversarial System,” hosted by the Australian Law Reform Commission (“ALRC”) and the National Institute for Law, Ethics, and Public Affairs, Brisbane, July, 1997; DA Ipp, Reforms to the Adversarial Process in Civil Litigation – Part I (1995) 69 *Australian Law J* 705; Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89” (Sydney: ALRC, 1999) (“Managing Justice”).

² CJ Menkel-Meadow, The Trouble with the Adversary System in a Post- modern, Multicultural World (1996) 38 *Wm & Mary L Rev* 5, at 10.

³ See Ipp, *supra*, note 1 at 712-713.

⁴ Most authors make in this point in their essays in Stacy & Lavarch, *supra* note 1.

⁵ *Supra* note 2, at 25.

⁶ J Davies, Fairness in a Predominantly Adversarial System, in Stacy & Lavarch, *supra* note 1, at 102.

⁷ C Sampford, Educating Lawyers to be Ethical Advisers (1999) 11 *Proctor* 19.

⁸ *Supra* note 7, at 19.

⁹ J Downie, A Case for Compulsory Legal Ethics Education in Canadian Law Schools (1997) 20 *Dalhousie Law J* 224, at 230.

¹⁰ See RA Schmuck & PA Schumuck, *Group Processes in the Classroom* (7th ed) (Madison, Wisconsin: Brown & Benchmark, 1997); JA DeVito, *Messages: Building Interpersonal Communication Skills* (4th ed) (New York: Longman, 1999).

¹¹ ALRC Report No 89, *supra* note 1, at para 3.32.

¹² S Ross, *Ethics in Law* (2nd ed) (Sydney: Butterworths, 1998) at 22 citing note 48, D Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Boston: Little Brown and Company, 1994).

¹³ *Supra* note 12, at 24.

¹⁴ A Hass, *Doing the Right Thing: Cultivating Your Moral Intelligence* (New York: Pocket Books, 1998).

¹⁵ Ross, *supra* note 12, at 24.

¹⁶ S Monk, *Courier Mail*, 21 November 2000, at 2.

¹⁷ Monk *supra* note 16, at 2.

¹⁸ E O’Dwyer & B Vale B, *Courier Mail*, 22 November 2000, at 7.

¹⁹ Monk, *supra* note 16, at 1.

²⁰ This is presumably because they are policed in the main by legal professional bodies who have no incentive to scrutinise too carefully the actions of their own members.

²¹ QUT introduced their integrated new first year curriculum in 2000.

- 22 Michael Kirby, *Legal Professional Ethics in Times of Change* (1996) 14 *Australian Bar Rev* 170.
- 23 S Burns, *Teaching Legal Ethics* (1993) 4 *Leg Educ Rev* 141.
- 24 Information on the legal ethics and adversarialism aspects of the course was presented to legal ethics teachers at the recent legal ethics workshop (see * above). I gained valuable feedback in terms of the group's reaction to the content and level of difficulty of the material for first year students.
- 25 QUT colleagues who have contributed: S Kift, see note 27; P MacFarlane, author of S Ross & P MacFarlane, *Lawyer's Responsibility and Accountability: Cases, Problems, and Commentary* (Sydney: Butterworths, 1997); and M Leiboff.
- 26 The law school team that worked on the new first year curriculum was led by Phillip Tahmindjis. Paul von Nessen and I were joint Coordinators of Law, Society, and Justice for 2000. I will be sole Unit Coordinator in 2001.
- 27 S Christensen & S Kift, *Graduate Attributes and Legal Skills: Integration or Disintegration?* (2000) 11 *Legal Educ Rev* 207.
- 28 American Bar Association, *Legal Education and Professional Development – An Educational Continuum* (Chicago: ABA, 1992) (the "McCrate Report").
- 29 Including ALRC No 89 (ALRC *supra* note 1), McCrate (*supra* note 28), and S Vignaendra, Centre for Legal Education, *Australian Law Graduate' Career Destinations* (Canberra: Department of Employment, Education, Training, and Youth Affairs, 1998).
- 30 Christensen & Kift, *supra* note 27.
- 31 Student enrolments in the LLB programme in year 1 of 2001 may approach 600.
- 32 Staff of the Law Faculty have been encouraged to gain formal higher education teaching qualifications.
- 33 Natalie Cuffe, Consultant Librarian to the QUT Skills Development Project.
- 34 See note 29 *supra*.
- 35 ALRC Report No 89, *supra* note 1, Chapter 2 "Education, Training, and Accountability" at para 2.85.
- 36 Christensen & Kift, *supra* note 27.
- 37 I acknowledge that I drew heavily on the PowerPoint slides created by Sally Kift in an earlier version of lectures on this topic to the Law in Context lecture class.
- 38 OLT site at <https://olt.qut.lwb142/qut.edu.au>. Students usually download the PowerPoint slides and take notes in the spaces provided opposite the relevant slide.
- 39 In subsequent student evaluations, I plan to ask a specific question about the value and importance of the videos shown.
- 40 ABC, Four Corners, "Double Jeopardy," 19 July 1999.
- 41 Insight, SBS, 9 March 2000.
- 42 ABC, Four Corners, "His Honour," 8.30pm, 14 September 1998.
- 43 These issues formed the subject of a paper presented at the QUT Assessment Conference entitled "Promoting Good Assessment Practice" held the 5-6 February 2001. See abstract of paper by Dr John Harrison, "Assessment in Business Ethics Education: Should it Be Pass/Fail?" at <http://www.talssss.qut.edu.au/BAC/HarrisonAbstract.htm>.
- 44 See Appendix A.
- 45 Appendices A and B were developed by Paul von Nessen, the joint coordinator for 2000 of Law, Society, and Justice.

Appendix A

TUTORIAL PRESENTATION ASSESSMENT Law, Society, and Justice First Semester 2001

Questionnaire completed by:
Tutorial Time:
Presentation Topic:

Please answer the following by circling 1 (negative) to 5 (positive):

- | | | | | | |
|--|---|---|---|---|---|
| 1. The executive summary of this topic was done well | 1 | 2 | 3 | 4 | 5 |
| 2. The presenters of this topic allocated their subject among themselves appropriately | 1 | 2 | 3 | 4 | 5 |
| 3. The presenters of this topic made it interesting | 1 | 2 | 3 | 4 | 5 |
| 4. The presenters encouraged class participation | 1 | 2 | 3 | 4 | 5 |
| 5. The presenters of this topic were well prepared | 1 | 2 | 3 | 4 | 5 |
| 6. Specific comments about the oral presentations: | | | | | |
| 7. Specific suggestions for improvement: | | | | | |
| 8. How has this presentation been of benefit (if any) to you? | | | | | |

Appendix B

TUTORIAL PRESENTATION QUESTIONNAIRE FOR TEAM MEMBERS Law, Society, and Justice First Semester 2001

Questionnaire completed by:
Tutorial Time:
Presentation Topic:.....

Please answer the following:

1. I did/did not participate in the preparation of the joint presentation to an appropriate level with the other participants.
2. All of the other presenters did/did not participate in the preparation of the joint presentation to an appropriate level.
3. If the answer to 2 is “did not” please indicate the reasons for this conclusion (ie. John Doe neither attended the organising meeting nor contributed to the executive summary).
4. What observations do you have about the way your team organised this task?
5. What processes did your team follow in completing the task?
6. If you were to do this again, what would you do differently?
7. What value, if any, did this exercise provide to you?

Appendix C

Feedback on Oral Presentation						Comments (Optional)
Student's Name:.....						
	Excellent	Good	Average	Below Average	Poor	
Content/structure	A	B	C	D	E	
What the student said – includes knowledge and understanding of relevant subject matter, structure of argument						
Contextual aspect	A	B	C	D	E	
The degree of analysis and critique (practical or jurisprudential as appropriate) employed by the student						
Presentation	A	B	C	D	E	
How the student spoke – includes manner and delivery of argument, whether argument is succinct						
Responsiveness	A	B	C	D	E	
Ability to listen, ability to answer questions or respond to discussion, ability to facilitate discussion						
Other Skills	A	B	C	D	E	

Excellent	Good	Average	Below Average	Poor	Comments (Optional)
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Any other
generic or
specific skills
intended to be
fostered by the
activity

General comments