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Designing Learning Strategies for Competition Law – Finding a Place for Context and Problem Based Learning

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Introduction

Competition law, the role of which has been rapidly expanding over the past decade, has become a popular subject in most law schools' curricula. However, unlike Consumer Protection law or Criminal law, students come to this subject with little notion of what it entails. Nevertheless, like those other subjects, Competition law has been the site of significant theoretical and empirical analysis.

This paper examines the manner in which two teaching strategies namely, teaching in context and problem based learning, can be used together in teaching Competition law. Although problem based learning and teaching in context have often been viewed as opposing teaching strategies[1] connected with different visions of legal education, this paper looks at how they can be effectively used together to enrich the learning experience at both the undergraduate and postgraduate levels. Problem based learning, which gained popularity in many disciplines, brings with it numerous benefits that can enhance law teaching. It is hugely popular with students and can be used effectively to gain a detailed understanding on how the legislation may be applied. However it has its limitations. The main limitation is that it can stress the doctrinally based, rule oriented approach to teaching law.

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* Division of Law, Macquarie University. This article is a revised version of a paper presented at the ALTA Conference in the University of Canberra, 2-5 July 2000. I am grateful to Professor Jack Goldring for his helpful comments. However all responsibility for mistakes and omissions lies with me.
 (2002) 13 *Legal Educ Rev* 1.

1 Whereas problem based learning has been popular in the practice based disciplines, such as Medicine, relying significantly on contexual materials has been popular in the humanities. For an introduction to the approaches to teaching law see D Boud & G Feletti (eds), *The Challenge of Problem Based Learning* (London: Kogan Page, 1997) 69.

This limitation can be addressed by incorporating context, which is aimed at querying the notion that legal rules are truly objective.[2] Competition law can be taught in context by encouraging students to explore the sociological, political and economic underpinnings of the legislative approach. It promotes a critical awareness of the current legal system and the process of law reform.

This paper does two things. First it examines the factors which determine the design of the subject including the objectives of teaching competition law, the barriers faced by teachers and the composition of the student body. Secondly the paper looks specifically at two teaching strategies which can complement each other in meeting the stated objectives of legal education.

Objectives of Teaching Competition Law

Professor Goldring has pointed to two main objectives in legal education namely to understand the law and to appreciate how the law is, what it is.[3] Clearly the dominant force of economic rationalism of the last decade has also had its influence on legal education. Cuts in University funding have seen many reactions from law faculties. Whereas some faculties have responding by offering subjects focussing on legal practice in order to satisfy student demand,[4] many are adopting a policy of commercialisation and offering fee based courses to postgraduate students or to undergraduate students attending summer school. Other faculties are considering commercial sponsorship as a means of supplementing the Faculty's budget.[5] The demands of the student/client and the profession have become hard to ignore. This has influenced the way in which legal education is perceived and delivered.[6] The importance of understanding the aims and objectives of legal education and the manner in which this

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2 For an examination of the manner in which teaching in context has influenced legal education see M LeBrun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Sydney: LBC, 1994) 8-10.

3 J Goldring, The Future of Legal Education (1993-94) 11 *Journal of Professional Legal Education* 151, at 152-153.

4 See V Brand, Decline in the reform of law teaching? The impact of policy reforms in tertiary education (1999) 10 *Legal Educ Rev* 109, at 121. Also see C McInnis & S Marginson, *Australian Law Schools After the Pearce Report* (Canberra: Government Printing Office, 1994) 21.

5 V Brand, *id* at 120.

6 *Id* at 121-127.

should be reflected in the content of the curriculum cannot be underestimated. This issue has been the source of some rich and varied discussion.[7] The importance of learning how the law has developed is recognized as important as is knowing how to apply the law to a given problem.[8]

For the purposes of my discussion I have relied on three specific objectives identified by Richard Johnstone, in studying the manner in which law teaching has developed in Australia.[9] They have been called firstly, cognitive and skills objectives; secondly objectives relating to values; and thirdly motivational objectives[10].

The cognitive and skills objective deals with the manner in which legal education should develop basic knowledge and skills to equip students to be lawyers.[11] It involves teaching students the basic principles of the subject including the legislation and the case law. It also involves the ability to evaluate, synthesise and apply these legal principles to a particular problem. This is long been acknowledged as the main objective of most law schools.[12] This issue has resurfaced recently with the increasing number of Law Schools which are incorporating the Professional Legal Training necessary for practice, into their undergraduate programs.[13] The discussion which follows, proposes that this objective can be met with a lecture dealing with doctrinal examination of the law together with problem-based learning exercises which will enable students to apply and appreciate what they have learnt.

The second of the objectives relates to the values inherent in the legal system. This objective is aimed at encouraging students to "consider and explore the values explicitly

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7 *Supra* note 2, at 158-176.

8 *Id.*

9 R Johnstone, Rethinking the Teaching of Law, (1992) 3 *Legal Educ Rev* 17, at 22-28.

10 *Id* at 26.

11 *Id* at 22.

12 On the importance of developing skills see R Woellner, Developing and Presenting a Skills Program in the LLB: A Discussion of Design and Operational Issues (1998) 16 *Journal of Professional Legal Education*, 87.

13 Recently many universities have begun offering the professional legal training courses within the Faculty in some instances as part of the undergraduate program. An examination of the universities' web sites revealed that ANU, Monash University, Newcastle University, QUT, UTS, UWS and Wollongong University all offer such courses as a "one-stop" legal qualification.

and implicitly contained in the law and its practice". In short, students need to be able to "think like lawyers" and at the same time stand back and reflect on "how lawyers think".[14] This involves introducing students to different perspectives and theories which will enable them to reflect on the value-laden nature of competition law. Teaching competition law in context may encourage students to undertake such a critical examination. Indeed the role of the academic lawyer not only to carry out critical analysis of the law but also to influence decision making and reform is becoming more commonplace.[15] Encouraging and training students to engage in this process of inquiry should be one of the fundamental aims of the Law School's curriculum.

The third objective is motivational – which means to allow the student to learn about the law in any way they wish.[16] Much has been written about the different approaches to learning and to put it simply much of this literature distinguishes between the "surface" and the "deep" approach to learning. The surface approach has usually been described as the transmission of information to the student where the student absorbs and reproduces the information to fulfill the subject requirements.[17] In contrast the deep approach to learning is described as involving the student transforming the material and understanding its relevance in a wider context.[18] This surface/deep dichotomy is certainly relevant to legal education particularly given that the law degree is seen not just as a professional qualification but as a generalist degree[19] and the wide appeal of the degree as a post graduate qualification undertaken by fee paying students from a variety of backgrounds. Often the block teaching mode of delivery is being embraced by legal academics in a pragmatic attempt to cater for the large demand for a legal qualification. In such an environment a student

14 *Supra* note 9, at 26.

15 See D Weisbrot, Competition, Cooperation and Legal Change (1993) *Legal Educ Rev* 1, at 22 and 26. See also R Symth, Law or Economics? An Empirical Investigation into the Influence of Economics on Australian Courts (2000) 28 *ABLR* 5 where the authors have carried out a study listing the articles or texts cited by the Federal Court and High Court of Australia.

16 *Supra* note 2, at 27

17 See N Entwistle, Recent research on student learning and the learning environment in J Tait & P Knight, *The Management of Independent Learning* (London: Kogan Page) 100.

18 *Id* at 100-101.

19 *Supra* note 4, at 110 and 127-132.

focused approach to teaching and assessment can assist "students to develop and change their conceptions to the subject".[20]

Thus the third objective is a process of engaging the student and being receptive to the manner in which they choose to learn. This is only possible by giving careful consideration to the learning strategies employed, the educational materials used and the assessment tasks that are set.[21] Further recognising the different needs of students[22] and meeting these needs can build an environment where these students can both inform and challenge each other, developing a joint responsibility for learning.[23]

The Barriers to Effective Teaching of Competition Law

Competition law is not an easy subject to teach. There are two main barriers that must be addressed in teaching this, and probably a number of other commercially oriented subjects, such as Corporations Law[24] or Taxation Law.

The most significant complaint from students, which is expressed in the teaching evaluations, points to the extent of economics that they are required to know and the manner in which such theoretical knowledge can be translated to a

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20 K Trigwell, M. Posser & F Waterhouse, Relations between teacher's approach to learning and students' approach to learning (1999) 37 *Higher Education* 57, at 67.

21 This paper, limits itself to dealing with the issues of teaching in context and the use of problem solving and does not detail the assessment tasks used or the educational materials supplied. For the present purposes it should be noted however that the assessment tasks are flexible aimed at encouraging a deep approach to learning. See S Brown & P Knight, *Assessing Learners in Higher Education* (London: Kogan Page) 11.

22 On the issue of students' needs and learning strategies see P Spiegelman, Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web, (1998) 38 *Journal of Legal Education* 243.

23 *Supra* note 9, at 29. Also see D Harris & C Bell, *Evaluating and Assessing for Learning* (London: Kogan Page) 90 and P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 48 where the analysis refers to medicine and has equal application to the teaching of law.

24 For a discussion of the challenges facing teachers of Corporations Law, see K Hall, Theory, Gender and Corporate Law (1998) 9 *Legal Educ Rev* 31, at 34-36; D Kingsford Smith, Studying Modern Corporations Law in Context (2000) 33 *The Law Teacher* 196; P Spender, Women and the Epistemology of Corporations Law (1995) 6 *Legal EducRev* 195.

real life event. Indeed the legislation, after the amendments made in 1995 as a consequence of the Hilmer Report,[25] has a firm basis on economic principles. Whereas the Australian Competition and Consumer Commission (ACCC) has based its decisions squarely on economic theory, the Courts which have encountered a growing body of literature on all aspects of competition regulation, usually from the United States, have been grappling with this economic theory.[26]

For example analysis of any merger application five years ago would have applied the structuralist analysis relying on the structure-conduct-performance model, whereas the same analysis today would call upon game theory to explain the consequences that may follow from the merger. Unlike the United States where Law and Economics is now part of the curriculum at many Law schools[27] and economic analysis is applied to an increasing range of subjects, this is not paralleled in Australia.[28]

Although law and economic scholarship did get a toe-hold in Australia in the 1980s,[29] it does not appear to have flourished as one would have expected particularly in the undergraduate curriculum. In a survey undertaken by the author[30] it was found that only two Law Faculties offered a foundation

25 Australia, *Report by the Independent Committee of Inquiry* (Hilmer Report), August 1993 (Canberra: AGPS) xvi.

26 See Smythe, *supra* note 15.

27 See R Whaples, A Morriss & A Moorhouse, What Should Lawyers Know About Economics? (1998) 48 *Journal of Legal Education* 120. Here the authors found that the AALS directory listed 159 persons teaching at least one course in the area. Also see T Venkateswarlu, Law and Economics Course readings: a survey of North American universities (1997) 41 *American Economist* 89. Here the author surveys the inclusion of law and economics subjects in the Faculties of Economics in North American Universities and the manner in which such readings are designed to facilitate the application of economic tools in examining optimal laws.

28 See A Duggan, Law and Economics in Australia (1989) 1 *Legal Educ Rev* 37, where the author points to the limited number of subjects involving law and economics. It is likely that there are many more such subjects today given the widespread acceptance of law and economics scholarship, illustrated by the Hilmer Committee Report and subsequent reforms and the CLERP program much of which has been enacted.

29 See R Hunter, R Ingleby & R Johnstone, *Thinking About Law Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995) 63.

30 I conducted a survey by examining the web sites of every Law Faculty of every university in Australia. Only two Law Faculties offered a subject primarily concerned with Law and Economics. It is assumed that a number of Law Faculties would deal with this school of thought in a first year foundation subject.

subject concentrating on Law and Economics. Even more surprisingly it was found that no such subject was offered in the Faculties of Business or the Faculties of Economics.[31] However the majority of Law Faculties in Australia offered advanced elective subjects.[32] The strong influence of the economics tool kit[33] and its applicability to law, particularly Competition Law, cannot be denied.[34] Teachers of Competition Law have to address the question of how to introduce these complex concepts of law and economic scholarship to students, who may not have been exposed to such literature or analysis before, and how to do this in a speedy and engaging fashion.

The second main problem encountered, particularly in the early weeks of the semester, is that students find it difficult to engage with the subject matter because it is not relevant to their lives. What does a merger between two

31 The web sites of the Faculties of Business and Faculties of Economics were also examined in the survey. What was surprising was that there was no single subject dealing with Law and Economics being taught in either the Faculties of Business or Economics at either undergraduate or postgraduate levels in any Australian University. This is a sharp contrast to the experience in the United States where a survey of American Canadian Universities showed that such subjects had been increasingly added to the economics curriculum in the last four or five years. See T Venkateswarlu, Law and Economics Course readings: a survey of North American universities (1997) 41 *American Economist* 89.

32 These elective subjects were undertaken in the third or later years of the law degree. They included Competition Law and Restrictive Trade Practices.

33 See H Demsetz, The Primacy of Economics: An Explanation of the Comparative Success of Economics in the Social Sciences (1997) 35 *Economic Inquiry* 1. It is argued that the success of economics is attributable to the fact that it is more definite than any of the other social sciences and that it has universal applicability in our decentralised economies.

34 The use of microeconomic principles in analysing the efficiency of our legal rules has been widely accepted. This is illustrated not only by the reliance by legislators on these principles evidenced by the Corporate Law Economic Reform Program and the reforms to our competition and telecommunications laws but also large number of law and economics text books from the United States. For example see R Posner, *Economic Analysis of Law* (4th edition) (Boston: Little and Brown, 1992); M Polinsky, *An Introduction to Law and Economics* (2nd edition) (Boston: Little and Brown, 1989); R Cooter, *Law and Economics* (3rd edition) (Reading, Mass: Addison Wesley Longman, 2000); RP Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* (St Paul, Minn: West Publishing Co, 1990); C Veljanovski, *The Economics of Law: An Introductory Text* (London: Institute of Economic Affairs, 1990), and GS Crespu, *Cases and Materials on Law and Economics* (St Paul, Minn: West Publishing Co, 1984).

telecommunications companies have of interest or relevance to an undergraduate student? It has been stated that Australians, unlike their American counterparts, seem ambivalent about the value of fully fledged competition,[35] which is certainly well illustrated by the significant degree of press coverage given to the rural and regional sectors, which are facing deregulation of industries. This is further illustrated by the degree of attention paid by government to the concerns of rural and regional Australians. Students, faced with such diverse issues are ambivalent about competition law. There is a complex statute to come to grips with and the material dealt within it is constantly expanding.[36] The challenge becomes one of engaging students with the subject matter as early as possible so that they can participate in the discussions and assess the material.

The Student Composition – An Important Consideration in Designing Learning Strategies

In considering the design of any subject attention must firstly be directed at the composition of the student body. Although the discussion here is based on my experiences, it is likely that this is relevant to other universities.

Whereas there is a greater degree of uniformity among the post-graduate student population undertaking the Competition Law subjects, this is not so at the undergraduate levels. At the undergraduate level it would appear that there has been little change to the types of students pursuing legal education and it continues to attract the middle and upper middle classes.[37] Generally the undergraduate students fall into two main categories – business students and non business students.

First there are the business oriented students – who include mature age students, part-time students and students who have completed their first degrees. Often these students

35 R Steinwall (ed), *25 Years of Competition Law* (Sydney: Butterworths, 2000) 146.

36 For example see the inclusion of the Access Regime in the Act and the ever-expanding role of the ACCC which now includes regulating GST matters.

37 On the composition of students at undergraduate level see J Goldring, An Updated Social Profile of students entering law courses (1986) 29(2) *Australian Universities Review* 38-44. Also see A Ziegert, Social Structure, Educational Attainment and Admission to Law School (1992) 3 *Legal Educ Rev* 154 and C McInnis & S Marginson, *Australian Law Schools after the 1987 Pearce Report* (Canberra: AGPS, 1994) 204.

have a some knowledge of business and current affairs having undertaken a number of business subjects in their business degrees. They wish to link their learning to current discourses and events in the area. They also have a knowledge of economics which forms the basis of current commercial law rules. The views these students hold are often fixed with little reflection on regulatory theories which can explain these rules.[38] They are looking for content that will allow them to apply their subject matter to mergers and corporate collapses, prosecutions underway of corporate officers for price fixing or law reform proposals. These students want to undertake tasks that will involve the application of the statute and case law. They are in favour of learning the details of the legislation and applying it to "real life" scenarios. Although they are open to critical theories, they have to be easily applied to the given topic.

The second student category is the non-business student including Humanities, Communications and Science students as well as the straight Law students. This category also includes mature age students and part time students. These students are either doing a combined degree for example in Humanities and Law or have a fairly good grounding in Arts related subjects. They generally have little or no knowledge of business and are not well versed with the guiding economic rationale of the current regulatory framework or the terminology of competition law, which is presumed by the standard texts and the statute. They usually require greater guidance with these matters. However they are also much more critical of the economic rationale and are open to a wider range of alternative theories in assessing competition law principles and practice. What they sometimes lack is a critical framework in which to express their concerns. Engaging these students with the subject matter and allowing their concerns to be voiced within an informed theoretical framework is the challenge posed by these students.

As alluded to earlier this is not so obvious at the postgraduate level. It appears that the introduction of fees for post graduate education has led to greater degree of uniformity among this student body[39]. The majority of these students

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38 For example see A Ogus, *Regulation: Legal form and economic theory* (Oxford: Claredon Press, 1994) for an excellent analysis of how economic theories have influenced legislative reforms.

39 See Higher Education Council *The Effects of the Introduction of Fee-paying Postgraduate Courses on Access for Designated Groups* (Canberra: AGPS, May 1997).

opt to do the subject in order to enhance their careers. Usually they are from a commercial background working in law firms or in large corporations. They have a clear idea of why they are doing the subject and are usually confident and more than willing to enter into a learning partnership. It is important to learn early on what the specific backgrounds and interests of the students are. More often than not students are involved in a particular competition law issue in their workplace. Developing the materials in a manner to focus on these specific interests can be demanding as it may require a revision of the way in which one was going to teach the subject. However it has two main advantages – it creates a conducive environment for a learning and it involves the student body in this learning partnership.

What is "Context" and Why Should We Bother With It?

Context has been used in numerous ways and has influenced legal education for well over two decades.[40] So it is most reasonable to ask, "what is context"? Although several meanings can be attributed to this term,[41] the following statement by Minow and Spelman is helpful:

> The call for context itself tacitly signals both that the selection of some context is unavoidable, if only by default, and that the selection of one context over another implies a preference for one set of analytic categories rather than another. Against the background assumptions of liberal political and legal theory that treat principles as universal and the individual self as the proper unit of analysis, a call for contextual interpretation may well defend switching from one set of analytic categories to another that may only seem more "contextual" because it emphasizes group-based traits of individuals. In the late twentieth century in the United States, those who urge contextual interpretation often point to the harmful effects of legacies of

40 For an examination of the manner in which teaching in context has influenced legal education see *supra* note 2. Also see B Horrigan, Teaching and Integrating Recent Developments in Corporate, Public and International Law and Practice, *Paper presented at the Corporate Law Teachers Association Annual Conference, 2001* (Victoria University, Melbourne, February 2001).

41 For the three possible meanings which can be attributed to the term see M Minow & E Seplman, In Context, (1990) 63 *Southern California Law Review* 1597, at 1602-1606.

> exclusion based on race, gender, class, or their group traits.[42]

This makes clear that there can be many contexts to any particular issue under discussion in competition law. They all involve an understanding of the values inherent in any rule and a critical examination of these values using another contextual backdrop – for developing the design of the subject.

The use of context contributes to the development of analytical skills in a student going toward achieving the second objective discussed earlier – that is that law teaching should encourage a critical questioning of the values inherent in laws. It allows students to consider how lawyers think. Being able to do so can allow the learner to appreciate the voices or values that are not considered in Competition Law. This allows the student to understand the process of law making and indeed to appreciate why the law is the way it is. And it encourages students to listen to other points of view, a valuable skill for lawyers to possess.

Traditionally such an analysis is not common in law schools. A survey of the main Competition Law texts books supports this claim.[43] As stated about Corporate Law, another supposed "black letter" law subject, perhaps this has been because of the growing scope and complexity of corporate law statutes or because of the technical nature of many corporate law concepts.[44]

Finding the Right Context for Competition Law

Competition law in Australia is regulated by the *Trade Practices Act 1974*. Of significant influence to competition regulation over the recent past has been the Report by the Independent Committee of Inquiry into National Competition Policy (Hilmer Report) published in August 1993 which undertook a wide examination of competitive conduct by firms as well as governments. The report and consequent amendments to the Act are firmly based on neoclassical market economics, explicitly recognising that the object of

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42 *Id* at 1605-1606.

43 The two main Competition Law textbooks including our own concentrate on the statutory provisions and their interpretation. The two main texts in the area are Steinwall et al, *Australian Competition Law* (Sydney: Butterworths, 2000) and S Corones, *Competition Law in Australia*, (Sydney: LBC, 1999).

44 See Hall, *supra* note 24, at 31.

the Act is to enhance the welfare of Australians through the promotion of competition. Efficiency of the firm is seen as the key. However it is abundantly clear that this is not the whole picture. Many other factors inform and shape competition law and are essential to any meaningful analysis of the subject.

I have attempted to fulfil two objectives in teaching this subject. The first is to ensure that students become well acquainted with the basic principles of neo classical economic analysis so as to be able to tackle the statute, cases and literature in the area; and the second is to attempt to encourage students to consider the values which are inherent in the neo classical framework – to put the current competition law in context.

There is no doubt that students in this subject need a good grounding in the neo-classical economic analysis, to which the Chicago school[45] has made an enormous contribution. There is a vast amount of literature in this area and is incorporated in the main textbooks on Competition Law.[46] Supplementing this literature with extracts of the Hilmer Report is valuable in giving the material an Australian focus. However how much economics is enough to understand the legislation and the case law is a difficult question to answer. A recent study undertaken to identify the main economic concepts students should learn in a law and economics course gives us some valuable guidance about what are the most commonly encountered concepts.[47] Concepts such as opportunity cost, externalities, marginal analysis, equilibrium, Pareto optimality and Kaldor-Hicks rate highly and indeed form the core of microeconomic analysis. Students who encounter these concepts at an early stage are better able to deal with the material in the subject.[48]

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45 For a brief overview on the Chicago School see Corones, *supra* note 43, at 12-13.

46 For example see the discussion on neo classical economics in Steinwall et al, *supra* note 43, at 89-114.

47 *Supra* note 27, at 121. This article also gives a list of readings that are recommended by the members of the American Law and Economics Association and the American Economic Association.

48 Later they encounter more advanced economic concepts such as game theory. For a good description of how this theory can be applied see D Robertson, The regulatory assessment of mergers (and things like mergers) (2000) 7 *Competition and Consumer Law Journal* 201, at 204-207.

The two main schools of thought that have dominated this debate are the Structuralist School[49] and the Chicago School. The Structuralist School contends that it is market structure that determines market conduct, the firm's performance as well as profitability. Thus any attempt to increase competition will involve a modification of the existing market structure. This view has been well accepted in the Australia as a starting point to any competition analysis.[50]

The views of the Chicago School are firmly based on the principles of market efficiency and a fundamental ability of markets to self regulate. The proponents argue that the basis for analysing competition/anti-trust issues should be to query the implications for static efficiency and consumer welfare of any conduct.[51] The Chicago School rejects the Structuralist approach and argues that it is efficiency, not structural factors, which are important to a firm's profitability. In Australia although the structuralist approach still forms the basis the influence of the Chicago School cannot be underestimated. It has been rightly stated that there is an impression created by the proponents of this school that they represent economists as a whole.[52] Part of the reason why neo-classical economics has had a significant influence is that it appears to be scientific and promises to be value-free. It promises to solve difficult problems.[53] But it is not value free and does not offer solutions to all problems. Although there has been a shift away from the Chicago School during the late 1980s and 1990s in legal scholarship,[54] it nevertheless still appears to significantly influence the legislature in Australia.[55] It is in getting this message across and assisting students to develop a critical understanding of law and economics that context can be of assistance.

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49 Also referred to as the Harvard School. See Corones, *supra* note 43, at 17.

50 See Corones, *supra* note 43, at 18.

51 See Steinwall, *supra note* 43, at 112.

52 See S Bottomley & S Parker, *Law in Context* (Sydney: The Federation Press, 1997) at 279. However for a discussion of the second wave of law and economics see M Richardson & G Hadfield (eds) *The Second Wave of Law and Economics* (Sydney: The Federation Press, 1999).

53 G Cooper, Inevitability and Use (1989) 1 *Legal Educ Rev* 28, at 30.

54 See J Farrar, In Pursuit of an appropriate theoretical perspective and methodology for comparative corporate governance *Paper presented at the Corporate Law Teachers Association Conference*, Victoria University, February 2001 11.

55 The recent reforms to Corporate Law and Competition Law are still largely influenced by the Chicago School.

Teaching competition law in context is to teach the doctrinal rules alongside a wider social and political framework.[56] The choice of materials and critical perspectives that are adopted is not only dependent on the lecturer but also on the types of student in the class. The same set of materials will rarely accommodate the interests of all students. Likewise the contextual materials that are used, whether they are dealing with the gendered nature of competition law or the political focus of recent reforms, will all depend on the lecturer's particular focus. In this paper I have examined two such approaches to teaching Competition law in context – a feminist context and a historical context.

There is a good deal of feminist jurisprudence and literature dealing with competition law which can be used effectively, in the early weeks of the semester, to question the underpinnings of the neo-classical model.[57] The important role feminist jurisprudence can play in highlighting the inherent values underlying the terms "the rational investor", "the consumer", "the worker"[58] "the businessman"[59] or indeed the meaning of "public interest". It clearly demonstrates that law is not neutral and objective and may be questioned and queried.

One interesting example of how the feminist context can be used in competition law is illustrated by Professor Radin. In a discussion on the limits of universal commodification, Professor Radin asks whether there should be a free market for babies.[60] She questions Posner's analysis[61] that everything

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56 See W Twining, *Law in Context — Enlarging a Discipline* (Oxford: Clarendon Press, 1997) 49. See also S Bottomley & S Parker, *supra* note 52, at 10-12.

57 For example see JM Radin, Market inalienability (1987) 100 *Harvard Law Review* 1849; JM Radin, *Contestable Commodities* (Cambridge, Mass: Harvard University Press, 1996); MA Ferber & JA Nelson (eds), *Beyond Economic Man: Feminist Theory and Economics* (Chicago: University of Chicago Press, 1993).

58 See RJ Owens, Work and Gender in the Law Curriculum (1995) 6 *Legal Educ Rev* 183. See also N Naffine, *Law and the Sexes: Exploration in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

59 Hall, *supra* note 24.

60 Radin, *supra* note 57, at 131.

61 Posner's contribution to Law and Economic scholarship has been enormous. See Posner R, Eonomic Analysis of Law, Little Brown, 1992, Also see Landes E and Posner R, The Economics of the Baby Shortage, (1978) 7 *Journal of Legal Studies* 323. It has been argued that Posner has moved away from the strict efficiency based analysis used in his earlier writings to a more pragmatic approach: see Farrar, *supra* note 54.

people value is ownable and saleable[62] and proposes that there are contested commodities which defy free exchange. Using this analysis, students can consider whether the free market is indeed the most efficient way of allocating resources. They can also explore the types of commodities they believe are contested commodities – those which defy commodification and should not be subject to the free market. In this manner students can consider not only the values on which competition law is based but also their own values and those of fellow students. The discussion can be carried through to specific topics that are dealt with in the subject. The deregulation of government business enterprises is a sound topic for applying the analysis of both Professor Posner and Professor Radin. By doing so students are asked to think about whether such essential services or parts of these services could be viewed as contested commodities.

The second way of incorporating context is to examine the political nature of competition law. In an interesting and informative publication, which is more than 20 years old, and just a little younger than the *Trade Practices Act 1974*, a number of the socio-political issues which were the focus of the predecessors of the current Act are examined.[63] There has been some further consideration of the interests and values that were reinforced by these earlier Acts.[64] These readings provide a good inter-disciplinary introduction to the history of competition law.[65] I encourage students to explore the current political context by looking at the secondary boycott provisions in the Act. The history of the secondary boycott provisions illustrates the differences between the political parties in Australia. The tumultuous history of these provisions can only be explained by the views held by the two major political parties on the trade union movement. The current secondary boycott provisions introduced by the coalition government is based on the conservative

62 Radin *supra* note 57, at 3

63 A Hopkins, *Crime Law & Business – The Sociological Sources of Australian Monopoly Law* (Canberra: Australian Institute of Criminology, 1978) 1.

64 For example see G Fleming & D Terwiel D, What effect did early Australian Antitrust legislation have on firm behaviour? Lessons from business history', (1999) 27 *Australian Business Law Review* 47 and G de Q Walker, *Australian Monopoly Law Issues of Law, Fact and Policy* (Melbourne: FW Cheshire, 1967) 3.

65 For an introduction to the history of American antitrust see EM Fox & LA Sullivan, Antitrust Retrospective and Prospective: Where are we coming from? Where are we going?', (1987) 62 *New York University Law Review* 936.

agenda and neo classical economics. It forms part of a package of reforms introduced by the government in the areas of industrial relations, consumer protection and corproate law. Such an examination encourages students to think of the political context of competition law specifically and commercial law in general. This type of analysis applies equally to a study of the development of a global competition law.[66] Context in these cases allows students to appreciate the many dimensions to competition law but it also allows students to make important links between the different subjects they study including corporations law, competition law, international trade law, consumer law, industrial law and alternate dispute resolution.

Incorporating Problem Based Learning in Competition Law

Although I have used problem solving exercises for a number of years in teaching Law subjects it is only recently that I have formalised this method of learning and have incorporated it into the teaching of Competition law.[67]

Firstly, problem based learning needs to be defined and this is not an easy task.[68] Perhaps the best definition is provided by Boud and Felletti:

> While there are different versions of what constitutes PBL, it does not as is sometimes erroneously assumed, involve the addition of problem solving activities to otherwise discipline-centered curricula, but a way of conceiving of the curriculum which is centered around key problems in professional practice".[69]

Teaching law using problem based learning can consist of "case studies and individually directed learning as distinct from other modes of training such as small group exercises".[70] It can include giving students a fact situation (as

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66 See P Drahos & J Braithwaite, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

67 V Nagarajan & D Meltz, *Questions and Answers – Trade Practices Law* (Sydney: Butterworths, Sydney, 1999). I am responsible for six chapters, which deal with Restrictive Trade Practices.

68 See J Drinan, The Limits of Problem-based Learning' in Boud & Feletti, *supra* note 1, chapter 32.

69 See Boud & Felletti, *supra* note 1, at 14. Also see J Macfarlane & J Manwaring, Using Problem Based Learning to Teach First Year Contracts (1998) 16 *Journal of Professional Legal Education* 271.

70 See K Winsor, Applying the Ideas of Problem-based Learning to Teaching the Practice of Law, in Boud & Feletti, *supra* note 1, at 219.

closely approximately to a real life situation) which raises a number of legal issues and asking the students to advise on these issues.

However problem based learning is something more than simply asking students to transfer the information from a lecture to a given fact situation. It involves a good deal of thought in designing problems[71] which will allow the student to embark on a process of independent study whereby the student recognises the issues involved, undertakes the necessary research and analysis and applies the law. This will also allow students to assess his or her level of learning.

Problem based learning, which is now an integral part of education in many disciplines[72] has two main benefits. Firstly it can develop basic knowledge and skills to equip students for legal practice.[73] Secondly it enables students to take responsibility for learning and allows them to evaluate their own levels of learning.

However it also has numerous shortcomings. It places emphasis on what is needed, on the ability to gain propositional knowledge as required, and to put it to the most valuable use in a given situation.[74] Problem based learning approaches ideally should not focus on one particular area of law as this is not realistic. Legal problems in the real world do not always come under subject headings as they do within a Law School. This is a problem that goes to the heart of the way we teach law. Perhaps the best way to address it is to make students aware of these limitations in the way we teach.

Problem based learning must avoid the premise that every disagreement has a solution which can be resolved by litigation. It should be recognised that one of the lawyers' main tasks is to avoid litigation[75] and this should be

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71 For the kinds of difficulties which can be encountered in PBL see MA Dahlgren, R Castensson & L Dahlgren, PBL from the Teachers' Perspective, (1998) 36 *Higher Education* 437, at 447.

72 For a bibliography on the manner in which problem based learning has been employed in many areas see the Australian Problem Based Learning Network on http://www.newcastle.edu.au/centre/problarc/research.html.

73 See R Johnstone, *supra* note 9, at 23. Also see S Nathanson, Bridging the divide between traditional and professional legal education (1997) 15 *Journal of Professional Legal Education*, at 24.

74 D Margetson, Why is Problem-based learning a challenge? in Boud & Feletti, *supra* note 1, at 38.

75 See G Blasi, Teaching/Lawyering as an Intellectual Project, (1996) 14(1) *Journal of Professional Legal Education*, 65, 69. Also see A Hunt,

accommodated in the design of the problems. One way of doing so in competition law is to allow students to consider the possibility of embarking on a compliance program or applying for authorisation to the ACCC.

The most significant shortcoming of relying solely on problem based learning in the teaching of any subject is that it may ignore the contextual nature of law whereby the issues of history, culture, social organisation, politics and economics and law reform are insufficiently considered. However as recognised succinctly "nor does it, as does subject based learning, prejudge what is relevant subject mater; there is a sense (but this needs careful interpretation) in which problems select the subject-matter needed to deal with them".[76] Problem based learning alone cannot fulfil the objectives of identified earlier namely – "the development of a critical analysis and an appreciation of the historical and economic context in which the law operates". But problem based learning can constitute only one of the forms of the assessments and learning strategies used.[77] Indeed this issue is well commented on by Drinan[78] who sees that it may useful to confine the name problem based learning to a defined territory of learning purposes.[79] He argues however that use of the term "experimental learning" may be able to overcome some of the inherent constraints associated with the use of the term "problem-based".

Margetson has recognised that problem-based learning requires a much greater integration of knowing *that* with knowing *how*.[80] The issue of the multi-dimensional nature of law being ignored is indeed an important shortcoming of problem based learning. This can be to a large extent be overcome by teaching the subject in context. However there will have to be an ongoing dialogue with students in order to set the framework for learning. There are three main of points to consider.

The role and place of theory in legal education: Reflections on Foundationlism (1989) 9 *Legal Studies* 146, at 161.

76 *Id.*

77 Similar statements have been made in the context of the College of Law, which was considering problem-based learning. See K Winsor, Applying the Ideas of Problem-based Learning to Teaching the Practice of Law in Boud & Feletti, *supra* note 1, at 224-232.

78 See J Drinan, The Limits of Problem-based Learning, in Boud & Feletti, *supra* note 1.

79 *Id*, at 327.

80 See D Margetson in Boud & Feletti, *supra* note 1, at 38.

Asking the right question will be important if the learning is going to explore some of the multi-dimensional issues and a critical perspective. It is also important in enabling students to embark on independent study. Asking students to make an authorisation application for a price fixing agreement will enable them to embark on independent study. When considering an authorisation application students could also be asked to identify the factors will not be considered as a public benefit in such an application. Such a question will allow the student to explore the notion of values and commodification. A further question which asks students to explore the reasons for such a definition of public benefit can allow students to look at contextual issues within the answer.

De-briefing students adequately and as often as necessary will ensure that they are able to participate in the process of discovery of the answers to the problem. It will also enable the lecturer to engage in the development of the parameters of the subject whereby there will be an appreciation of the contextual nature of the law including the political, social and economic contexts and the overlap that this question may have with other areas of law. Such debriefing would be most effective on a one-to-one basis between the student and the lecturer.

Finally it is important that students be aware of the process of inquiry which would be suitable in tackling such problem based learning approaches. This can be done by assisting students with developing their research strategies and giving feedback on the answers.

Conclusion

It is clear that neither problem based learning nor teaching in context alone can accommodate the objectives of legal education. Whereas problem based learning may encourage independent thinking and prepare students for legal practice, it will not allow them to appreciate the values that are built into competition law. The introduction of in context can allow students to assess critically the values inherent in our legal systems and identify some alternative and creative ways of examining laws. Using these different learning strategies can facilitate a deep approach to learning by linking a complex chain of events to theoretical knowledge.[81]

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81 P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 48. The analysis here refers to medicine and has application to the teaching of law.

Training for Better Decisions: Designing a Computer-mediated Distance Education Subject for Tribunal Members

*Pamela O'Connor & Beth Gaze**

The post-war expansion of government programs has seen the establishment of numerous tribunals to make decisions, or to hear appeals from government decisions, in areas as diverse as planning, migration and guardianship. At the same time, the need to regulate occupational groups has led to a proliferation of industry-specific disciplinary tribunals. All of these can be considered to be administrative tribunals,[1] although no clear line separates them from "court-substitute" tribunals which adjudicate disputes relating to private rights and liabilities.[2]

While there are no general entry-level qualifications required for appointment to administrative tribunals, a great deal is asked of the members. In many tribunals, members combine the roles of investigator and adjudicator, and some are also expected to be skilled in alternative dispute resolution processes. Effectiveness as a tribunal adjudicator requires the ability to identify the issues, elicit information, evaluate evidence, interpret and apply legislation, precedents and policy, and to communicate reasons for decision.[3] Kathryn Cronin has observed, "such an array of skills and roles is not easily combined in the one person".[4] Many of the required

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* Senior Lecturers, Law Faculty, Monash University. The development of the subject described in this article was funded by a Special Initiative Grant from Monash University and the Law Faculty.
 (2002) 13 *Legal Educ Rev* 21.

1 The functions of occupational disciplinary tribunals are not penal but protective of the public: *New South Wales Bar Association v Evatt* (1968) 1 KB 244, at 278: J Forbes, *Disciplinary Tribunals* 2nd ed (Sydney: Federation Press, 1996) para 12.24 and footnote 98.

2 Example of the latter are Small Claims, Residential and Retail Tenancies and Anti-Discrimination Tribunals.

3 The Administrative Review Council listed the skills and experience that had been suggested as being necessary or desirable for tribunal members ARC, *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (Canberra: AGPS, 1995) paras 4.8 - 4.14.

4 Kathryn Cronin, Professional Education for Tribunals, paper delivered to Third Annual AIJA Tribunals Conference, Melbourne, 9 June 2000, at 3.

skills, values and knowledge will need to be learned or improved after appointment.[5]

Despite widespread agreement that members of administrative tribunals should be trained for their role, no clear model for providing the training has emerged. The Australian Law Reform Commission (ALRC) has recently reported that, while tribunals are endeavouring to provide induction training for new members and some continuing professional education for existing members, "there is a need for greater comprehensiveness, coherence and coordination".[6] The existing system under which individual tribunals arrange their own in-house training programs is costly.

Costs can be reduced if tribunals integrate their programs and share educational resources. The Canadian Council of Administrative Tribunals (CCAT)[7] has indicated that the starting point for devising an effective national approach to tribunal training is to distinguish between the common or generic skills and knowledge required of all tribunal members, and other learning needs that are specific to a particular tribunal. The training model proposed by the CCAT is based on this functional distinction:

> For subjects that are tribunal-specific, they are best delivered by the tribunal. For some subjects common to all tribunals, such as principles of administrative justice, generic training may be most efficient. This also provides consistency in practice.[8]

In Australia the ALRC and the Administrative Review Council (ARC) have also recognised that there are certain core skills required for tribunal members, and that training programs should be based on recognition of the common features.[9] University law schools can assist in the delivery of generic training for tribunal members. The ALRC has recently observed that some universities already have the required expertise and infrastructure for learner support, and

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5 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* Report No 89 (Sydney: ALRC, 2000) para 2.207.

6 *Id* para 2.210.

7 The CCAT is a national association representing members and staff of administrative tribunals in federal, provincial and territorial jurisdictions.

8 CCAT, *Discussion Paper on First Principles and Goals for the Training and Continuing Education of Tribunal Adjudicators* (Ottawa: CCAT, 1999) 2.

9 ALRC, *Managing Justice*, *supra* note 5, para 3.93; ARC, *supra* note 3.

have the economies of scale to provide cost-effective training.[10]

This article reflects upon the experience of Monash University in developing a new graduate law subject for members of administrative tribunals, called "Decision Making for Tribunal Members".[11] The subject gives a broad introduction to the role of tribunal members, the framework of legal regulation in which they operate, and the legal and ethical requirements for administrative adjudication. The learning activities for the subject are designed to develop core skills of statutory interpretation, use of precedents, identification of issues, analysis of problems and writing reasons for decisions. The intended student group is people currently serving as tribunal adjudicators, including those who have legal qualifications.[12]

Overcoming the Obstacles to Common Training

The impetus for developing the subject came from a discussion at the 1998 National Forum of the Australian Institute of Administrative Law at a workshop session on Tribunals and Training. One of the tribunal heads observed that there were two major obstacles to greater cooperation by tribunals in the delivery of training: the geographic dispersion of tribunal members and the specialist nature of tribunal practice.

Geographic Dispersion of Learners

From our perspective as educators, these obstacles were by no means insuperable. Geographic dispersion of the learner group could be addressed by delivering training via distance education, provided that the mode of delivery was suited to the educational objectives. Although some of the core skills identified by the ARC might require some face-to-face teaching (for example, inter-personal communication), many of

10 ALRC, *id* paras 2.213-14.

11 The authors were members of the project team responsible for developing the subject as a co-production of Monash University's Faculty of Law and the Centre for Higher Education and Development. CHED's Dr Peter Jamieson, Dr Len Webster, Associate Professor David Murphy and Joanne Becker provided valuable advice on the educational design of the subject and how to exploit the features of the Interlearn program.

12 It should not be assumed that lawyers appointed to administrative tribunals possess the required skills and knowledge. They are trained in the adversarial processes of court-based adjudication, which differs significantly from administrative adjudication.

the areas of learning relating to the process of adjudication could be studied at a distance.

We saw a number of benefits for tribunal members in developing the subject for delivery by distance education. Members, whether studying locally or at a distance, would appreciate the convenience of being able to study at home or at work, at times that suited themselves. Through computer conferencing and group activities undertaken via the Internet, they could enjoy collegial interaction with members of their own and other tribunals.

Diversity of Learning Contexts

The second obstacle to generic training identified at the AIAL workshop was the diverse and specialised nature of tribunal practice. The problem was how to teach generic skills and knowledge in a way that would satisfy the learners' need to see the practical application to their own tribunal context. Our proposed solution was to design learning activities that require students to formulate their own problem and then to solve it by applying their newly learned skills and knowledge. The students are the experts at identifying the current issues and problems facing their tribunal. Requiring them to devise a problem would ensure that students were working on problems that they had themselves identified as significant and relevant. For example, a problem-based activity designed to promote learning of skills and principles of statutory interpretation would instruct the students to begin as follows:

1 Take a statute under which you have a decision making function.

2 Identify a provision which, when applied to a set of facts invented by you, is ambiguous, unclear, or which appears to produce an unjust or unreasonable result.

We expected that requiring students to formulate and answer problems of their own devising would promote the transfer of skills from one problem to another. Stephen Nathanson points out that law students sometimes fail to see that problem-solving skills that they use in one legal context can be applied to another.[13] He recommends that teachers build into the design of learning activities devices for reminding students to make the necessary connections.[14] The

13 S Nathanson, Developing Legal Problem-Solving Skills (1994) 44 *Jnl of Legal Educ* 215, at 226-27.

14 *Id* at 227.

exercise of formulating a problem would promote transfer by prompting students to review their experience and construct factual scenarios in which their new learning could be applied.

A further way of demonstrating the transferability of skills and knowledge is to enable students to share their answers. The provision of many examples helps students not just to apply their new learning but to distinguish situations where it is necessary from those where it is not.[15] If students work on self-devised problems, their answers could form a rich store of varied examples. This would be a valuable learning resource which fellow students could access from a database on the Internet. Naturally, the learning activities should be designed to discourage disclosure of confidential or restricted information, and students should have the opportunity to ask for their answers to be kept private.

To share student answers is a departure from standard university practice. Generally law teachers are reluctant to allow students unmediated access to the answers of other students because of the risk of plagiarism, or fear that errors and misconceptions may spread. Plagiarism is not a concern where each learner is addressing a unique problem; nor is the spread of errors a significant concern where the focus of the activity is on process rather than outcome. Tribunal members read decisions of other members in the course of their work, and have to make their own assessment of the quality of others' reasoning. Errors and misconceptions can be addressed in feedback to the individual learner, and raised in a general way in an online tutorial.

Planning the Subject

We decided that the proposed subject should focus on teaching generic skills and knowledge that learners would apply to actual or simulated problems arising from their own tribunal context, that their answers would be shared, and that the subject would be delivered by distance education. We were confident that with these design features, we could largely overcome the obstacles of geographic dispersion of learners and the diverse and specialised nature of tribunal practice.

The decision to deliver our subject by distance education required no compromise in quality. A wide variety of law subjects are already offered for external study by a number

15 Diana Laurillard, *Rethinking University Teaching: a framework for the effective use of educational technology* (London: Routledge, 1993) 18.

of Australian law schools,[16] and are widely regarded as equivalent to qualifications awarded for on-campus study.[17] Particularly when supported by appropriate use of computer technology, distance education can provide a rich learning environment that is in no way inferior to the quality offered by many on-campus courses.[18]

The Web offers the potential to improve student learning in various ways: it supports interaction (teacher to student and student to student), enables students to work collaboratively, provides free access to a vast array of primary and secondary materials, and allows flexible sequencing of teaching materials by means of hypertext and links.[19]

To make effective use of this potential requires a restructuring of the traditional university model of teaching.[20] Laurillard suggests the following 3-step approach: first, analyse the learning activities that students will be given; second, analyse the strengths and limitations of the various educational media; and third, select the combination of media that will facilitate the learning activities.[21] This approach ensures that educational considerations will determine the choice of media and not *vice versa.*

The Educational Design

Selecting Content and Objectives

The first step in developing the subject was to determine what the subject matter or curriculum was to be. Adult education theory holds that adults are motivated to learn when they experience gaps in their knowledge that learning will satisfy. So analysis of the learners' needs is the starting point for developing a curriculum for tribunal members.[22]

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16 For a list, see the website for the Open University's International Centre for Distance Learning <http://www-icdl.open.ac.uk/>.

17 Goldring, *supra* note 39, at 95.

18 *Id* at 116; Robyn Benson & Melissa de Zwart, The Experience of Online Learning: Evaluating the Effectiveness of an Innovation in Web-Based Legal Education in Sims, O'Reilly and Sawkins eds, *Learning to Choose: Choosing to Learn*, Proceedings of the 17th Annual Conference of the Australasian Society for Computers in Learning in Tertiary Education (Lismore, NSW: Southern Cross University Press, 2000) 425-34.

19 JE Zanglein & KA Stalcup, Te(a)chnology: Web-Based Instruction in Legal Skills Courses (1999) 49 *J of Legal Educ* 480-503.

20 Laurillard, *supra* note 15, ch 10.

21 *Id*, ch 10.

22 MS Knowles, *The Modern Practice of Education: Anragogy versus Pedagogy* (NY: Association Press, 1970, 1980) 64-65.

We found little published evidence of what tribunal members perceive their learning needs to be. No one in Australia has undertaken a multi-tribunal analysis of member learning needs, like the one completed by the Canadian Council of Administrative Tribunals (CCAT).[23] In January 1998 the CCAT's Training Committee undertook a national survey of Chairs and tribunal members, asking them to identify and prioritise areas of training need.[24] The 160 survey respondents (among whom were 50 Chairs) identified the following training needs:

- As areas of high importance, they listed conduct of a hearing; fairness and natural justice; decision-making; administrative law; evidence; ethics; conflict of interest; and statutory interpretation.
- As areas of medium importance, they identified computer skills; mock hearings; gender/cultural sensitivity; and structure and function of government.[25]

Ramsden suggests a range of other sources that can be used in defining the content of a new subject.[26] These include recognised knowledge lacunae and learning needs identified in reports of review bodies. The ARC's *Better Decisions* report set out a list of the skills and abilities that had been suggested as "necessary or desirable" for members of administrative tribunals.[27] Without endorsing the list, the ARC proposed that tribunals jointly specify "a minimum set of core skills and abilities required of an effective tribunal member".[28] These specifications could then be used as the starting point for developing courses and training activities.[29] The ALRC has since endorsed the ARC's recommendation.[30] Until very recently, however, there has been no national forum or peak body for Australian administrative tribunals to co-ordinate the specification process.[31]

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23 Although some tribunals have surveyed the learning needs of their own members: the Administrative Appeals Tribunal conducted such a survey in 1992, discussed in ALRC, Discussion paper 62 *Review of the Federal Civil Justice System* (Sydney: ALRC, 1999) para 3.121.

24 CCAT, *supra* note 8.

25 *Id* at 12.

26 Paul Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 136.

27 ARC, *supra* note 3.

28 *Id*, paras 4.15-4.17

29 *Id.*

30 ALRC, DP 62, *supra* note 23, paras 115-3.116.

31 The Council of Australasian Tribunals, established in June 2002, may take on this role in future.

Ultimately our selection of subject content was based on the Canadian survey findings, the list of skills and abilities in the ARC's *Better Decisions* Report, and our reflection on the nature of the activities that tribunal members are required to undertake in order to perform their adjudicative role effectively. This was informed by our own experience as tribunal members,[32] and of teaching Administrative Law to undergraduate law students. We decided to proceed in an experimental way, designing a subject and offering it on a pilot basis. We would then modify our curriculum and objectives after obtaining evaluative feedback from a selected group of tribunal members enrolled in a pilot offering of the course, other persons with responsibilities for tribunal training, and an external academic assessor.

Learning objectives are frequently organised in a hierarchy, stated as broad aims at course level and becoming more specific at subject and unit level.[33] We started by formulating the subject aims and objectives, and broke them down into more specific and concrete objectives for each topic unit. This exercise helped us to identify what was common or generic, to discriminate between core and peripheral material, to make explicit the links between topics, and to re-assemble the topics as a coherent whole.

Implementing the Design

Problem-based Learning

Biggs' "constructive alignment" model proposes that teaching and learning activities should be selected that are most likely to elicit the kinds of student performance specified in the subject objectives.[34] We selected a variety of learning approaches to serve different objectives or aspects of the subject, including keeping a professional journal, analysis of a case, reflective writing exercises, online investigation and reporting, asynchronous computer conferencing and problem-based learning.

Problem-based learning was our principal method for teaching the core skills of analytic reasoning, statutory

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32 Pam O'Connor was a member of the Social Security Appeals Tribunal (SSAT) from 1985-87 and 1989-93, and Beth Gaze was a member of the Student Assistance Review Tribunal from 1990-94 and has been a member of the SSAT since 1995.

33 Ramsden, *supra* note 26, at 129-34.

34 John Biggs, Enhancing teaching through constructive alignment (1996) 32 *Higher Educ* 347-64.

interpretation, problem-solving and writing reasons for decision. In this approach the focus of student learning is on the problems they are likely to encounter in professional life, rather than on the assimilation of academic knowledge abstracted from context.

Problem-based learning is highly regarded in constructivist theories of education.[35] The central tenet of constructivism is that knowledge is constructed by the learner, not transmitted by the teacher. Learners construct meaning by relating new information to what they already know or believe. Teachers facilitate learning by helping students to make connections between the new information and the students' prior knowledge.

Adult education theory also strongly supports the anchoring of learning activities in an "authentic" task or problem based in the learner's own experience. According to Knowles, the educator's first task is to persuade the adult learner that it is worth investing the time and effort to learn. Presenting tribunal members with problems from their own practice will promote their readiness to learn.[36] Knowles suggests further that the analysis of life experience is central to adult learning; and that teaching methods that draw upon the learner's workplace experience are therefore most effective.[37]

We envisaged that the students would attain the subject objectives by completing the learning activities. While the subject was heavily text-based, we did not expect that the learning would occur through reading and assimilating instructional material. The text was designed as a resource that would enable students to undertake the problem-based activities. Additional resources were provided via online links, and students could search the library catalogue on the Web. Requests for books and photocopied articles could also be submitted by email to the University's Flexible Library Service for external students. In addition, most students would have access to some resources at their tribunal workplaces.

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35 For example, JR Savery & TM Duffy, Problem Based Learning: An Instructional Model and its Constructivist Framework, in BW Wilson ed, *Constructivist Learning Environments: Case Studies in Instructional Design* (Englewood Cliffs, NJ: Educational Technology Publications, 1996).

36 Knowles, *supra* note 22, 64-65.

37 *Id* 66-67; Boud et al contend that learning can only occur if the learner's experience is engaged at some level: David Boud, Ruth Cohen & David Walker eds, *Using Experience for Learning* (Buckingham, UK: Open University Press, 1993) 8.

By designating the key learning activities as assessable, we could align our assessment methods with our learning objectives.[38] Since the learning activities required students to demonstrate competence in the core skills and knowledge, their answers would provide a valid measure of their attainment of the objectives.

Opportunities for Interaction

Opportunities for interaction with teachers and fellow students are highly desirable features of an integrated learning environment. Goldring reports that students studying law off-campus place a high value on contact with other students and teachers.[39] An internal training needs survey conducted by the Administrative Appeals Tribunal (Cth) in 1992 showed that, among the benefits that members hoped for from professional training was"'exchanging experience with peers".[40]

We decided against including a compulsory face to face component, as this would impose substantial costs on interstate students. Instead we incorporated interactive features into the subject by use of the Internet. We designed learning activities that would encourage or require students to interact with each other and the teacher by email, by sharing their answers to activities and by participating in online conferencing. A different topic unit was scheduled for each week of the semester, with a related series of open-ended questions for online discussion. The questions for discussion were posed by the teacher, by the students and by "visiting experts". Among the visiting experts were tribunal members, academic commentators and others who could inject fresh perspectives on the weekly topic area.

One-to-one interaction among students can be promoted by setting learning activities for them to complete in pairs. Paired activities break down the isolation of students and also provide opportunities for formative self-assessment and peer assessment. As well as promoting collaborative study, paired activities model co-operative work practices. We provided one paired activity at an early stage in the program. Students were asked to obtain their study partner's feedback

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38 Biggs' model of "constructive alignment" requires that the assessment activities should measure student attainment of the learning objectives: Biggs, *supra* note 34.

39 John Goldring, Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education (1995) 6 *Legal Educ Rev* 91-116 at 110.

40 L Armytage, cited in ALRC, *supra* note 5, para 3.121

on a draft answer to a problem-based activity, and to report on the revisions that they had made to the draft in response to the feedback.

Encouraging Reflective Practice

Along with an emphasis on the professional knowledge base and competence in practice, contemporary approaches to professional education place value on prompting students to reflect on their professional role and experiences.[41] Since professionals acquire much of their competence through practice, educational theorists have become interested in the reflective process by which professionals learn from experience.[42] Fostering the cycle of action and reflection is seen as a means of enabling professionals to adapt to external change, to reappraise their values and to become life-long learners.

We provided activities to prompt students to reflect upon their professional role and what they had learned from particular experiences in their tribunal practice. Over a period of four consecutive weeks, students made entries in a professional journal, recording each step in the process of reaching a decision in an actual case from their tribunal practice. Journal entries were kept privately, although students were invited to share their reflections on the general issues, dilemmas and solutions that arose. At the end of the four weeks, they used the journal entries to prepare a statement of reasons for the decision. As a final activity, they were asked to review their journal entry and to write a short essay reflecting upon what they had learned in the process of making the decision.

Reflective practice was also encouraged by in-text activities and questions inserted into the print materials, and by the questions posed by the teacher and visiting expert for online discussion.

The process of reflection in action required by these activities challenges students' understandings of what counts as knowledge and how one learns it.[43] It challenges

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41 Hazel Bines, Course Delivery and Assessment, in Hazel Bines & David Watson eds, *Developing Professional Education*, (Buckingham UK: The Society for Research into Higher Education and Open University Press, 1992) 57-67, at 61.

42 On reflection-in-action, see Donald Schon, *Educating the Reflective Practitioner* (San Francisco: Jossey-Bass, 1987) and D Boud, R Cohen & D Walker eds, *Using Experience for Learning* (London: SRHE and Open University Press, 1993).

43 Donald A Schon, Knowing-in-Action: The New Scholarship Requires a New Epistemology (1995) *Change* November / December, 27-34.

the epistemology of technical rationality that accompanied the shift of professional education from the apprenticeship system to the universities.[44] It also demands a degree of introspection, self-evaluation and frankness that some students may find uncomfortable. The student response was a matter that would require careful monitoring in the evaluation process.

Designing the Web-based Learning Environment

To support the online delivery of the subject we used Interlearn, a program developed by Monash University's Centre for Higher Education. As Interlearn had been developed for the delivery of CHED's professional education course in higher education, its functions had been designed specifically to support online delivery of professional education courses.

The Interlearn site structure features a password-guarded personal worksite for each student. The personalised home page consists of a subject map with links to each of the thirteen weekly topics. Each topic site provides instructions for the learning activities, links to online resources and a dialogue box for online submission of the student's response. When the student completes the activities for a topic and submits them online, the title of the topic in the subject map changes colour and displays a tick, to provide a record of work completion.

A series of buttons on the side of the home page provide links to student and teacher email and phone contact details, a resources page, a news page, online discussion forum and activity search. The activity search function enables students to search a database of student answers to the learning activities, by selecting from drop-down boxes the student's name and the number of the activity. The activities that would be available to be searched were clearly indicated, and students were given the opportunity to request that their answers be kept private.

We decided against putting all the instructional materials online. The subject is text-intensive, and we anticipated that students would prefer to read it in print. It was acknowledged that this would restrict the potential of online teaching for flexible sequencing of instructional material through the use of hypertext.[45] However print media can also provide opportunities

44 *Id.*

45 For discussion of the possibilities the Web offers for flexible sequencing, see, Zanglein and Stalcup, *supra* note 19, at 492-93.

for students to choose their own route through the materials, by providing self-navigational aids such as tables of contents and cross-referencing.

The resources page provides links to a rich variety of online primary and secondary sources, including statutes, cases, articles, conference papers, *Halsbury's Laws of Australia* and tribunal websites. Direct hypertext links to selected resources are also provided from the online instructions for learning activities in the student's worksite.

Evaluation

The subject was delivered during 2001 as a pilot offering to a group of 19 students, drawn from seven different State and Commonwealth tribunals across four states.[46] They were of diverse professional and disciplinary backgrounds, and included six students with legal training. Most were members of tribunals but five were case management staff whose responsibility was to prepare a case for hearing by a tribunal member, even, in some cases, to the extent of identifying what if any further evidence should be sought (either at a hearing or in another way) or preparing all or part of a draft decision. Among tribunal members, some held full time life appointments, while others held full time, part time and sessional fixed term appointments.

The subject was evaluated by both external and internal methods. External sources of evaluation included comments from the heads (or nominees) of four major tribunals who reviewed the printed materials, and evaluative feedback from an external academic assessor who had access to the online worksites and discussion forum as well as the printed materials.[47] Internal feedback mechanisms included:

- a review of how students performed in the assessable activities and discussion forum
- analysis of the students' comments and queries to the subject teacher throughout the course
- feedback comments sought informally about half way through the subject

46 Eighteen of the students completed the course, one after some months delay due to personal reasons. One student deferred participation due to workload.

47 The authors express their gratitude to Ms Robin Creyke, Reader in Law at the Australian National University, for acting as the external assessor.

- final assessable activity, which asked students to reflect on what they had learned
- evaluation questionnaires completed by students at the end of the subject.

External Evaluation

The external academic assessor commented on the high standard of written materials, which represented a major synthesis of administrative and other laws pertaining to tribunal work, and the practical focus of the assessment activities. She suggested that the satisfactory / unsatisfactory assessment scheme, appropriate for a non-award professional skills course, was less suitable for setting appropriate quality benchmarks where the subject is offered for credit in a postgraduate award course.

Comments provided by the tribunal heads on the written materials illustrated the diversity of the tribunals and of their positioning in relation to this subject, given the variation in levels and areas of training they provide to members. For example, some tribunals have trained members mainly on areas of law and legislation relevant to their decision-making, others have focussed on tribunal related skills training such as conducting hearings and writing decisions, while others have also trained members on public service conduct requirements. A major benefit of the subject was the sharing of information and making contacts between members of different tribunals.[48]

Internal Evaluations

The subject evaluation questionnaire, completed by 10 students, showed that students were very happy with the subject content, teaching methods, study guide and activities. Completing the subject enhanced their ability to perform their functions as tribunal members, and stimulated their interest in further study. Some commented, however, that their workloads meant that they could do no more than complete minimum subject requirements. Even lawyers who had previously studied administrative law benefited from the focus on tribunal issues and updating of systematic

48 Honourable Justice Murray Kellam, President, Victorian Civil and Administrative Tribunal, Developments in Administrative Tribunals in the last two years, paper presented at the Public Law Weekend at the Centre for International and Public Law (Canberra: Public Law Weekend, 11 November 2000) 5.

administrative law knowledge. In particular, the students found that the subject provided them with an overall legal framework for understanding the context of and guiding principles for their function, including the relationship of tribunals to the court system, to the federal system of government, and, especially for federal tribunals, their positioning within the executive, between law and administration. This provided a framework within which to make sense of the separate more specialised training provided by the tribunals themselves.

Overall, the use of online delivery enabled this subject to be delivered to an important target group for whom this sort of specialised education would not otherwise be accessible. For most students, the key element which enabled them to take the subject was its flexible delivery. Some aspects of flexible delivery, however, were not seen as advantages. Students would have preferred to include some interactive discussion, whether face to face, by telephone linkup, or by some other method. They found the on-line discussion forum not completely satisfactory for class discussion, as contributions could not be edited or deleted by the contributor, and its asynchronous nature made ongoing discussion disjointed. The very flexibility of being able to do the subject at their own pace meant that meaningful class discussion was hard to achieve.

Major Issues in Subject Design / Technology

Several areas of subject design and implementation are considered in more detail as they generally pose a challenge in distance or online education, and in this subject. They include the use of the on line components, the problem of making effective use of the discussion forum, the use of the activity search function, and the role of assessment activities.

1 On-line components / interface

The first challenge for students was coming to grips with the technical interface, in ensuring both that students' computers were running the necessary software to provide access to all subject facilities, and that all students had the confidence and familiarity with computers to use all the functions necessary for their own subject participation. Some students had effective computer help provided by their tribunals, while others, especially sessional members, had to deal with these challenges on their own home computers with only the phone and email help provided by the

University. Problems relating to running the necessary software were resolved during the first two to three weeks. What remained were problems of slow internet access for some members using home computers and a modem, which made access to the on-line components of the subject slow and discouraged their use. This is a reminder that to be effective, on line education requires student access to computer equipment well above minimum standards.

Some limitations arose from the software used for the subject. The Interlearn software used did not retain text formatting applied by the student in their word processor when the text was copied into the student work-site or posted to the discussion forum. This problem can be improved by clear instructions to students or improvements to the software. The discussion forum software did not permit students to delete or edit contributions they had made, which meant they could not revise or improve upon their contributions. This operated to deter contributions which were not the result of detailed and formal thought, which made the discussion forum rather less spontaneous than it was intended to be.

2 Discussion forum

Use of the discussion forum was the least satisfactory aspect of the subject. While all students read the forum, only about one third regularly contributed to it and engaged in discussion. Although the standard of the contributions made was uniformly high, it was not really used as intended for informal, open and friendly student-student discussion of the subject and surrounding issues. Among the factors mentioned by students as limiting their contribution to the forum were: slow modem access, lack of time, the fact that contributions were not assessable and therefore not essential, or because they didn't know the other students well enough. Where students were running behind the nominal class schedule (as most were at some stage), the discussion had often moved on before they could contribute. One student felt the discussion was often too technical in relation to tribunals with which they were not involved.

While students who do not contribute benefit from reading postings (just like students who listen but do not contribute to class discussion in a face-to-face class), their limited participation represents a significant lost opportunity in a professional and expert group of students. Not only do non-participants not offer their experience and perspectives to others, but they also miss the opportunity for

more active learning and engagement with their peers. Students in face to face classes also listen to discussion without contributing and continue to learn, but the literature suggests that it is possible to get better participation in on-line discussion groups because they allow better for reflective participation and student-student interchange than face to face classes.[49]

How can more extensive student use of the discussion forum be encouraged? The external factors such as slow access and lack of time (meaning only minimal requirements are completed) could only be addressed by making participation in the forum assessable, for example by requiring 4 or more posts of substance over the course. However, this would inhibit the informality of the forum and probably limit its use for student-student discussion. To encourage participation rather than requiring it means the motivational and inhibiting factors must be dealt with.[50] This would include coming to terms with the online medium for discussion, as well as factors internal to the student group, the subject environment and software such as the group not knowing each other well and thus being unable to build up trust in each other necessary for discussion, the permanence of contributions, and the timing problems arising from different progress rates through the subject.

The online medium for teaching has specific characteristics, and in particular, as it is text-based, "social cues are absent and, as humans are used to the high bandwidth of face-to-face communications, this can cause problems."[51] In particular, the nature of the online environment requires an instructional model whereby the teacher acts as

> facilitator who is one of the participants and whose role is to guide and support the learning process. … [this] engenders a radical shift in the power and interaction structures in the classroom as the students must accept the responsibility for their own [learning], and the instructor must relinquish a certain amount of control over the process.[52]

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49 L Harasim, Online education: A new domain, in R Mason & A Kaye eds, *Mindweave: Communication, computers and distance education* (Oxford: Pergamon Press, 1989) 50, 54.

50 R Oliver & A Omari, Using online technologies to support problem based learning: Learners' responses and perceptions (1999) 15 *Australian J of Educucational Tech* 58, at 73.

51 M Collin & Z Berge, Facilitating Interaction in Computer Mediated Online Courses (Background paper, 1996)<http://www.emoderators.com/moderators/flcc.html>at "Disadvantages".

Taking this sort of responsibility can be challenging for the students, and the presenter needs to assist students to understand and undertake this path.

Trust

Student reluctance to take responsibility for their learning may be manifest as reduced participation in the discussion forum, or as reluctance to take risks by making postings which show uncertainty. When students either do not use the forum or post only when they have thoroughly prepared and are sure of their material, the forum is not fulfilling its potential as a place for student discussion, questioning and learning. Without knowledge of and trust in each other, the group cannot develop the confidence which will enable self-protective behaviours to be discarded. In an electronic context, lack of participation by many students exacerbates this problem, as students cannot get to know non-participants, and therefore could not feel confident about the audience or comfortable contributing. By contrast, in a face-to-face class, the non-participants can be seen and their non-verbal communication is available to the class.

Where students are spread across the country and cannot meet in person, knowledge and trust in each other can only be built through the electronic forum. Specific training on the potential and importance of the forum is important, but requiring students to actually engage with the forum and the group is vital. This could be done through an assessable exercise early in the semester which requires introducing oneself and engaging (through more than one posting) in discussion with other students on an issue in the course of direct relevance to them, which carried some (significant but not too heavy) marks. This would ensure all students could see the "voices" of all the other students, and may build some confidence in the group.

The permanence of contributions may have inhibited informal participation. A student who is diffident may be uncomfortable in a permanent discussion forum where they may have been prepared to participate in a face to face verbal discussion because of its transience. The ability to edit or delete contributions would alter the written record of the forum and could be confusing. Building trust in fellow students is the best solution to this problem, as well as giving

52 *Id*, at "The Role of the Instructor when teaching in the CC environment".

clear instructions about how the presenter can delete postings on request where appropriate.

Timing

Last, but not least, is the problem of timing. Many students may have felt that they needed time to reflect before contributing, but once they had taken this time, found that the moment for that topic had passed, or else could not find time to return to the point as well as keeping up with class work and their employment. Some of the features which make flexible education attractive to busy professionals can also make it difficult to achieve effective class discussion. Students are generally very busy with their professional and other obligations, and value the ability to control their own study timing, but this means that they are not all ready to discuss the same topic at the same time, and many had moved on by the time others reached the topic. However, although they did not utilise the discussion forum to its potential, the students commented that they wanted better class discussion, and more opportunities for personal interaction.

Trying to schedule a regular weekly time for class discussion online would not solve the problem as it would severely reduce the timing flexibility students valued so highly. This is already limited to some extent by the due dates for assessable activities, but further inflexibility is not desirable. An alternative is better education about the potential advantages of asynchronous on line communication in this context. Students can learn that the ability to run multiple discussion threads within a class, which need not be contemporaneous and to which students can contribute when it suits them is a major advantage, not a disadvantage, of online discussion groups which is not achievable in a face to face context.[53] Where the reality for many tribunal members is heavy and variable workloads which make any work above the required assessment activities difficult to achieve, contributions to the discussion forum have to be made when the student is immersed in the relevant material, or later in responses to discussion. Given workloads of professional postgraduate students, probably the best one can aim for is to

53 To see these aspects as advantages requires students themselves to be able to learn to take advantage of such unconventional learning methods. Other valuable aspects of the forum are the ability to sort contributions by thread, author, or date, and to see all, or only unread contributions, and to have a discussion extending over time which can become deeper as students learn more about the subject.

offer a tailored discussion forum with clear aims and functions for those who are able to take advantage of it.

3 Activity search function

The software activity search function allowed students to look at the work which other students had posted for assessable activities. Almost all students used it.[54] This function was an important element in the subject's educational basis, because assessment was based on selection and analysis of problems from each student's own tribunal practice. The activity search function gave students access to a range of different approaches to solving problems, and could be used to raise different perspectives and generate ideas for solving their own problem, and thus more fully explore the possibilities.

Some of these benefits were not available to the first students to post on any particular activity, and many students posted their activities only as they became due for assessment. The activity search function in Interlearn (unlike the discussion forum) allows draft activities to be saved, and edited at any time, so even those who posted early could revise their activities in light of others' work. For future offerings of the subject, a bank of selected examples is now available for reference by students. A side benefit was that this function provided a mechanism for students to learn more about other tribunals, and reflect on similarities and differences in dealing with issues.

Students who used this function to look at others' work found that it stimulated their thinking, presenting a different perspective or emphasis, and it gave a guide to the depth of analysis required for the activities. Its use could be improved by requiring draft activities to be posted a week before the due date for submission for assessment, to allow all students the opportunity to benefit from this aspect of learning. Although requiring fixed dates for assessment activities reduces student flexibility, it ensures more scope for effective class interaction through the online interface, as well as ensuring students progress through the course. The tension between maximising student flexibility, and stricter scheduling requirements to facilitate interaction is a consistent theme in analysing the benefits and disadvantages of this subject.

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54 One student felt that looking at other students' work before completing her own was not legitimate. However, students were analysing problems they had identified for themselves, so access to others' activities could not lead to unfair copying.

One of the assessable activities required students working in pairs to comment on each other's work before submitting it for assessment. Some pairs worked very well and provided useful feedback, while others had timing problems or found the feedback was not valuable, sometimes because of disciplinary differences or lack of experience. More education about constructive feedback could help with this exercise, though the timing problems are difficult to resolve.

4 Assessment and activities

The aim of the assessable exercises was to allow students to demonstrate their competence in the skills and knowledge covered by the subject. Activities were graded satisfactory/unsatisfactory. Where an activity was not completed satisfactorily, feedback was given and the student had to rework and resubmit until satisfactory completion was achieved. There were several reasons for choosing this scheme. First, many of the students were new to law study and postgraduate work, and had no knowledge of the methods or standard of assessment. Secondly, almost all students were adult professionals returning to study in fields related to their own expertise and it was seen as inappropriate to be grading their performance in areas related directly to their field of professional expertise, at least in an education re-entry, foundational subject. Thirdly, this scheme reflects the desired learning process for adults, where the aim is for all students to attain competence in understanding the subject, rather than to comparatively rank performances as is usually required for undergraduates. Finally, given the diversity among the student group in age, level of experience, position within tribunals, professional practice, disciplinary background, and previous amounts and areas of tribunal related training, no realistic expectation of student performance could be formulated in advance. Instead, this knowledge has to be acquired through experience with the students in the delivery of the course. This assessment system allowed provision of feedback to assist students' learning experiences without judging their relative performances.

The importance of encouraging reflection in adult professional learning has been mentioned above.[55] Some students found the assessment activities which required reflection upon their own work or on their experience of the subject itself difficult. Some felt that they were being asked for their feelings or reactions, not necessarily understanding the role

55 See text accompanying note 40 *supra*, and following.

of reflective learning, which suggests the need for better explanation of the reflective learning process. Several students regarded the subject workload as unevenly distributed over the two main modules. While this is partly true, it also reflected the fact that some (but not all) tribunals had trained their members and staff in some of the decision-making skills covered in the second module, which built on the basic principles and theories covered in the first.

Advantages and Challenges of Online Distance Education for Professional Students

Students commented that it was an excellent subject that should be a prerequisite for all tribunal members. They regarded it as interesting, enjoyable and very useful for tribunal functions. They saw the distance mode as fundamental in allowing them access to the subject, as most could not have undertaken the subject had it required on campus attendance, given their work and other commitments. The main disadvantage they saw was the minimal face to face contact with the presenter and other students, although some tribunals had multiple members from one location undertaking the subject, and they operated informal discussion groups themselves. Overall, however, the advantages of being able to access the subject outweighed the disadvantages. One student even decided to undertake a law degree after taking the subject.

Improved Communication

Future challenges for further development of the subject include the exploration of ways to improve informal communication, either through the online elements of discussion forum, email and activity search, or by other means such as telephone linkups or facilitating self-tutorial groups in cities with multiple students. Because of the diversity of experience and background students bring to the subject, but the similarity of their professional decision-making functions, there is enormous scope for synergistic benefit from broader discussion among students. The scope for better class communication (whether online or verbal) would be improved if all students used the discussion forum on a particular topic within the same week or two, but any requirement for work to be undertaken (relatively) contemporaneously would undermine student flexibility. Asynchronous discussion allowing a number of different threads of discussion maximises the potential of the online medium, but challenges students

to adjust to a new teaching and communication mechanism at the same time as adjusting to new subject matter and returning to study.

Resources of Tribunals and Their Members

Broader challenges arise from the resource position of tribunals, and the positions of full, part time and sessional members. Although some tribunals have provided support to members undertaking the subject through a contribution towards fees, few have offered assistance in the form of study leave. Given current tribunal workloads, it may be unrealistic to expect full time members to undertake a subject without making provision for study leave. The relatively insecure positions of members on sessional appointments limits the likelihood that they will invest in specifically tribunal related professional development, and the tribunal may also be less committed to ongoing training of sessional members.

While recent reports[56] have established the need for tribunals to be engaged with the professional development of their members to ensure quality of decision-making, they have not taken account of the tensions which arise from the different types of tribunal appointments. Fixed term appointments can be short term and non-renewal is always possible. Sessional appointments can be used to attract staff with the expertise the tribunal needs, but can also operate to transfer the risk of a downturn in appeals from the tribunal to the member, whose rostered work will diminish. These appointment practices may tend to undermine a tribunal's performance of its obligation to assist in developing its members' expertise, although the need for professional development of staff is no less. A subject like this provides an avenue for relatively inexpensive development of staff in fundamental principles relevant to their job, but the support of tribunals is needed to encourage staff to undertake development by clear demonstration that it is regarded as worthwhile.

Diversity of Tribunals

As noted above, the diversity of tribunals in Australia makes it difficult to find common ground so as to attain efficiencies in training members. Not only are functions, procedures, types of appointment and qualifications of members different, but tribunals vary greatly in the amount and nature of training they provide to members. This subject treads the

56 See reports listed at notes 3 and 5 above.

limited common ground of the fundamental and essential legal aspects of tribunal work which provides the framework for the more specialised training needed for each tribunal. For the tribunals themselves it provides the advantages of a tertiary level qualification and subject which would be beyond the means of any tribunal to provide for itself, and on which tribunals can rely to ensure their members have competence in and understanding of basic legal aspects of tribunal work. Even for tribunals which provide help with fee payments and possibly some paid study leave to undertake the subject, training through such a course is much less expensive than developing specialised training which may only be used once or occasionally. The provision of basic legal training for members frees tribunals to concentrate their training efforts on issues of current local concern, such as changes in their legislation, the role of performance management for tribunal members, and the role and content of an ethical code of conduct for members.

Conclusion

Education for tribunal members in fundamentally important legal frameworks has previously been left up to each individual tribunal, and has been unsystematic and variable in extent and quality. This subject provides a coherent, academically rigorous, high quality education and qualification for members of tribunals. This contributes to the aim of improving the quality of tribunal decision-making (thereby protecting all parties to decisions from appeals or challenges) by ensuring members know the basic legal framework, rules and principles within which their decision-making must be performed. This subject is now part of an award sequence which provides students with the opportunity to improve their formal qualifications through study directly relevant to their practice.

Australian law schools are well placed to contribute to the professional education of tribunal members. The absence until recently of a national peak body for Australian tribunals has led to lacunae in the provision of common training programs. Australian universities have the expertise to develop attractive subjects, and the educational infrastructure to support learners whether studying locally or at a distance. The provision of university-based programs will promote consistency in professional standards, and prepare members for a broader role within the tribunals sector.

Teaching Legal Ethics to First Year Law Students

*Diana Henriss-Anderssen**

Introduction

This paper will discuss incorporating the teaching of legal ethics into the first year undergraduate program of the law degree. Teaching legal ethics in law schools is a subject that has generated renewed interest in recent years. In 2000, the Council of Australian Law Deans[1] endorsed the recommendation of the Australian Law Reform Commission (ALRC),[2] that the development of a deep appreciation of ethical standards and professional responsibility be one of the main aims of university legal education in Australia.[3] There is little discussion by the ALRC in its report as to what is meant by ethical standards, and how this "deep appreciation of ethical standards and professional responsibility" should be taught.

The purpose of this paper is to explore the meaning of ethical standards and professional responsibility, and how this can be taught to develop the students' "deep appreciation". This paper will consider particularly how ethics teaching can be incorporated into the first year program. The design of the James Cook University subject LA 1006 *Legal Studies* will be used as a case study.

In particular, the following issues will be addressed. Firstly, what is legal ethics? The meaning of ethics in the legal context will be explored, and the traditional notion of

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1 Council of Australian Law Deans, Newsletter no 2. <http://www.law.newcastle.edu.au/cle/cald/index.html>

2 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report no 89 (Canberra: AGPS, 1999) Recommendation 2.

3 The ALRC recommendation identified three main aims of university legal education -the study of substantive law, the development of professional skills, and the development of deep appreciation of ethical standards and professional responsibility.

legal ethics (as proscriptive rules of behaviour) compared to broader concepts of legal ethics. A broad definition of legal ethics will be adopted. The paper will then address the justification for teaching legal ethics at an undergraduate level. This will entail a review of the arguments for incorporating the teaching of legal ethics into the undergraduate program. The third issue relates to the objectives of ethics teaching. What learning outcomes do we desire for our students? A set of objectives for teaching legal ethics will be suggested. Fourthly, the paper will examine the question of how ethics teaching should be incorporated into the undergraduate degree course. It is suggested that the teaching of legal ethics should be pervasive, and integrated into substantive law subjects and skills subjects (such as the mooting program) throughout the degree structure. Hence the need to develop an introduction to ethical issues at the first year level, so that this can be built upon in later year subjects. Finally, what teaching strategies (including assessment) are best employed to achieve these objectives? The design of teaching strategies and assessment for the first year subject will be discussed.

What is Legal Ethics?

The term "legal ethics" has for some time been synonymous with the professional rules of conduct governing members of the legal profession. This reflects the traditional separation between law and morality that is part of the ruling legal positivist paradigm within which the legal academy and profession have operated.

There have, however, been recent calls in common law countries for increased ethical education of lawyers.[4] Whatever the drivers of these calls (changes in the nature of legal practice, consumer pressure for greater accountability, economic rationalism, competition reform, and access to justice movements, to name a few), they reveal a need to broaden the concept of legal ethics.

A review of recent published literature reveals a concept of legal ethics that includes the values underpinning the

4 B Cotter, *Professional Responsibility Instruction in Canada* (1992); American Bar Association *Legal Education and Professional Development: An Educational Continuum* (Macrate Report) (1992); Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (UK; 1996); *Cotter and Roper Report on Education and Training in Ethics and Professional Responsibility*, New Zealand Law Society (Wellington; 1996); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (1999).

legal system,[5] and the role of the lawyer in the legal system (including professional rules and personal values).[6] This paper will therefore adopt a definition of legal ethics as the study of:

- the values underpinning the legal system, and
- the role of the lawyer in that system, including:
  – professional rules, and
  – personal values.

This definition, while encompassing the rules governing professional behaviour, is both broader and deeper than the traditional definition. It is broader in that it also includes an understanding of the values underlying the legal system (sometimes referred to as system or macro ethics).[7] This necessitates an understanding of the institutions of law, its processes and structures, and its philosophical, historical and sociological context. It also involves considerations of the concept of justice, and the relationship between the legal system and justice. The new definition is deeper in that it allows for the development of the individual's own ethical or value framework which forms the basis for ethical judgement (sometimes referred to as micro ethics).[8]

An appreciation of ethical standards and professional responsibility therefore involves:

- understanding the institutions of law, its processes and structures;
- understanding the values underlying the legal system;
- understanding the role of the lawyer in that system;
- consideration of the relationship between the roles of lawyer, legal system and justice;

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5 See for example; F Armer, The Teaching Of Ethics in Australian Law Schools (1998) 16(2) *J of Professional Legal Educ* 247, at 247; J Webb Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education (1998) 25(1) *J Law and Society* 134, at 136.

6 See for example; B Cotter, *Professional Responsibility Instruction in Canada* (1992); A Evans, The Values Priority in Quality Legal Education: Developing a Values/Skills Link through Clinical Experience (1998) 32(3) *Law Teacher* 274; D Link, The Pervasive Method of Teaching Ethics (1989) 39 *J Legal Educ* 485; J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5.

7 J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5; R O'Dair, Recent developments in the Teaching of Legal Ethics – A UK Perspective, in K Economides Ed, *Ethical challenges to Legal Education and Conduct* (UK; Hart Publishing, 1998) at 151.

8 J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5; O'Dair, *supra* note 7.

- understanding broader notions of justice;
- the personal and professional values of individual lawyers;
- the development of moral competence;[9] and
- the ability to exercise ethical judgement.

The Justification for Teaching Legal Ethics at an Undergraduate Level

Some of the main arguments for teaching ethics at an undergraduate level can be categorised broadly under four main headings. The first is the promotion of justice – according to this argument, the link between the law, the legal system, the legal profession and justice necessitates the ethical education of lawyers. As Webb succinctly argues, "'just' legal systems need ethical lawyers."[10] The promotion of justice in society requires a legal profession that understands and is committed to justice.[11] Legal training must therefore include ethical training.

The second main argument is that law can never be value-free. The claims of contemporary legal critiques, such as feminist legal theory, critical legal studies and postmodernism, that the law is not as objective and neutral as has been claimed, have now become more widely accepted. The argument is that doctrinalism, or "black-letter legalism", has disguised the value-laden nature of the law. As Le Brun and Johnstone note, "the practice of law is an ethically saturated arena."[12] The value-laden nature of law necessitates the inclusion of ethics teaching in law schools. Teaching ethics is therefore not a choice but a responsibility.[13]

The third category argues that teaching can never be value-free.[14] As Menkel-Meadow argues, "Law teachers

9 Webb provides an excellent discussion of moral development in the context of legal education in J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice? (1999) 33(3) *Law Teacher* 284, at 290-92.

10 J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 285.

11 *Id*; K Economides, Introduction: Legal Ethics – Three Challenges for the Next Millenium in K Economides ed, *Ethical challenges to Legal Education and Conduct* (UK; Hart Publishing, 1998) at xxi-xxii.

12 M Le Brun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Sydney; LBC, 1994) at 165.

13 A Hutchinson, Beyond Black-Letterism: Ethics in Law and Legal Education (1999) 33(3) *Law Teacher* 301, at 301.

14 See J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 286; C Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics? (1991) 41 *J Legal Educ* 3, at 3.

cannot avoid modeling some version of 'the good lawyer'; thus, they cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals. We create images of law and lawyering when we teach doctrine through cases and hypotheticals".[15]

The fourth argument focuses on the changing role of the legal profession in society. The general perception of lawyers as self-interested and otherwise "ethically incompetent",[16] changes in the nature of legal practice, consumer pressure for greater accountability, economic rationalism and competition reform,[17] have all increased the pressure on educators of the legal profession to produce ethical lawyers.

Each of these arguments assumes the broad concept of legal ethics described above, rather than the traditional one. The final argument indicates that the existing ethical training of lawyers is inadequate. The first three assume the teaching of values, both in the sense of system ethics or macro ethics, and in the sense of individual values (micro ethics).

Developing Objectives for Ethics Teaching

Incorporation of the teaching of legal ethics into the undergraduate law degree requires a consideration of the aims and objectives for ethics teaching. In the context of teaching legal ethics, it is necessary to determine what learning outcomes we desire for our students.

The use of objectives is an important part of planning curriculum.[18] For teachers, the use of objectives "provide criteria against which we can begin to guide, assess, evaluate and monitor our students' learning".[19] For students, objectives can be used as a reference for directing and measuring their progress.[20] In order to teach to the "whole person" Le Brun and Johnstone suggest that teachers involve students

15 Menkel-Meadow, *id.*

16 C Sampford & S Blencoe, Educating Lawyers to be Ethical Advisors, in K Economides ed, *Ethical challenges to Legal Education and Conduct* (UK; Hart Publishing, 1998) 315, at 316; see also A Goldsmith & G Powles, Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia?, in K Economides ed, *Ethical challenges to Legal Education and Conduct* (UK; Hart Publishing, 1998) 119, at 122.

17 See generally the discussion in A Goldsmith & G Powles, *supra* note 16, at 122-31; and C Sampford & S Blencoe, *supra* note 16, at 319-23.

18 See the discussion in Le Brun & Johnstone, *supra* note 12, at 154- 76.

19 *Id* at 155.

20 *Id.*

in learning experiences which engage not only their intellect (the "cognitive" domain), but also their emotions, values, attitudes, habits and beliefs (the "affective" domain), and their abilities (for example, communication and negotiation) (the … "skills" domain).[21] Objectives should ideally then be set in each of these three domains – cognitive, affective and skills.

Drawing on the broad definition of legal ethics outlined above, objectives for teaching legal ethics could be designed as follows:

Cognitive (intellectual)

- understanding of the role of law in society;
- knowledge of concepts of justice;
- understanding of the institutions of law – the processes and structures of the legal system;
- understanding of the philosophical concepts underpinning the law and the legal system;
- knowledge of the historical context of the legal system;
- understanding of the role of the legal profession in the legal system, its structures and responsibilities;
- understanding of the relationship between the role of lawyer, legal system and justice.

Affective (values)

- development of a sense of purpose of commitment to justice;
- reflection upon the students' own individual values;
- awareness of the situatedness of students' own identity, experience, and values;
- motivation to continually question and reassess students' own values and attitudes;
- consideration of the importance of the role and responsibilities of lawyers in the legal system and in society;
- enhancement of integrity;[22]
- motivation to prioritise ethical concerns;[23]

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21 *Id* at 158.

22 Webb uses this term to encompass honesty and trustworthiness, commitment to fairness and being true to oneself; J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5.

23 J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 292.

- development of character to convert ethical thought into ethical action.[24]

Skills[25]

- ability to recognise ethical problems;
- ability to resolve ethical problems;
- ability to reflect upon the process of recognising and resolving ethical problems.

The objectives outlined above are suggested as desirable learning outcomes for students by the end of the undergraduate law degree. Obviously, the standard or level of these objectives needs to be adjusted appropriately for the year level at which ethics is taught. This will depend upon how the teaching of legal ethics is incorporated into the course structure.

How Should Ethics Teaching be Incorporated into the Undergraduate Degree Course?

Frank D Armer, in his research on the teaching of ethics in Australian Law Schools,[26] identified two major methods of teaching ethics. The first is the "discrete method" where it is taught in one (or more) discrete subject(s) on legal ethics. The second is the pervasive method where ethical teaching is incorporated into substantive law subjects throughout the curriculum.[27]

The traditional means of teaching legal ethics has been by way of a single subject, often offered in the final year of university study. Frequently, the subject is not included in the degree structure, but is required for admission purposes only.[28] This traditional method of teaching of legal ethics, while widely accepted, has attracted criticism from advocates of the broader approach to ethics teaching. The criticisms cover a number of grounds, the most common being that the teaching focuses too narrowly on codes of conduct and

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24 *Id.*

25 The skills discussed here are all part of the ultimate ethical skill, the ability to exercise ethical judgement.

26 Discussed in his article, Armer, *supra* note 5.

27 *Id* at 252. Susan Burns identifies two further methods – in clinical courses and simulated practice: S Burns, Teaching Legal Ethics (1993) 4(1) *Legal Educ Rev* 141, at 145.

28 See for example the James Cook University subject Legal Ethics which is not counted to the degree but is offered to those students who require the subject for admission to the profession.

rules governing behaviour. Webb argues that stand-alone courses offer too little too late.[29] If the broader definition of legal ethics outlined above is adopted then clearly this method of teaching is inadequate. Learning proscriptive rules of behaviour does not necessarily impart to students an understanding of the values underlying the legal system or allow them to develop their own value framework that becomes the basis for ethical judgement.

Another criticism of this method of teaching ethics is that it gives students the message that ethics is relatively unimportant,[30] and something that can be partitioned and kept separate from the law itself. As Burns points out,

> Unlike courses in substantive law subjects which are relatively self-contained, issues of ethics pervade many if not all substantive law courses. To limit the consideration of ethical issues to one course limits the ability of students to recognise ethical issues when they arise in diverse areas of practice as they are bound to do.[31]

By contrast, teaching legal ethics by the pervasive method means that ethical issues are explored as they arise in substantive law subjects and skills-based subjects, such as mooting and drafting. A number of problems have been identified with the pervasive method of teaching ethics. First, the insistence that all subjects be adapted to integrate ethical issues may infringe the autonomy of individual teachers, and there may be some reluctance on their part to integrate the teaching of ethical issues into their subject. Secondly, some teachers may not feel qualified to teach these issues. Thirdly, extensive coordination (and the corresponding resources) may be required to ensure that the ethical instruction did not become haphazard and inconsistent. Nina Tarr argues, however, that inconsistency in this regard may not be the problem that it appears to be.[32] She argues that repetition and overlap can be beneficial and in fact necessary to learning, as one exposure or learning experience may be insufficient.[33] Further, as students acquire greater understanding through the course of their studies, the same

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29 J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 287.

30 Armer, *supra* note 5, at 253.

31 Burns, *supra* note 27, at 151.

32 N Tarr, Teaching the Reflective Practitioner in the United States (1999) 33(3) *Law Teacher* 310.

33 *Id* at 312.

issues can be explored to greater depth and analysis.[34] Tarr further argues that inconsistency can be important because ethics issues do not usually have clear answers:

> Exposing students to a variety of approaches illustrates for them that reasonable people may respond differently to the same circumstances. If part of the goal is to enable students to recognise various ethical situations and exercise judgment, exposing them to inconsistent responses will enhance their development.[35]

While some inconsistency may not be a problem, without extensive coordination ethics instruction left to the pervasive method alone may become so haphazard that "quality control" is lost. The obvious answer to this problem is to either have tight monitoring and control of the teaching and instruction, with careful assessment and recording of students' attainment of ethical objectives throughout the degree,[36] or to supplement the pervasive method with one or more discrete legal ethics subjects. This is discussed further below.

If one accepts the broader definition of legal ethics then the pervasive method of teaching it is ideal. A critical understanding of the values underpinning the legal system, the role of the lawyer in that system, the development of ethical judgement from understanding and developing the students' own individual values can only be taught developmentally. For example, the skill of ethical judgement will develop later than, and is dependent upon, development of many of the cognitive and affective objectives. In order to develop ethical judgement students must be exposed to ethical issues as they arise in the course of their studies. Given the pervasive nature of ethical issues, the pervasive teaching method is ideal. This would ideally be supplemented by compulsory subjects, one in first year introducing ethical objectives, and in later years, in jurisprudence and applied ethics. The study of professional conduct rules would fall into the latter. The benefits of having this subject in the final year of study are that with the pervasive method, the students should have already attained a reasonable standard in many of the ethical objectives which will allow them to place the professional rules in context, and that this should

34 *Id.*

35 *Id* at 313.

36 Of course this raises the problem of infringement of academic autonomy, referred to above.

occur immediately prior to the students entering the profession when it is directly relevant. It is also an ideal vehicle for the final assessment of the students' attainment of the ethical objectives.

The Importance of Introducing Legal Ethics in First Year

Webb and Armer both support the argument that the ideal method of teaching legal ethics would be a combination of pervasive ethics instruction and at least one discrete legal ethics subject.[37] Armer, however, does not discuss the content of this discrete subject, except to suggest that it include moral philosophy and jurisprudence,[38] nor its place in the degree structure. Webb suggests that there needs to be at least one first year subject and ideally a second year subject.[39] The first year subject would …

> … set out the major ethical assumptions and implications of the due process model, the system of delivering legal services, and possibly introducing the core ethical assumptions underlying the professional role. The obvious choice for this would be a modified "English Legal System" or "Law in Society" module.[40]

It seems that although Webb talks about a "core" legal ethics subject, this first year subject would not be an exclusively legal ethics subject, but rather an introductory subject modified to include the teaching of ethical issues. The second year module (presumably an exclusively ethics subject) would develop specifically professional legal ethics within a philosophical framework.[41] One disadvantage of placing this module in the second year, as opposed to the final year, is that the students have not had as much opportunity of developing their own ethical awareness, and therefore do not have the same opportunity of placing the conduct rules in their wider ethical context. Further, although with the pervasive method, ethical instruction will continue throughout

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37 Armer, *supra* note 5, at 253; J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 293; J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5, at 146.

38 Armer, *supra* note 5, at 253.

39 J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 294.

40 *Id.*

41 *Id.*

the rest of the degree, students may not retain the full import of the professional conduct rules in context. For these reasons it would be better to place the discrete "legal ethics" subject towards the end of the degree, assuming that pervasive ethics instruction is ongoing throughout the degree.

The experience of teaching legal ethics by the pervasive method at the Notre Dame Law School in the United States is described by Link.[42] There the pervasive method is supplemented by three compulsory ethics subjects – a first year legal ethics subject, a jurisprudence subject and a third year applied-ethics subject. The content of the first year subject is described in detail by Link, and includes the study of the various roles of the lawyer (principally as protector of justice), explores notions of justice, and introduces ethical theories and practical aspects of ethical decision-making.[43] In this model, students are introduced to professional conduct rules within the context described above, in their first year. This is taken up and developed in the later year applied ethics subject.

If legal ethics is taught by the pervasive method, there needs to be some introduction to ethical issues at first year level. It stands to reason that, given the developmental nature of many of the ethical objectives, introduction of these objectives in the first year allows for their maximum development throughout the course of the degree. Further, if ethical objectives are incorporated into the teaching of mainstream law subjects throughout the law degree, there needs to be some introduction to these objectives at the outset of the degree. Just as the legal research, writing and analysis skills necessary for the study of law are introduced at the commencement of the students' study of law, and developed throughout their studies, so the ethical objectives to be developed throughout the course of study must be introduced at the commencement of that course.

Even in the absence of pervasive teaching of ethical issues in later years, the introduction of some of the groundwork for ethical awareness at first year level would be an improvement on the current absence of broader ethical teaching. Further, if the students are to be taught to develop their own individual ethical or value framework for exercising ethical judgement, then it is important to "get in early" before they are "desensitised" by traditional legal scholarship. As

42 Link, *supra* note 6.

43 *Id.*

Webb points out, "a primary effect of conventional legal education seems to be to *desensitise* students to justice issues".[44] Elsewhere Webb says:

> …Students learn early on that the instinctive *moral* reaction of the first year student – "… but that's not right" is simply not valued by the system. They become detached from the wider non-technical issues and often increasingly passive or plain cynical in the face of attempts to get them to respond to a situation.[45]

It is therefore important to introduce ethics teaching in the first year, and work towards the development of ethical awareness by building on the students' existing values before they become desensitised. This can be achieved either by an exclusive or discrete legal ethics subject such as described by Link, or by the integration of ethics teaching into an introductory law subject as described by Webb. The redesign of a first year law subject at James Cook University is an example of the latter.

Redesigning the First Year Curriculum at James Cook University to Incorporate an Introduction to Ethics

Any discussion of the ideal methods of teaching assumes the resources to implement these methods. In the absence of extra resources, however, the integration of ethics teaching into mainstream law subjects can be achieved where teachers are committed to the ideals of ethics teaching. It is in this way that the introductory elements of legal ethics have been incorporated into the redesign of a first year subject at James Cook University. This is similar to Webb's idea discussed above of a modified first year "Law in Society" module. It remains an introductory law subject that has integrated ethics teaching and is not an exclusively legal ethics subject.

The writer is an associate lecturer at the James Cook University Law School, and course coordinator of the first year

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44 J Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?, *supra* note 9, at 285-86, citing Anthony Amato, Rethinking Legal Education (1990) 74 *Marquette Law Review* 1; Boon & Levin, *The Ethics and Conduct of Lawyers in England and Wales* (London: HMSO, 1995) at 154-56; Nicholson & Webb, *Ethics and the Legal Profession: Critical Interrogations* (Oxford: Oxford University Press) (forthcoming).

45 J Webb, Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education, *supra* note 5, at 138-39.

subject *Legal Studies. Legal Studies* is offered in the second semester of first year, and has been something of a "Law in Context" subject. As such it has required little amendment and is therefore an ideal subject to incorporate much of the elements of ethics teaching described above.

The subject matter of the *Legal Studies* subject is divided into three modules – Legal Institutions, Access to Justice and an Introduction to Legal Theory. The content of each of these modules will be described, and related to the ethical objectives to which they are directed.

Module One – Legal Institutions

The first module consists of an introduction to the role played by the legal institutions such as the judiciary, the jury system, the legal profession and the courts, within the jurisprudential and constitutional framework of the Australian legal system. In the first week the students are introduced to the jurisprudential and constitutional framework of the Australian legal system. The rule of law is discussed, as are the principles of responsible government, parliamentary sovereignty, federalism and separation of powers. Within this framework, the roles of the judiciary, juries, the legal profession and the courts are examined.[46] For example the role of the judiciary is examined in the context of its independence, both in the separation of powers' sense and in the sense of its capacity for objectivity and neutrality. When the students study the legal profession, they are introduced to the structure of the profession, traditional legal ethics and the lawyer-client relationship, as well as issues in the push for reform. In their study of the courts, students study the nature of the adversarial system and examine the impact of the courts on those who use them. Issues such as the architecture and design of the court buildings, the roles of judicial and support staff, the relationship between the various players (for example the legal profession, their clients, interpreters, and support staff), and the effect of language and ritual are discussed.

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46 The required readings for this module are excepts from the following texts: Hunter, Ingleby & Johnstone eds, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 2000); Bottomley & Parker, *Law in Context* (Federation Press, 1997); G Bird, *The Process of Law in Australia* (Butterworths, 1993); K Laster, *Law as Culture* (Federation Press, 1997).

The content of the first module meets the following cognitive objectives of legal ethics teaching:

- understanding of the role of law in society,
- understanding of the institutions of law – the processes and structures of the legal system,
- knowledge of the historical context of the legal system,
- understanding of the role of the legal profession in the legal system, its structures and responsibilities, and
- understanding of the relationship between the role of lawyer, legal system and justice.

It is directed at the following affective (value) objectives:

- development of a sense of purpose of commitment to justice, and
- consideration of the importance of the role and responsibilities of lawyers in the legal system and in society.

Module Two – Access to Justice

The second module examines the impact of the Australian legal system and law on cross-sections of the Australian community. The study includes considerations of gender, language, age, race, disability and socio-economic background. The module begins by looking at some general problems of access to justice and possible means of redressing these problems. The focus then shifts to access to justice for Indigenous Australians. Topics include Government policy and practice toward Indigenous Australians since 1788, the "Stolen Generation", and an introduction to Native Title and Land Rights. The module concludes with the introduction of the global perspective of international human rights standards.

The content of this module addresses the cognitive objectives of understanding the role of law in society, knowledge of concepts of justice, and understanding the relationship between the legal system and justice. The study of the problem of cost[47] as an inhibitor to access to justice, for example, further enhances understanding of the relationship between the role of lawyer, legal system and justice.

This module addresses the following affective objectives:

- development of a sense of purpose of commitment to justice,
- reflection upon the students' own individual values,

47 This problem is approached both from the sociological perspective and from the perspective of the legal profession.

- awareness of the situatedness of students own' identity, experience, and values,
- motivation to continually question and reassess students' own values and attitudes,
- consideration of the importance of the role and responsibilities of lawyers in the legal system and in society,
- enhancement of integrity, and
- motivation to prioritise ethical concerns.

It is directed at the skill objective of ability to recognise ethical problems.

Module Three – Introduction to Legal Theory

The third and final module introduces a range of philosophical perspectives on the law. It begins with a study of Liberalism, and then outlines Critical Legal Studies and Feminist Legal Theory. This component is introduced at the end of the course, so that the students are less likely to be disconcerted or threatened by the theoretical material. By the time the theories are introduced, the students have already become familiar with the process of critique in the less theoretical content of the first two modules.

The content of the third module is directed at the following cognitive objectives:

- understanding of the role of law in society,
- knowledge of concepts of justice,
- understanding of the philosophical concepts underpinning the law and the legal system, and
- understanding of the relationship between the role of lawyer, legal system and justice.

It is aimed at the following affective objectives:

- development of a sense of purpose of commitment to justice,
- reflection upon the students' own individual values,
- awareness of the situatedness of the students' own identity, experience, and values,
- motivation to continually question and reassess the students' own values and attitudes,
- consideration of the importance of the role and responsibilities of lawyers in the legal system and in society, and
- motivation to prioritise ethical concerns.

Designing Teaching Strategies and Assessment

The teaching strategies employed in *Legal Studies* reflect a teaching philosophy that sees teaching as facilitating active student learning, and embraces Ramsden's six key principles of effective teaching in higher education.[48] The strategies are designed to encourage students to adopt a "deep" learning approach in which the student seeks depth of understanding.[49] A "surface" approach in which the student seeks to simply reproduce information is actively discouraged.

For resource reasons, the didactic method is the main teaching method for the subject. Students attend a two-hour lecture and one-hour tutorial per week. The lectures are as interactive as possible. The tutorials are limited to twenty students and participation in tutorials is assessed. Assessment is used as an incentive to promote active learning, and the assessment of tutorial participation ensures that students turn up to the tutorials prepared and ready to engage in meaningful discussion.

As mentioned above, assessment is used as a major teaching strategy. Probably the most important piece of assessment, as far as teaching legal ethics is concerned, is the court report and presentation.[50] As part of this formative assessment, students are required to attend sessions of the courts. They are first required to submit to their tutors a piece of written work which summarises the literature they have been required to read for Module One, and canvasses where appropriate opposing points of view. This ensures that they have read the relevant literature and made some attempt to at least reproduce it, if not to understand it. The tutors hand the written work back to the students with feedback. They receive no assessment mark at this stage – it is an opportunity for students to learn from the feedback they receive. The work will then be improved by the students and used as the basis for their written report (see below).

The students are then required to form groups of three or four to visit the courts, where they must attend sessions of

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48 P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) at 96-103.

49 See the discussion of deep and surface learning styles in Ramsden, *supra* note 46, ch 4; and Le Brun & Johnstone, *supra* note 12, ch 2.

50 This was inspired by a colleague, Lynda Crowley-Cyr, who had implemented a similar piece of assessment on a smaller scale, for commerce students studying law for the first time.

the Magistrates and either the District or Supreme Courts.[51] During their visit, the students are required to make observations about the court system, the law in operation and its impact upon the litigants, with particular reference to access to justice. The students are instructed to address issues such as:[52]

- the nature of the proceedings witnessed and the legal issues involved;
- the architecture and design of the court buildings and court rooms, including reception areas and waiting rooms, and their impact on users of the courts;
- the roles of judicial and support staff;
- the relationship between the various players – the judiciary, support staff, the legal profession, their clients and other users of the courts;
- the effect of language, symbols, rituals and ceremony;
- the impact of the above and any other factors on persons from diverse backgrounds within the Australian community (for example, Aboriginal, non-English speaking, male/female, youth/aged, disabled, or socio-economic background).

Each group is then required to make a presentation to their tutorial class, outlining their observations. For the purposes of the presentation, the groups are encouraged to choose a particular focus from the areas listed above. Which one is chosen will greatly depend upon what the group observed. Group work is used as a teaching strategy to encourage active student learning by requiring them to communicate, discuss and justify their ideas to their peers.[53] The students will need to discuss the issues, their observations and ideas within their groups, to create their presentation.

The students, as individuals, are then required to produce a written report. Using the earlier piece of written work as a starting point, the students are asked to produce a report that also records their personal observations of the courts, and synthesises their own observations with the published literature on the area.[54]

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51 The group requirement has the added advantage that the trip may be less intimidating for some of the first-year students who may otherwise so find it.

52 The coverage of these issues in the court assessment was inspired by Bird, *supra* note 46; and Laster, *supra* note 46.

53 It is also to promote the (non-ethics-specific) skill objectives of teamwork and interpersonal communication skills.

54 Students are reminded to realise the limitations of their own observations recorded during a one-off visit as a basis for drawing any wider conclusions.

The court report assessment is directed to encouraging a deep learning approach to the cognitive legal ethics objectives of:

- understanding of the role of law in society;
- understanding of the institutions of law – the processes and structures of the legal system;
- understanding of the role of the legal profession in the legal system, its structures and responsibilities; and
- understanding of the relationship between the role of lawyer, legal system and justice.

The assessment also promotes the affective objectives of:

- development of a sense of purpose of commitment to justice;
- reflection upon the students' own individual values;
- motivation to continually question and reassess the students' own values and attitudes;
- consideration of the importance of the role and responsibilities of lawyers in the legal system and in society; and
- motivation to prioritise ethical concerns.

It will be apparent from the above that the legal ethics instruction in the *Legal Studies* subject is directed primarily at the cognitive and affective objectives. Occasionally the skill objective of recognition of ethical dilemmas is targeted. The ultimate ethical objective, the ability to exercise ethical judgement can only be achieved after many of the cognitive and affective objectives have been developed. At the first year level, the desirable outcome is the attainment of an introductory standard of many of these objectives. This is what has been attempted in the case of *Legal Studies*.

To the extent that it can be measured, the assessment and feedback from students indicates that this has been achieved. It has been argued that objectives should only be set as observable outcomes, so that success in teaching and learning can be objectively ascertained.[55] One limitation of this approach, however, is that it can effectively limit learning outcomes.[56] In contrast, the objectives set here are aspirational. Achievement of the objectives will occur along a continuum, as ethical awareness and judgement develops. While it may be possible to objectively determine a first-year standard of some of the objectives, particularly the cognitive ones, others such as the affective objectives which

55 Le Brun & Johnstone, *supra* note 12, at 156.

56 See the discussion in Le Brun & Johnstone, *supra* note 12, at 156-57.

relate more to the students' own values are not so easily assessed according to observable objective criteria. Notwithstanding this limitation, the assessment and feedback from students indicate that a first year standard of these ethical objectives is being realised. The students' work submitted for assessment indicates that the cognitive objectives and some of the affective objectives are being achieved. Feedback from students in response to a questionnaire, which specifically addressed the issue, demonstrates that the students themselves felt that the ethical objectives had been achieved.[57] Other student feedback about the course, both formal and informal, is overwhelmingly positive. Motivation, an indication that the affective self is engaged, is high. The teething problems inevitably associated with innovation have not affected these outcomes.

Good teaching is a constant process of reflection and adjustment. A number of inspiring teaching strategies, such as the use of role modeling and storytelling,[58] are described in the published literature on ethics teaching. The next stage in the integration of ethics teaching into the *Legal Studies* subject will involve reflection upon whether ethics teaching in that subject can be improved by the use of these strategies.

Conclusion

The meaning of ethical standards and professional responsibility is more than the mere study of professional rules of conduct. It involves the critical study of the values underpinning the legal system, and the role of the lawyer in that system. It includes professional rules and personal values, and the ability to exercise ethical judgement. This can only be taught developmentally, and should ideally be introduced at first year level. The design of the James Cook University *Legal Studies* subject has been used here as an example of the successful integration of ethics teaching into an introductory law subject.

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57 This questionnaire was designed by the writer and undertaken in addition to the University-wide student evaluation of subjects, to obtain feedback from students on a range of issues relating to the teaching of the subject, including the effectiveness of various teaching strategies employed.

58 See for example the discussions in Link, *supra* note 6, and Menkel-Meadow, *supra* note 14. For an interesting discussion of Atticus Finch as a role model see also T Dare, The Secret Courts of Men's Hearts, *Legal Ethics*; and Harper Lee's *To Kill a Mockingbird*, in K Economides ed, *Ethical challenges to Legal Education and Conduct* (UK; Hart Publishing, 1998) at 39.

TEACHING NOTE

Synergistic Literacies: Fostering Critical and Technological Literacies in Teaching a Legal Research Methods Course

*Paul Havemann & Jacquelin Mackinnon**

Introduction

Nowadays, new law courses are not approved unless both the "needs analysis" is convincing and the "consumer demand" is certain. Needs and demands today are driven by new pressures for technological literacy accelerated by globalisation and the current revolution in information and communication technologies (ICTs). The popular logic is that new global "knowledge economies" need "knowledge workers" or "wired workers" to labour in the new e-markets for goods and services and to use the burgeoning number and high quality of electronic information databases now essential to legal research. Students are acutely aware of these developments as well as of the highly competitive nature of the contemporary labour market for law graduates. Consequently, students are demanding more "how to" research skills training.

This article puts in context the reasons why, at the University of Waikato, we regard creating synergy between critical and technological literacy as essential for teaching and learning law-in-context research methods, and then describes the curriculum we designed for a legal research methods course in order to trial this approach.

From the start we have been clear that the new course was not just to be a "how to" course, and that we would be concentrating on critical literacy as much as technological literacy. For us, critical literacy is fundamental because it relates to the way in which one analyses the world, a process described as "becoming aware of the underlying structure

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 (2002) 13 *Legal Educ Rev* 65.

of conceptions".[1] This awareness includes the politics in the architectures that constitute the Internet and the assembly of information accessible on it.

We designed our curriculum for critical literacy around five types of analysis. Our shorthand for this is to call these "the five 'Cs'". Our five interrelated categories for analysis focus on:

- Change – in society, economy and culture
- Concepts – legal and sociological concepts and analytical frameworks
- Critique (and standpoint or perspective)
- Comparisons (and Contrasts)
- Contexts.

We argue that, at a minimum, these are the conceptual tools necessary to critique and engage the operation of the law in the context of society, noting especially inequalities and injustices.[2] Throughout the course students are encouraged to harness technological literacy to each dimension of their analysis.

This article consists of two main parts. The first part ("Context and Assumptions") explores in some depth the reasons for the need to teach critical literacy alongside technological literacy. The second part ("The Legal Research Methods Course") describes our efforts to promote the synergy between critical and technological literacies in the context of a fourth year optional course, Legal Research Methods 2000, at the University of Waikato School of Law.

Context and Assumptions

The Need for Critical and Technological Literacy for Law-in-Context Research

The changing face of tertiary education has resulted in fresh challenges for teachers and students. Elite universities that once aspired to pursue scholarship and education for their intrinsic worth and that valued pure research and the development of moral character[3] have long since been displaced in most OECD countries (including New Zealand) by under-

1 P Walker & N Finney, Skill Development and Critical Thinking (1999) 4 (4) *Teaching in Higher Education* 534.

2 See J Kretovics, Critical Literacy: Challenging the Assumptions of the Mainstream (1985) 167 (2) *Journal of Education* 51.

3 J Ben-David & A Zloczower, Universities and Academic Systems in Modern Societies (1962) 3 (1) *European Journal of Sociology* 45, at 64-65.

funded mass higher education systems with highly instrumental curricula. These mass higher education systems have been justified in terms of democratising education, as part of the class compromise intrinsic to the Keynesian welfare state, and in terms of preparing the labour force for productive citizenship. In their heyday such higher education systems aspired to offer greater equality of access; to provide education adapted to a great diversity of individual qualifications, motivations, expectations and career aspirations; and to facilitate the process of lifelong learning, as well as to serve their local communities and the economy. At their best, such systems promote critical thinking and work for the public good[4] but the egalitarian and democratic social values on which they were founded have been unrelentingly challenged by the cult of market relevance and economic rationalism.

Despite years in which market fundamentalism has been hegemonic, universities in OECD countries are still admitting students in greater numbers and these students are increasingly from "non-traditional" backgrounds: the commitment to more open access to education, at least, has been sustained.[5] However, while the 21st century student body is heterogeneous as to qualifications, motivations, expectations and career aspirations, most these days come to university to get ahead, to become the "clever people" and "wired workers" of the information age.[6] Consequently, promoting critical thinking and working for the public good will be difficult unless and until access to Information Technology (IT) and the understanding of its workings are actively promoted and the synergy between critical and technological literacy accepted as the operating norm. For legal educators committed to legal, critical and technological

4 L Cerych et al, Overall Issues in the Development of Future Structures of Post-Secondary Education, in *Policies for Higher Education: General Report on the Conference on Future Structures of Post-Secondary Education* (Paris: OECD, 1974) 23.

5 See discussion of enrolment growth in Proceedings of the World Conference on Higher Education (Paris: 1998), Volume IV, *The Requirements of the World of Work* (Working Document, 15) at <http://unesdoc.unesco.org/images/0011/001173/117311m.pdf>

6 See JA Codd, Knowledge, Qualifications and Higher Education, in M Olssen & MK Matthews (eds), *Education Policy in New Zealand: the 1990s and Beyond* (Palmerston Nth, NZ: The Dunmore Press Ltd, 1997) for a discussion on the shift to an "ideology of instrumentalism" with the expectation that higher education is about various skills that can be performed and "knowledge as information to be acquired" (at 133-136).

literacy the implications of the multi-disciplinary law firm and borderless market in higher education are multi-layered and complex, especially given that "the university … like all other human institutions … is not outside but inside the general social fabric of a given era … an expression of the age ".[7]

It will be helpful now to say something of the establishment of the Waikato Law School. The genesis of the Law School was the Fourth New Zealand Labour Government's (1984-1990) struggle to reconcile contradictions between its New Right monetarist program and its egalitarian social democratic commitments.[8] The Law School Committee gave eloquent expression to the latter in its statement of the School's foundation values and goals.[9] They included a commitment to provide opportunities for non-traditional students, including Maori and those from socio-economically disadvantaged groups, to gain access to a legal education, a reflection of regional needs.

Most relevant to this paper and closely related to the access goal is the curriculum goal. This promotes synergies among contextualism,[10] Maori-Pakeha biculturalism, rigorous learning of the law, and the law's theory, methods, doctrines, processes and ethics, in preparation for professional legal practice. Even on an austerity budget the School, with help from the local Law Society, also invested in a decent IT platform. Waikato Law School's success in relation to its access goals is reflected in the admission figures for 2000. The percentages for non-traditional students admitted (where "traditional" appears to be defined as white, middle class, male school leavers) were: 28.7% Maori, 30% mature (aged over 30) and 63% women.[11] Law teachers at Waikato, as elsewhere, have to facilitate learning for a diverse student

7 A Flexner, *Universities: American, English, German* (London: Oxford University Press, 1930) 3.

8 P Havemann, Regulating the Crisis – from Fordism to PostFordism in Aotearoa/New Zealand: Some Contradictions in the Interregnum, Morbid and Otherwise (1994) 18 (1) *Humanity & Society* 74.

9 See University of Waikato Law School Committee, *Te Matahauariki (The Horizon Where The Earth Meets the Sky/The Meeting Place of Ideas and Ideals): Report of the Law School Committee* (1998). For a discussion of the School's foundation goals, see MA Wilson, Waikato Law School: A New Beginning, in J Goldring, C Sampford and R Simmonds (eds), *New Foundations in Legal Education* (Avalon, NSW: Cavendish Publishing, 1998) 194.

10 P Havemann, Law in Context – Taking Context Seriously (1995) 3 *Waikato LR* 137.

11 Minutes, School of Law Board of Studies, University of Waikato, March 2000.

body within a new legal education paradigm in what we regard as a revolutionary period fraught with opportunities and perils.

Government-funded public higher education in New Zealand and many other OECD countries still remains the primary though not the unchallenged "provider" of human capital in the form of an educated workforce to produce and to compete internationally.[12] However, OECD states have increasingly allowed the market to be the mechanism for signalling demand for education and thus for identifying and prioritising educational values and goals.[13] We, in New Zealand, are now familiar with the discourse of student as consumer and industry as chief stakeholder (and, increasingly, direct purchaser) of research and knowledge. There has been a widespread rupture in the model of governance for higher education, characterised mostly by a shift from state funded to user pays education. Instead of being a social right to be accessed for the public good, higher education has substantially become a private property right.[14] Ironically, corporate beneficiaries of this accumulated human capital still pay precious little for it.

Our case then for stressing the need for both critical and technological literacy for law-in-context research stems from our appreciation that our students are living in revolutionary times. They must develop into legal knowledge workers able to compete and to survive as players in the "knowledge economy"; to participate as intelligent citizens[15] in a globalising polity; and to serve as ethical professionals in the changing and uncertain world of globalised practice.

In the next section we outline some of the context, critique, understandings of change, choice of comparisons, and key concepts that inform our curriculum design for synergising critical and technological literacy to meet the challenges posed by the present revolutions.

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12 For example, more than 90 per cent of students enrolled in formal programs at tertiary institutions were partially funded by the Ministry of Education (that is, subsided by the Government) as at 31 July 1998 ((1998) 8(10) *Education Statistics News Sheet* 2).

13 J Boston, The Funding of Tertiary Education: Enduring Issues and Dilemmas, in J Boston, P Dalziel, S St John (eds), *Redesigning the Welfare State in New Zealand* (Auckland: Oxford University Press, 1999) 197.

14 For a full exposition, see S Marginson, *Education and Public Policy in Australia* (Cambridge: Cambridge University Press, 1993) Part II.

15 P Havemann, Modernity, Commodification and Social Citizenship (1997) 1 *Yearbook of New Zealand Jurisprudence* 17.

Theoretical Frameworks: Modernisation, Self-Identity and Globalisation

The late 1980s produced the revolutionary (in New Zealand) "social engineering" vision upon which the Waikato Law School was founded. Few, then, except the most prescient, would have foreseen the technological revolution and processes of globalisation that would impact on legal knowledge workers (including academics and lawyers) in the late 1990s. Our current notions of knowledge and learning, including access to knowledge, the nature of knowledge, the uses of knowledge, legal practice and, most intimately, self-knowledge and self-identity, are now being radically challenged.

Scholars are forever wrestling with the task of defining the nature of the revolution(s) of the times. The present revolutions have been characterised variously as the postmodern, or the transition from modernity to late modernity,[16] or from Fordism to post-Fordism,[17] or as the emergence of the risk society[18] or network society involving the transition from industrial to informational capitalism. The network society as a conceptual framework seems highly germane to a discussion about knowledge work as a current context for legal education. We are indebted for this framework to Manuel Castells' pioneering sociological analysis of the network society and the information age – the transition from industrial to informational capitalism.[19]

Equally relevant to our analysis is Anthony Giddens' concept of the process of reflexive modernisation, capturing the transition from modernity to late modernity. Reflexive modernisation describes the dynamic interplay of globalisation, enhanced social reflexivity, and the rise of a post-traditional social order. Giddens' work expounds the significance of this revolution for the construction of self-identity and the reflexive practice of enhancing self-knowledge for critical literacy. Giddens' concept of reflexive modernisation, focusing

16 A Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990).

17 A Amin (ed), *Post-Fordism: A Reader* (Oxford: Blackwell Publishers, 1994).

18 U Beck, *The Risk Society: Towards a New Modernity* (London: Sage, 1992).

19 M Castells, *The Information Age: Economy, Society and Culture* Volume I: *The Rise of the Network Society*; Volume II: *The Power of Identity*; and Volume III: *End of Millennium* (Malden, Mass: Blackwell Publishers, 1996, 1997, 1998 respectively).

on the reflexive self and the agency of the self, is helpful for identifying the importance of critical literacy in this new informational age for self-identity, and for making life choices and life chances. Giddens distinguishes social reflexivity from simple reflexivity. Simple reflexivity is characteristic of traditional, local societies in the pre-modern and non-modern worlds. In such societies, norms derived from a traditional order enable people to make sense of their world and their place in it, so as to define a self-identity grounded in locality, kinship and community and constructed from the ideologies and experiences flowing from these sites of experience. Social reflexivity, in contrast, is the defining characteristic of the late modern, information age. All societies have invented, re-invented and refurbished tradition; today, however, there is a radical disjuncture between the past and the present. This disjuncture appears to result from the increasing inability of societies to invent and sustain tradition because all tradition must now be continuously exposed and justified as a basis for order. Thus the inexorable process of reflexive modernisation is what makes Giddens describe late modern society as a post-traditional society.[20] Social reflexivity is also a key ingredient of the knowledge society, if it is to be more than merely the information society.

Giddens suggests[21] that the four key institutional dimensions of modernity are capitalism, industrialism, surveillance, and violence. According to Giddens, four global "bads" have been associated with them: economic polarisation, ecological threats, denial of democratic rights, and the threat of large-scale war. Globalisation and the IT paradigm are very important dimensions of late modernity and the present epochal revolution. Globalisation is a multi-dimensional process, the backbone of which is the Internet and the ICTs. Hence globalisation should not be defined exclusively or primarily in terms of a new economic order. The technological paradigm shift is one of the chief levers of globalisation, and globalisation accentuates and exacerbates the degree to which the "bads" of modern times are manifested. Globalisation does not at present signal a more even distribution of wealth and

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20 A Giddens, *Beyond Left and Right*: *the Future of Politics* (Cambridge: Polity Press, 1994) 6-7; M O'Brien, Theorising Modernity: Reflexivity, Identity and Environment in Giddens' Social Theory, in M O'Brien, S Penna and C Hay (eds), *Theorising Modernity: Reflexivity, Environment and Identity in Giddens' Social Theory* (London: Longman Higher Education, 1999) 17, at 20; U Beck, A Giddens and S Lash, *Reflexive Modernisation* (Cambridge: Polity Press, 1994) 83-84.

21 Giddens, *supra* note 16, at 100-101.

power. Instead, globalisation and the ICT revolution appear to be expediting the process of creating steeper hierarchies of knowledge workers in cyber spaces – with infocrats controlling the metropolitan hub, cyber proletarians/cyber serfs in cyburbia, and the cyber illiterates and lumpen trash in cyberia. Globally, the result is the social exclusion of many, if not most, people from basic sites of power, especially the market and systems of local, regional and global governance.[22]

Castells provides an insight into the magnitude and significance of the new technological paradigm shift. For him the information technologies are the engine driving the transition into informational capitalism and the network society. He suggests that, like earlier technological paradigm shifts, the IT paradigm shift is fundamentally altering the material basis of our economy, society and culture.[23]

The present IT revolution is comparable to a limited degree to the revolution brought about in the West by the alphabetisation of language around 7 BC. The ability to convert the spoken word into written text, thus separating the speaker from the message in time and place and meaning, provided the infrastructure for cumulative, knowledge-based communication. Consequently, new social hierarchies were created in terms of the literate and illiterate, and oral communication was relegated to a lower tier of esteem and relevance.[24] This trend was compounded and its pervasiveness accelerated in the 15th century by another technological revolution in the West: the Gutenburg printing technology. Access to literacy, access to books and writing materials, and the capacity to print – access to knowledge and the power to communicate – became more important sites of power, especially for lawyers, who, like literate priests, were the knowledge workers of this era. Alphabetic literacy only gradually

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22 See generally P Knox and PJ Taylor (eds), *World Cities in a World System* (Cambridge: Cambridge University Press, 1995); Castells (Vol III), *supra* note 19, at 70; P Havemann, Enmeshed in the Web? Indigenous Peoples' Rights in the Network Society, in R Cohen and S Rai (eds), *Global Social Movements* (London: Athlone Press, 2000) 18; P Havemann, Freedom, Serfdom and Internet Governance: Private Domains or Cybercommons? in AR Buck, J McLaren and NE Wright (eds), *Land and Freedom: Property Rights* (Aldershot: Ashgate Publishing, forthcoming).

23 Castells (Vol I), *supra* note 19, at 29-30. See also J Mokyr, *The Lever of Riches: Technological Creativity and Economic Progress* (New York: Oxford University Press, 1990) and G Dosi et al, *Technical Change and Economic Theory* (London: Pinter Publishers, 1988).

24 E Havelock, *The Literate Revolution in Greece and its Cultural Consequences* (Princeton, NJ: Princeton University Press, 1982).

became a vehicle for social and economic mobility in feudal and later class-based industrial orders.

In contrast with the gradual paradigm shift brought by alphabetisation, the IT paradigm shift of our own epoch is arguably much more significant. It is characterised by the very rapid and exponential expansion of the capacity to communicate and create interfaces among technological fields through a common digital language. Information technologies allow those who control them to exploit incomparable memory storage, flexibility in the reconfiguration of text, communication feedbacks and interactions, and instantaneous planet-wide transmission of vast volumes of data.

Castells lists[25] the characteristics of the new technological paradigm that we need to consider:

- Information is itself the raw material the technologies act on, whereas in previous technological revolutions, such as the alphabetic or industrial revolutions, information acted on technology.
- The new technologies interacting on information have an unprecedented ubiquity and pervasiveness, shaping all processes of individual and collective existence, material and psychological, because information is an integral part of all human activity.
- As networks are created to communicate and to out-communicate[26] – that is, to stifle oppositional voices and block out competitive communication (for instance the proponents of citizens' rights or the competition in the global marketplace for legal services) – the new ITs have an unprecedented capacity for exploiting networking logics. Networking, for example in the form of financial market transactions via this medium, is almost impossible to regulate and tax globally and locally, making governance of the activity both very difficult and most necessary.
- Undreamt-of flexibility is another hallmark of the new ITs, making fast and easy reconfiguration, reprogramming and retooling possible. Thus, new technology has enormous capacity for emancipating or repressing, depending on who controls it.

The new IT allows for an unprecedented degree of integration and convergence of a set of now indispensable

25 Castells (Vol I), *supra* note 19 , at 60-65.

26 G Mulgan, *Communication and Control: Networks and the New Economies of Communication* (Cambridge: Polity Press, 1991).

technologies – micro-electronics, computing machines, software, telecommunications, broadcasting, and also genetic engineering – amplifying and spreading the impact of each one to a massive degree.

International Governmental Organisations (IGOs) such as the International Telecommunications Union are gradually recognising that in the global information society – dominated as it is by informational capitalism, access to information and knowledge, and technology – the global information infrastructure, therefore, has an increasingly vital place in the social fabric of democratic social order. Its role encompasses the interweaving of good governance, human rights and the Rule of Law both locally and globally.[27] More than ever, power resides with those who control the ICTs, repositories of information, knowledge workers and the knowledge industries. Our students have to acquire the necessary literacies, critical and technological, to participate in and contribute to the new, technology-powered knowledge economies and the network society. The need for technological literacy (but not yet critical literacy) has been recognised by our law students. It is our view that critical literacy involves being able to understand the power and politics in the normative and ideological architectures that constitute the Web, the market, the state and globalisation.

Senior year law students who once eschewed courses on theory, and on methods and research, are increasingly taking an interest in computer-mediated research, which they now see as essential for their own confidence and employability. We discern that students place much emphasis on technological literacy in a *narrow* sense of computing skills. Students believe that they need to know what information is available electronically and how to access the databases or World Wide Web sites cheaply and fast. In contrast, our "needs analysis" for the curriculum does not dichotomise:

- analysis and method;
- concept and critiques; contextualisation and explanations for change; justifications for comparison and technique;
- conceptual keywords and Boolean search keywords, and so on.

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27 International Telecommunications Union, *The Missing Link – Report of the Independent Commission for World-wide Telecommunications Development* (Geneva: ITU, 1984) and see ITU's *Valetta Declaration and Action Plan* (Geneva: 1998); KW Grewlich, *Governance in "Cyberspace": Access and Public Interest in Global Communications* (The Hague: Kluwer Law International, 1999) 73-93.

We stress that employing theoretical frameworks for the purposes of analysis is a method, and that analysis requires taking concepts and analytical frameworks seriously. Without concepts, only crude analysis is possible, and without thoughtful analysis, knowledge work cannot be done now, any more than it could in the past. We sometimes have to stress this point because of what we perceive to be the false promise of ease and speed of "knowledge acquisition" which is part of a newish cyber utopianism and accompanying media hyperbole. Equally problematic are many students' negative feelings about "theory"; they are impatient with what they see as "theorising about theory" when what they want to know is how to apply theory, automatically and immediately.

We understand that law students' intuitive and knowledge-based insights into the nature of the present IT revolution and globalisation lead many of them to position themselves to be among the infocrats at the apex of the knowledge economies. They will at the very least want to be employed as infoserfs, not left as infopaupers trapped in poverty in some informational black hole. As law teachers attempting to respond to students' sense of urgency (that is, consumer demand for technological literacy), we stress and demonstrate that knowledge and higher order skills such as analysis and synthesis are required for the optimal use of information-finding techniques.

Meeting the Need for Critical Literacy

Our aim has been to design a course to meet students' ever present (though not always conscious or articulated) need for critical literacy as well as a new and almost overpowering demand for technological literacy. There appears to be a profound tension between the deep learning reflected in contextualism and critical knowledge-building, and the potentially shallow learning often associated with acquiring techniques, including those for using new technology. Often the latter is reflected in a "techno-fetishist" preoccupation with simple, crude information gathering. This tension is as evident at Waikato Law School as at any other. Like other schools committed to teaching law in its social setting, we struggle to resolve the tension and convert it into a dynamic synergy.

At Waikato, we start with the supposed foundations for critical literacy. It is compulsory for all students to study Law and Societies in the first year and Jurisprudence in the

second year of the LLB program. All students other than graduates must also study non-law subjects in the first two years. Within each law subject students are exposed to societal, economic, and other contexts within which law operates and develops. We also have a strong emphasis on legal research and writing and on forensic skills. We explicitly recognise that legal education does not have the production of solicitors and barristers as its sole imperative. The study of law from the perspectives of other disciplines has become mainstream in our School, as in other schools of law. We believe it is equally important to provide students with a framework to assist their engagement in interdisciplinary research and, more riskily, to encourage them to join with "theoretical", rather than "operational" or "doctrinal" approaches to the learning and teaching of law.[28]

The ever present pressure from students and some employers for immediate relevance and transferable skills makes it tempting to bias the curriculum in the direction of "technological literacy" alone. When we surveyed students who enrolled in our Legal Research Methods course at the beginning of the academic year, they expressed a desire to acquire technology-based skills in relation to interdisciplinary research. By this, they appear to mean information on how to access the scholarship of law and other disciplines through print indexes and, more importantly as our students see it, electronic databases. They want to acquire at least a basic understanding of statistics and information on how to access statistical databases. They tell us that they would be better informed if they knew where to look for information, and knew how to operate information technology, and that they need more help with conceptualising and writing.[29] Their emphasis seems to be on the mechanics of print and database/World Wide Web based searching and on the presentation of research findings, rather than on the conceptual and contextual underpinning of research as an intellectual task. This pragmatic emphasis is reflected in what some legal practitioners tell us they want from our graduates. These employers want law graduates who have good research and writing skills. Most often, what is meant by research skills is that law graduates ought to be able to "handle" IT and know their way around the legal databases.

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28 A Sherr, Legal Education, Legal Competence (1998) 32 (1) *Law Teacher* 41.

29 We are told this in classroom discussions with students and questionnaire responses in 0860.460A Legal Research Methods 2000.

Legal research methods texts seem to perpetuate this conception of research. Most identify primary and secondary sources of law and both print and electronic resources for finding the law. They explain how the resources ought to be used and provide useful addresses for sourcing national and international legal materials. These texts are excellent providers of the types of information, noted above, which students and legal practitioners have identified as being necessary for legal research. Other disciplines have texts with similar purposes and they can assist law students with interdisciplinary research. But students who are to become researchers need to know *what they are looking for*, not just where and how to find it. Researchers need to construct a conceptual framework as part of a methodology for academic research. Law students require a conceptual framework for law-in-context research. Texts dealing with legal research skills from an interdisciplinary perspective are much rarer than the legal research texts described above. Chatterjee's *Methods of Research in Law: A Handbook for Students*[30] has just one chapter on socio-legal research, which has been criticised for its brevity and lack of guided further reading on quantitative and qualitative socio-legal methodologies, comparative studies, and the role of legal history.[31]

If our rhetoric is that a contextual approach to all law study ought to be taken, then research students require assistance from their law schools with the specialist languages of research and of particular disciplines, and with training in finding discipline-specific literature (print, electronic or World Wide Web based). They need to be able to take context seriously and to be introduced to a range of methodologies, both qualitative and quantitative. They also need to be given guidance on choosing appropriate methodologies. The ethics of research and the nature of knowledge(s) should be explored. Research students should be able to use comparative and historical materials appropriately.

Students need to be sensitised repeatedly to the necessity that research findings must be presented in a way that is appropriate to the audiences for whom the research is conducted. We point out that the university is the prime "setting for

30 C Chatterjee, *Methods of Research in Law: A Handbook for Students* (London: Old Bailey Press, 1997).

31 A Blackhurst and PW Edge, Book Review [1998] 1 *Web Journal of Current Legal Issues.*

literacy development"[32] at this point in their intellectual careers; that to become an active member of an academic research culture or learned profession like the law, you have to adopt its "purposes, values and practices".[33] However, we also stress the importance of other, non-academic audiences and the imperatives of doing research and writing it up to meet the needs of such audiences. In such research, the student needs to be involved; that is, the research should inform the researcher rather than simply the research product. This notion is critical for students so that they recognise the general utility of critical analysis for research even when the research is not to be presented in the form and style of legal or academic discourse.

How law schools tackle the teaching and learning of research methods varies. One school of thought argues that, ideally, such knowledge and skills can be acquired as part of the undergraduate LLB program, through research tasks related to subject assessment. Others argue that such knowledge and skills may be taught explicitly or may be implicit in the research tasks set within skilling components of the curriculum. A third model is to treat research as a discrete subject. We chose the third model to assist students wishing to engage more knowledgeably in a law-in-context approach to research. The model freed us from time constraints that would be imposed by having to cover law subject content. As William Twining pointed out, "[m]aking space for a substantial amount of direct skills teaching would inevitably involve sacrificing other worthwhile and not-so-worthwhile enterprises."[34] This model also allows students to engage with a topic area of their own choosing.

Our approach is andragogical: that is, geared to promoting learning for self-determining adult learners. A narrow focus on practical skills related to learning how to find and use legal materials would not empower our research students to become independent researchers and would perpetuate the false "theory / method" or "theory / technique or skill" dichotomy. Our remedy for "narrow vision" is similar to that proposed by Karl Llewellyn in his critique of Langdellian case method: expand the number of skills and then "the

32 M Nevile, Literacy Culture Shock: Developing Academic Literacy at University (1996) 19 (1) *Australian Journal of Language and Literacy* 38, at 38-39.

33 *Id* at 39.

34 W Twining, Legal Skills and Legal Education (1988) 22 (1) *The Law Teacher* 4, at 8.

wherewithal for vision"[35] should be provided by "perspectives", "contextual approaches" or "thinking in terms of total pictures".[36] The five "Cs" bundle of analytical tools offers a means for analytically identifying the contours, textures and meanings in such a total picture.

For us, critical literacy is obviously basic to the "total picture" approach explicit in doing law-in-context research. This form of literacy relates directly to the way in which one becomes "aware of the underlying structure of conceptions".[37] Our claim for the five "Cs" method is that it provides students with the conceptual tools necessary to critique and engage society along with its inequalities and injustices,[38] and that these conceptual tools also assist them to harness technological literacy to their task.

The Legal Research Methods Course

Aims and Objectives

The aims and objectives of the course are set out for students as follows:

Legal Research Methods 2000

Legal Research Methods is a new course that has been designed to meet a recognised need for advanced research skills, knowledge, and strategies for the effective, ethical and culturally appropriate conduct of research in the contexts of societal and legal change and of developing technologies. This course prepares students to undertake research in a variety of employment contexts. The course is taught on campus, but you will have access to materials on-line through Topclass and will have an opportunity to participate in further discussion of relevant material through the on-line Class Forum.

continued

35 K Llewellyn, *Jurisprudence* (Chicago: Chicago University Press, 1962) 377.

36 See the discussion of resistance to skills teaching in Twining, *supra* note 34, at 9.

37 Walker and Finney, *supra* note 1, at 534.

38 See Kretovics, *supra* note 2, at 51.

Through discussion, active reading, applying research methodologies and participating in Law Library Computer Laboratory tutorials related to this course, students should be able to:

(1) demonstrate an ability to formulate and refine legal research questions and to identify appropriate methodological techniques, discuss legal and social science concepts, and locate such concepts within analytical frameworks (as appropriate);

(2) demonstrate an understanding of the language of legal research, socio-legal research, and academic and policy- oriented research (as appropriate);

(3) demonstrate an understanding of the theory and methods underpinning research in law and related social science disciplines (as appropriate);

(4) use library and electronic resources for research in law and law-related disciplines and evaluate the quality and relevance of materials found on the World Wide Web; and

(5) demonstrate the appropriate application of theory and method in legal and law-related research.

To promote the synergy of technological and critical literacy we aim to model the goal of the course on the self determining law-in-context researcher. In order to do this we draw fully on the skills and knowledge of many people in the Waikato Law School. The combination of teaching and learning opportunities offered by academic law staff and law librarians exemplifies a most exciting synergistic partnership. The team offering the course have pooled their knowledge. Hence the teaching staff includes electronic legal research experts from the Law Library, Kay Young and Kate Young, with technical backup from Douglas Davey, Computer Consultant to the Law Library.

The sequence and structure of our syllabus is set out later in this paper. It illustrates our attempt to address technological and critical literacy in parallel, as well as converging teaching/learning experiences. Such a platform of learning processes has been important to promote synergies rather than dichotomies. Construction of a conceptual framework for a research project progresses at the same time as knowledge of available electronic databases/search engines is acquired. As the course progresses, students experience the relationship between keywords for conceptual mapping and keywords

for successful information retrieval, in the context of their chosen research projects.

There is no all-encompassing text for the course available from any jurisdiction; in the spirit of andragogic education, we have pointed students in the direction of resources,[39] and provide a loose-leaf folder for them to use to assemble our handouts and their own resources.

Law-in-Context Research and the Five "Cs"

What follows is a brief summary of our specific approach to the development of critical literacy. Our technique has been to use a weekly two-hour seminar to workshop with students how they can go about the task of framing their topic in terms of the relevant dimensions of the five "Cs". Our method for conceptualising law-in-context research projects involves constructing spider diagrams (mind maps)[40] and building models, including keywords, proposal writing and description of methodology, in terms of the five "Cs". The application of the five "Cs" to the students' own projects is the implicit though fundamental sixth "C", namely the process of concretisation.

As part of this process of concretisation we use short group discussion sessions to focus on each of the five "Cs" in turn, with spider diagrams as vehicles for overviewing interrelationships through identifying keywords. Keywords drawn from discipline-specific and generic vocabularies for research are basic to our approach. Keywords arrived at

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39 L Blaxter, C Hughes and M Tight, *How to Research* (Buckingham: Open University Press, 1996); P Crème and MR Lea, *Writing at University: A Guide for Students* (Buckingham: Open University Press, 1997); P Maykut and R Morehouse, *Beginning Qualitative Research: A Philosophic and Practical Guide* (London: Fulmer Press, 1999); R Watt, *Concise Legal Research* 3rd ed (Sydney: Federation Press, 1997); H Becker, *Tricks of the Trade*: *How to Think About Your Research While You are Doing It* (Chicago: Chicago University Press, 1998); P Beilharz, *Social Theory: A Guide To Central Thinkers* (North Sydney: Allen & Unwin, 1991); V Jupp, *Methods of Criminological Research* (London: Unwin Hyman, 1989). See also University of Waikato Law Library links; R Tyner, *Sink or Swim? Internet Search Tools and Techniques* (1998) <http://www.ace.ac.nz/Centres/Technology/ICT/internet/Sinkswim.htm> (20/02/00); and Social Policy Virtual Library, WWW Virtual Library <http://www.bath.ac.uk/~hssgjr/simul/s-www1.htm> (20/02/00) which links the user, for instance, to the ILO, IMF, WTO, World Bank, OECD and many other websites and databases.

40 See, inter alia, G Gaywith, *Power Learning: A Student's Guide To Success* (Lower Hutt, NZ: Mills Publications, 1992) 50-51 on using mapping as part of a brainstorming, examining, categorising, organising, reviewing and structuring process.

from general knowledge or prior personal or professional knowledge are as helpful in the initial stages as keywords from a specialist and researched knowledge base, though specialist knowledge clearly becomes more important as students develop sophistication in refining their questions and defining their concepts.

Keywords aid in the refinement of the topic; they help to frame a thesis statement and to identify lines of thought and directions for research. We point out that it is no coincidence that keywords are also vital tools for Boolean database searching and World Wide Web surfing. This convergence of components required for critical literacy with those required for technological literacy constitutes a vital link between what many students have previously seen as two separate spheres sharing little or no interface. Keywords for conceptual mapping and the choice of keywords for Boolean searching are not identical; however, what is the same is the requirement for intellectual engagement by way of the use of analytical tools for which there is no technical fix or short cut. To stimulate student interest and to illustrate the breadth and depth of law-in-context research, we drew up our list of key words (see Appendix) and suggested that students embellish it themselves and find out what all the keywords they were not familiar with meant in the research context.

Planning law-in-context research involves asking the following questions about the five "Cs":

1 Change

- How will you explain legal and social change? (For example, economic determinism, egoism, serendipity or structuration; the transition from status to contract; from gemeinschaft to gesellschaft society, repressive to restitutive law, Fordism to post-Fordism, modernity to late or post-modernity, or from industrial capitalism to informational capitalism.)
- Is your question premised on the need for change or on the fact that change appears to have occurred?
- Have you considered identifying and organising the historical epochs relevant to your topic in terms of changes in society and changes in legal doctrine?

2 Concepts

- What are the key jurisprudential concepts embedded in your question? (For example, rights, property, sovereignty, contract, personality, liability.)

- Which sociological concepts and analytical frameworks seem relevant? (For example, social reflexivity, globalisation, ethnicity, gender, class, state, market, ecology.)
- What are the legal techniques for social ordering reflected in the body of law most central to your questions? (For example, public and private arranging, constituting, penalising, benefiting, regulating.)
- Have you defined your use of these terms and explained how you intend to use them?

3 Critique

- What is your critique?
- What standpoint or perspective do you adopt when asking your question? (For example, objectivism/scientific positivism.) Or do you implicitly or explicitly use value-laden assumptions drawing from, for example, liberalism, Marxism, feminism, post-modernism, legal realism, critical legal studies, economic rationalism?
- Is your model of human nature and society a conflict, order, or pluralist model?
- Are you locating your inquiry at the personal, cultural or structural level of analysis?
- What are the limitations of your standpoint or perspective, and how does this affect your critique?

4 Comparison

- Are comparisons and/or contrasts implicitly or explicitly necessary to your answer?
- What are your units of, or themes for, comparison/contrast? (For example, jurisdictions, regimes of rules, peoples, policies.)
- Can you be explicit about your justification for the choice of units of analysis you make?
- Have you considered historical contingency and sociological specificity in choosing your units of comparative or contrasting analysis?

5 Context

- What important aspects of the economic, political, social or cultural context need to be provided in your answer so that your research will answer "why" questions as well as "what" and "how" questions?

Which disciplines offer the richest sources for you? (For example, history, sociology, political science, Maori/ethnic studies, gender studies, economics.)

Sequence and Structure of Legal Research Methods 2000

Week Number, Date and General Topic	*Seminar Themes*	*Computer Tutorial*
(1) 6 March Overview and expectations	The language of research – theory and method Overview of the "five 'Cs'" method Types of research – forms of projects Identifying and formulating a thesis statement	(None)
(2) 13 March Thinking about and doing research strategically	Developing research strategies and managing time Ethical considerations and cultural appropriateness	Constructing a literature review Logging on and using Topclass
(3) 20 March Contextualising	Legal and social theory Locating and using historical materials	Introduction to databases
(4) 27 March Conceptualising	Jurisprudential concepts Social science concepts and analytical frameworks	Introduction to databases
(5) 3 April Comparison and contrast	Units of comparison Specificity and contingency	Maximising resources

Sequence and Structure of Legal Research Methods 2000

(6) 10 April Comparative and international law research	Introduction to comparative legal systems and resources Locating and using international materials	Legal databases
17 April	[Study break]	
24 April	[Study break]	
(7) 1 May Accounting for social and legal change	Scholarship and evidence	World Wide Web
(8) 8 May Identifying a critique	Legal theory and social theory Objectivity, positivism and critical theories Modernity and post modernity	World Wide Web
(9) 15 May Legal writing	Focus and structure – scholarship, evidence and analysis Focus and structure – scholarship, evidence and analysis Legal writing – the research paper Writing up research, self-assessment and troubleshooting Legal writing – objectives and forms	Non-law databases

Sequence and Structure of Legal Research Methods 2000

(10) 22 May Panel discussion 1:	Specialist legal discourses *or* Law, globalisation and lawyering in the 21st century *or* Meeting specialised legal and socio-legal research needs Specific writing problems	Relevant legal and non-legal databases
(11) 29 May Panel discussion 2:	Specialist legal discourses *or* Law, globalisation and lawyering in the 21st Century *or* Meeting specialised legal and socio-legal research needs The assessment and publication of research Presenting research findings	Government documents

Sequence and Structure of Legal Research Methods 2000

(12)	5 June Panel discussion 3:	Specialist legal discourses Or Law, globalisation and lawyering in the 21st Century Or Meeting specialised legal and socio-legal research needs Summation and review	Legal databases test
12 June-14 July		STUDY BREAK AND MID-YEAR EXAMS	

Assessment Tasks

Our approach to assessment is also designed to promote a critical/technological literacy synergy. Each student must submit for assessment:

- a research topic proposal and preliminary literature review
- a paper identifying, evaluating and selecting appropriate research methodologies
- a research paper on a topic of the student's choosing.

In addition, students will undertake a research databases test in the Law Library Research Laboratory.

Research topic proposal and preliminary literature review

In this assignment students are expected to demonstrate an ability to:

- formulate and refine legal research questions
- identify appropriate methodologies
- discuss legal and social science concepts
- locate such concepts within analytical frameworks that reflect the scholarly literature in the area
- use the language of law-in-context research for academic, professional practice and policy-oriented research.

Students must indicate who the intended user(s) of the research are likely to be. For example, whether the research is to be written up as an article for an academic legal journal or interdisciplinary journal, an article for a professional legal journal, a Law Commission working paper, a written argument for an appellate court, or a law and policy briefing paper.

Our approach here is to stress the obvious importance of being explicit about which voice you write in and which audience(s) you aim to reach. However, as the key to critical literacy in action, we also point out that sometimes it is necessary to be explicit about each aspect of one's analysis (explicit analysis). An example would be academic writing where a scholar is writing primarily for other scholars. Other types of law-in-context research relate to opinion work as a lawyer, research for courts, or research for public bodies engaged in policy development and law reform. In this type of research too, theoretical frameworks provide a basis for analysis of what is fundamental and implicit. How implicitly or explicitly the analytical frameworks and concepts underpinning the research are voiced in the resulting

research paper will be a matter of judgement reached after considering the audience. The five "Cs" method of analysis nonetheless remains a necessary part of the research process.

In the critical literature review that must accompany the research topic proposal, annotations to the literature listed must identify the relevance of the items to the topic statement and arguments supporting or contrary to that topic statement. Relevance may be supported by relating items to dimensions of social/legal change, key concepts, the student's critique, any comparative aspects, and relevant dimensions or context. Individual feedback is given on the research proposal and literature review, and students are referred to materials on methodologies.

Research methodologies assignment

The purpose of this assignment is to measure student learning in relation to appropriate and effective research methodologies and the ability to analyse critically relevant materials necessary for the design of a research project. Students' facility with the use of the five "Cs" as methodological tools for analysis, and their ability to identify the issues relevant to the type of audience for whom the research project is intended, are the critical dimensions of this assessment exercise. Again, individual feedback is given in order to sustain an iterative research process with each individual student.

Research databases test

As we wrote at the outset, many students may have assumed that this aspect of the curriculum would constitute the core of the course. From the beginning of the course, students have been attending weekly tutorials in the Law Library Computer Laboratory. Database materials used in these tutorials are also available on-line to students in the course.[41] Students download the materials from home if they have Internet access. The topics cover law and non-law databases, World Wide Web search engines and sites, and evaluation of electronic materials. A problem-based learning approach is used. Students are encouraged to relate the five "Cs" analysis of their topics to electronic search strategies. The test has both written and practical components.

41 Kay Young and Kate Young, Law Librarians, designed and taught this vital part of the course.

Research project

Two primary criteria are used to assess the paper that results from the project. One criterion is the degree to which the paper demonstrates (implicitly or explicitly) the appropriate use of research methods and theory in addressing matters of context, critique, conceptualisation, comparison/contrast, and theory about change, relevant to the question. The other criterion is the extent to which the paper effectively demonstrates breadth and sophistication in the use of library and electronic databases and other legal and social science research resources. Secondary criteria for assessment – primary in most other papers – concern structure and focus; evidence, scholarship and analysis; and quality of writing and presentation.

Conclusion

Andragogy for the knowledge society requires teachers to investigate methods that provide functional skills and conceptual tools in an explicitly synergistic way. The five "Cs" approach to critical literacy cannot stand alone as a technique for planning and guiding law-in-context research. To be a contribution to holistic law-in-context education, it must be embedded in a curriculum that continuously promotes the synergy of technological and critical literacies.

Our aim must be to try to animate the students' capacity for analysis and social reflexivity while at the same time explicitly skilling them to be knowledge workers in a world largely governed by the new technological paradigm. For us, as educators and knowledge workers, what is significant is how the cultural and social dimensions of globalisation impact on the reflexive project of self-identity construction and the use of knowledge.

To be reflexive is to be human. And to be denied the chance to be critically literate, or the knowledge and skills for technological literacy that now constitute fundamental components of the global and informational mode of production and governance, is to be denied keys to self-actualising reflexivity and hence to be de-humanised, disenfranchised as a citizen, and de-skilled as a knowledge worker.

Appendix: Some Keywords for Law-in-Context Research

- academic research
- action research
- advocacy research
- after Fordist
- aims
- American realism
- analysis (modes / units)
- analytical frameworks
- argument
- audience / voice
- Austinian positivism
- autopoiesis
- B 2 B
- Brandeis brief
- case studies
- causation
- cmc
- collaborative research
- comparative law
- comparison
- concepts
- constructs
- content analysis
- contextualisation
- correlation
- critical (theory)
- critical legal studies (CLS)
- critique
- cultural studies
- data / database
- de-construction
- diagrammatic
- dichotomy
- discourse
- doctrinal
- documentary analysis
- economic rationalism
- e-hub
- empirical
- epistemological
- epoch
- essentialist
- ethics
- evaluation research
- feminisms
- field work
- flow chart
- focus
- Foucault / Foucauldian
- gemeinschaft / gesellschaft (M Weber)
- globalisation
- goals
- governance
- hegemony (A Gramsci)
- heuristic device
- histograms / bar graphs
- human subject research ethics
- hypertext
- ICTs
- ideal type
- ideology
- informational age / capitalism
- institution / institutional design
- instrumentalist
- instruments
- internet
- interview analysis
- juridical
- jurisprudence
- law and economics
- liberal
- links
- literature review
- macro / meso / micro

- Marxist / Marxian
- method / methods
- methodology
- models
- modernity
- network society (M Castells)
- new public management
- New Right
- normative
- objectives
- objectivity
- ontological
- originality
- outcomes
- paradigm
- participatory research
- periodisation
- philosophy of law
- pie chart
- policy / policy analysis
- political economy / ecology
- positivist
- post colonial theory
- postmodernism
- praxis
- presentation
- pure / applied research
- purpose statement
- qualitative / quantitative
- questionnaire
- radical race theory
- rational (public) choice theory
- reductionist
- research (noun and verb)
- research proposal
- rhetoric / reality
- risk society
- sample size
- scholarship
- social reflexivity
- socio-legal
- sociology of law
- spider diagram
- statistics
- strategy / tactic
- structuralist (post-)
- structuration (A Giddens)
- structure
- style
- subjectivity
- survey research
- synthesis
- tasks
- theme / thematic
- theory
- thesis / hypothesis
- time line
- web (WWW)

BOOK REVIEW

The English Legal Process in Context

Fiona Cownie and Anthony Bradney, *English Legal System in Context*, 2nd edition, London, Butterworths, 2000, pages i-xxv, 1-362. Price $61.00.
ISBN 0 406 92403 1.

*Annette Marfording**

"This book is about the English legal system." (1) So begins this textbook, in a manner both appropriate and misleading. Appropriate, because of the book's parochial focus on England; misleading, because the authors discuss the English legal process, not the English legal system as a whole. In any book about a common law legal system the reader would also expect a discussion of the categories or divisions of law, such as common law and equity, civil law and criminal law;[1] a historical introduction;[2] and a discussion of the constitutional background of the legal system,[3] all of which are not considered here. This is not necessarily meant as a criticism; it simply suggests that a different title might have been more appropriate. In terms of what the authors do cover, their placing the English legal process in the context of not only its theoretical, but also its actual operation, makes the work significantly better than other "legal system" or "legal process" books, which mainly use a state-centred and rule-centred paradigm. The success of this book lies in the authors' commitment to the importance of discussing law in context and in action, and in its juxtaposition of statutory provisions and empirical evidence as to their (non) operation in practice.

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 (2002) 13 *Legal Educ Rev* 93.

1 For example, G Slapper and D Kelly, *The English Legal System* 3rd ed (London: Cavendish, 1999) and GL Gall, *The Canadian Legal System* (Toronto: Carswell, 1990).

2 For example, RJ Walker, *The English Legal System* 6th ed (London: Butterworths, 1985) and R Byrne and JP McCutcheon, *The Irish Legal System* 2nd ed (Dublin: Butterworths (Ireland), 1990).

3 Byrne and McCutcheon, *supra* note 2, Slapper and Kelly, *supra* note 1, and Gall, *supra* note 1.

Chapter 1 lays the theoretical foundations for the authors' contextual, law-in-action approach. Their main criticism of a state-centred paradigm is that it ignores the fact that many disputes are resolved by non-state agencies. In their critique of a rule-based approach, the authors discuss the work of legal anthropologist Malinowski, legal theorist Gierke, legal realists Karl Llewellyn and Jerome Frank, legal sociologist Richard Abel, and structuralist Doreen McBarnet, all of whom argue for the necessity to study law in its practical operation, taking account of the socio-cultural context in which it functions. The only unfortunate omission here is to alert the reader to the impact of the political and economic context on law-in-action, the importance of which is emphasised particularly by legal comparativists.[4]

In chapter 2, headed "Courts", the authors first make the valid point, underpinned by statistical evidence, that courts are wrongly seen as central to the legal system. People often resort to alternative dispute resolution mechanisms rather than to litigation, if they pursue their claim at all. Objectives of dispute resolution mechanisms, such as mediation and conciliation on the one hand and litigation on the other, are explained, and the debate as to whether judges merely declare what the law is or also engage in law-making is briefly discussed.

Chapter 3, which describes the court hierarchy in England, is less successful. The authors first outline the categories of courts: courts of record and not of record, superior and inferior courts, and courts whose decisions are regularly reported and those whose decisions are not. This part introduces many technical terms, such as prerogative writ, mandamus, and certiorari, all of which are not explained, making the chapter a difficult one for beginning students, given there is no glossary either. A more substantial criticism relates to the authors' discussion of the actual court hierarchy. Given their emphasis on the practical operation of the law, the most important courts (statistically speaking) are clearly the Magistrate Courts, the lowest courts in the judicial hierarchy. Yet, the authors begin with the *highest* court in the English hierarchy, the European Court of Justice. Unfortunately,

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4 O Kahn-Freund, Uses and Misuses of Comparative Law (1974) 37 *MLR* 1, at 27; MA Glendon, MW Gordon and C Osakwe, *Comparative Legal Traditions* 2nd ed (St Paul: West Publishing Co, 1994); A Marfording, The Fallacy of the Classification of Legal Systems: Japan Examined, in V Taylor ed, *Asian Laws Through Australian Eyes* (Sydney: LBC Information Services, 1997) 65, at 88.

the authors do not point out the fact that this Court, in contrast to national English courts, does not allow for dissenting judgments, nor do they discuss the reasons for this. A lot of their discussion of the individual courts in the English court hierarchy will not make much sense to students, since the courts' jurisdictions are not clearly explained, examples are not given, and undefined technical terms such as "Lords of Appeal in Ordinary", "admiralty law", "ecclesiastical courts", "Chancery", "civil and criminal division", litter the pages. A very brief explanation of Lord Woolf's reforms and objectives and the new Civil Procedure Rules is structurally ill-placed in the section on the County Court, even though they are not designed for that Court only, and there is no assessment of whether the reforms are going to be effective. Courts of special jurisdiction, such as Coroners' Courts, Courts of Chivalry, Courts-Martial, and Election Courts are described so briefly that they may as well have been omitted. In addition, a court diagram should have been included to facilitate an understanding of the appeal structure and the court hierarchy.

Chapter 4 deals with tribunals and it again is lacking clarity of explanation, and the more detailed focus on two tribunals, the Employment Tribunals and the Special Educational Needs Tribunal, is only partially successful. With regard to the first, good use is made of statistics to examine practicalities such as legal representation and likelihood of success, whereas the latter's subject jurisdiction is enumerated only in a footnote, which most students are unlikely to read. And its jurisdiction is so narrow that one wonders why it was chosen at all, given the book's emphasis on practical importance.

Chapters 5 and 6 discuss legal reasoning. The concern of chapter 5 is the common law, whereas chapter 6 deals with statutes. Given increasing legislative activity and the proliferation of statutes, the order of these chapters should, from the authors' perspective, logically have been reversed. Chapter 5 explains the idea and the advantages and disadvantages of the doctrine of precedent clearly. But the same cannot be said for the difference between ratio decidendi and obiter dicta. Nor are dissenting judgments mentioned, which would have thrown light on the practicality of the doctrine of precedent. In addition, chapter 5 should have explained the difference between statute and case law, and should have outlined the areas of law governed by statute and case law. Chapter 6 outlines well the rules of statutory

interpretation and their inherent difficulties, but the brief discussion of the Human Rights Act 1998 (UK) and its impact lacks attention to the historical background of the Act: the European Convention on Human Rights (only mentioned in a footnote), and the effect of decisions by the European Court of Human Rights, declaring English statutes in breach of the Convention.

Chapter 7 is dedicated to legal education and the socio-economic and gender distribution of law students, but omits any mention of actual university entry requirements, simply stating that "[l]aw students are highly successful at A levels". (128) For foreign readers, a discussion of the university versus college system in England would have been useful.

Chapter 8 follows logically, looking at the legal profession and its persisting inability to achieve gender and ethnic equality. Unfortunately, despite the heading "Solicitors and Barristers", the work each branch of the profession does is not explained.

Chapter 9 deals with the judiciary and is an exception to the parochialism elsewhere in the book. Regarding the selection of judges, England is compared to France, Germany, and Japan, and its selection process discussed in terms of both advantages and disadvantages. The separation of powers doctrine is outlined with reference to the United States; however, the issue of judicial review of the legality of legislation is not mentioned, even though European Court of Human Rights decisions and the enactment of the Human Rights Act have made inroads into the previous absence of judicial review in England. A surprising omission occurs in the section discussing judicial independence. Whereas the authors state "judges should not be part of the government" (165), the importance of judicial independence from the executive government and its potential attempts to influence judicial decision-making are not mentioned.

The remaining chapters, though, are very good in fulfilling the authors' promise to take a contextual approach. They concern such matters as "The Civil Court in Action", "Private Security and Other Non-Police Agencies", "The Public Police: Uncovering Crime and Powers of Stop and Search", "Powers of Arrest and Search", "Investigation and Prosecution", "The Magistrates' Court", and "The Crown Court". While outlining the relevant statutory rules, the chapters also examine law as it operates in practice, thereby successfully highlighting the difference between law on paper and law-in-action.

The book utilises a very unfortunate non-consecutive footnoting system. Each chapter begins with footnote 1 but, once note 20 is reached, the footnote numbering goes back to 1, even in the middle of chapters. This makes it more difficult to find previous references, which are merely indicated by the author's name and op cit. Another very annoying feature of the book is the incredible number of spelling and grammatical mistakes, especially in chapters 3 and 4. Examples include (all emphases added) "[m]agistrates must sit with *a one* of the above" (57), "*their is* wider provision for" (57), "target … is being *acheived*" (82), "[this] will not … *effect* … lawyers" (127), "the *principle* criterion". (172) It is surprising that a publisher of Butterworths' reputation did not pick these up in proof-reading the manuscript. Considering that most teachers would want their students to be able to spell correctly, this book provides a bad role model.

In conclusion, if students manage to read their way past certain unexplained details and technical terms as outlined above, the book's contextual and law-in-action approach makes an important and relatively innovative contribution to the enhancement of students' understanding of the English legal process. It is suggested, however, that concerns, such as the ones mentioned in this review, are addressed in a future edition.

BOOK REVIEW

How to do Things with Law Students

William Twining and David Miers, *How To Do Things With Rules: A Primer of Interpretation*, 4th ed, London, Butterworths, 1999, pages 1-451 + xxxiv. ISBN 0 406 90408 1.

*Nicholas Horn**

Introduction

How to describe my delight when I first discovered Twining and Miers' *How To Do Things With Rules* in its third edition some eight or nine years ago?(!) One of the occupational hazards of a career in legislative drafting is being stranded at a party after trying to explain to someone (anyone!) just what *fun* it is, doing things with rules. The conversation teeters, then shifts to other guests and more engaging topics. Twining and Miers' work is a text that *enjoys* its subject, while demonstrating the fundamental importance of interpretation at all levels of the law and for all those who come into contact with the law (that is, everybody). Armed with the "case of the legalistic child" (10-12), or the strange-but-true story of the fire engine drivers both prohibited and permitted to go through red lights (51-56), a shy and retiring drafter could venture forth to the next social engagement and hold his own in the most brilliant company.

The first part of this review gives an account of the achievements of Twining and Miers' work in its previous incarnations — in terms of its subject matter, approach and method. In the second part of the review, the distinctive features of the fourth edition are evaluated.

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 (2002) 13 *Legal Educ Rev* ???.

Appreciation of a Classic Text

Twining and Miers' work more than earns the laurel of "classic" bequeathed by Professor Goldring.[1] It represents a remarkable break with traditional legal teaching in three respects: in tackling the interpretation of rules as a subject worthy of legal instruction in itself; in what it has to say about interpretation and rules; and in the educational method it epitomises.

Interpretation – What?

The subject of Twining and Miers' work is the analysis of rules and the interpretation and application dimensions of "rule-handling", particularly as applied to legal rules. The authors extend the topic beyond the traditional confines of legal doctrine. By developing an approach to legal rules starting from a broader perspective of the social function of rules, their approach embodies the ethos of the law school at Warwick University at the time of first publication, when Twining was teaching there.[2] As Goldring notes, "the Warwick scholars considered that it was not enough to learn the rules without learning to appreciate them in their social context".[3]

The examples, questions and exercises collected in Part One (3-77) and the supplementary material in Appendix I (381-411) develop analogies between legal rules and non-legal rules (the judgement of Solomon, the legalistic child, school and prison rules etc), and some are used as case studies systematically throughout the book. Conversely, the legal analysis is always characterised by an awareness of larger social issues. For example, in other hands the fire-engine drivers' case, *Buckoke v Greater London Council*[4] (51-56; 120-21), might simply have been a footnote to a comment on the law-making jurisprudence of Lord Denning. Twining and Miers make it into a compelling illustration of how the realities of industrial relations affect interpretative standpoint. In another instance (among many), the authors' use of the domestic

1 J Goldring, Cultural Cringe or Lessons for Australian Legal Education? (1996) 7 *Legal Educ Rev* 125, at 128 (a review of W Twining, *Blackstone's Tower: The English Law School* (1994); GP Wilson (ed), *Frontiers of Legal Scholarship: Twenty Five years of Warwick Law School* (1995)).
2 *Id* at 126.
3 *Id* at 127.
4 [1971] 2 All ER 254 (CA).

violence case study (78-109, 121-22, 266-73 *passim*) shows an acute awareness that the failure of the legislative reform concerned was not simply a case of "bad drafting" (or any other narrowly-conceived technical error); it was as much, if not more, a consequence of the play of social forces surrounding the issue.

Who Interprets? Why?

One of the original features of Twining and Miers' approach is their emphasis on understanding how an interpretative problem arises in context. An interpretative problem only arises from the standpoint of the interpreter in question, playing a particular social role in a particular social setting.[5] From another standpoint, there may be no interpretative issue at all: "[w]hether an interpreter's reading of a rule is routine or problematic depends on who she is and the purposes for which she is reading it". (207)

Twining and Miers' work is rare among law texts in demonstrating an implicit understanding that the meaning of rules, like that of any other medium of communication, is crystallised fully only *in reception*. This is so to whatever degree (and here there is much to debate, of course) the sender, through the material form of the communication, predetermines or preconditions its meaning. In other words, the meaning of a rule is not fixed, determined by its form, but dynamic, constructed in each different situation in which the rule is invoked.

One of the red herrings exposed by this approach is the argument that the choice between "purposive" and "literal" interpretation is inherently political. For Twining and Miers, this is not a choice between liberalism and conservatism, but between interpretative tools that might, or might not, be used from particular standpoints in a given context. One could say that Twining and Miers take a purposive approach to the question of interpretation *itself*: their account is

5 The authors prescribe a "diagnostic model" for the "puzzled interpreter" whose reading of a rule is "problematic" in a particular situation. (208-20) After the overall context (standpoint, role etc) giving rise to the interpreter's puzzlement has been clarified, various "conditions of doubt" may be diagnosed. A well-ordered catalogue of such conditions is presented, for example: lack of clear policy objectives (item 4, 209); doubt about the meaning of words (item 8 (d), 210); poor drafting (item 13, 211); change in factual context after making of rule (item 17, 212); borderline cases. (item 33, 213) It is only then that the appropriate interpretative principle is to be applied.

always conditioned by a consideration of the purpose served by interpretation in a particular context. Once this approach is taken, the *method* of interpretation (that is, the choice of interpretative technique) becomes secondary. As the authors note: "[W]e consider the rules of statutory interpretation and the doctrine of precedent to be relatively minor dimensions of the problems and processes of legal interpretation". (114)

A signal difference between Twining and Miers' account of statutory interpretation and that offered by most standard texts is that principles of interpretation are not regarded as a body of doctrine in themselves, abstracted from the context in which interpretation actually takes place.[6] When treated like this, the principles are seen as means to an end: a "toolkit" from which the most appropriate may be chosen by a puzzled interpreter who has identified and diagnosed the source of puzzlement.[7] The student can then make some sense of the apparent confusion and internal contradiction of the assorted canons, rules and maxims that make up the law of interpretation.

Unfortunately, perhaps the status of Twining and Miers' work as a student text (and predominantly as a *beginning* student text at that) has prevented the authors' alternative approach from attaining a more authoritative standing.

Teach Interpretation? How?

The third remarkable thing about Twining and Miers' work is the method of law teaching that it represents. This is avowedly a "primer", not strictly speaking a legal text. The authors emphasise that their work is based on the assumption that "law is essentially a practical art" requiring the mastery of skills as much as the acquisition of knowledge. (viii) From my own experience, this approach accurately reflects the way in which the competency to think and act like a lawyer is acquired. There is a nicely tuned balance in the work between practical exercises and formal instruction that is doubtless also exhibited by many good teachers handling any legal subject, but that is rarely demonstrated so clearly in a textbook.[8]

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6 The authors offer a strong, if compressed, critique of the standard approach to the common law of interpretation in a section headed "Judicial interpretation in general". (274-87)

7 See discussion, *supra* note 5.

8 This approach to the study of law is also represented in Twining's engaging "Reading Law Cookbook: A Primer of Self-Education about

Another evident assumption is that there is value in introducing students to the study of legal interpretation as they begin their training, rather than leaving them to develop such skill (or not) *en passant* while studying mainstream law subjects. (ix) The authors intend their study of rule-handling to function as an adjunct to conventional legal method courses in the preparatory stages of a law degree. A decided advantage of this use of the text, surely, is that it would encourage the more philosophically-minded or socially conscious of students to see more than dry doctrine, dull discipline and drudgery in the domain of the law.[9]

The authors also recommend their text for the study of jurisprudence. (xiii) They are convinced that "the art of interpretation is best learned by a combination of theory and practice". (ix) By the nature of the subject, deep theoretical questions are encountered at every turn; for example: what is a rule? What is the relationship between rules and social values? How do words communicate meaning? Where is the common law? What is interpretation? But these are tackled for the most part in the course of, or just prior to, the detailed analysis of case studies and examples, following "the sound pedagogical principle that underlies much of contemporary legal education: the value of learning by doing". (ix) For those students (including this reader) who would pursue these topics further, there are more than ample references and indicative commentary and argument throughout, with "Suggestions for further reading" in Appendix IV. (435-42)

Twining and Miers use a "case study" method throughout. Part One ("Some Food for Thought": 3-112) gives a series of examples in the form of extracts from rules or cases, followed by questions designed to lead the students into the issues raised. The more formal instructional elements of the text (in Parts Two and Three) are made concrete throughout by the use of a number of those examples.[10] The use of this

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Law", a "skills-based" guide to handling (reading and analysing) a large variety of legal and related material. It is included in Appendix IV to the 4th edition. (421-33)

9 It should be added that the authors are careful to limit their aims to the teaching of *law student* skills (not *professional* legal skills); however, they note that there are obvious links between the two (as one would hope!). (viii-ix) This is a defence against the charge that their work is a capitulation to the view that legal education should be regarded purely as vocational training; the book's far-reaching scope more than amply rebuts that view in any case.

10 Notable among these are "the case of the legalistic child", whose efforts to steal jam from the larder are not thwarted by attempts to

method clearly demands that students prepare material thoroughly beforehand. Speaking from my experience as a teacher, this method can lead to a very satisfying interactive teaching environment.[11] In Twining and Miers' work, not only are the actual case studies fascinating in themselves (as are the examples in Part One), they are deployed expertly so that most major points of principle are supported by detailed analysis of a relevant example.

The analysis of the case studies is as innovative as anything I have seen in a law text book. The authors make a good case for various forms of diagrammatic tools (the "algorithm" or flow-chart presentation of legislative logic is particularly illuminating: see Appendix II: 413-19). And in keeping with the overall methodology of their work, these various analytical tools are as much themselves the objects of practical teaching as the results obtained from their use.

The Latest Edition

What's New?

After 25 years and four editions, this is clearly a text that is here to stay. But how has it changed over that time? According to the authors, the text was extended in the second edition in 1982, then in 1991 further revised to take account of significant developments in legal theory (Dworkin's *Law's Empire*; critical legal studies; the law and literature movement: x) The influence of European law on the law of the United Kingdom has been growing steadily over the life of the book, and this was one of the main areas of change in the third and now the fourth editions. In the fourth edition, for example, two significant new sections are added on "the European dimension" of legislative material and on interpretation of legislation, looking particularly at the *Human Rights Act* 1998 (UK). (221-26; 296-301) The authors have

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make his behaviour subject to the rule of household law; the bigamy case study (*R v Allen* (1872) LR 1 CCR 367: 42-50); and the domestic violence case study. (78-109)

11 In my varied career as an undergraduate law student, spread between three Australian universities, I had little formal introduction to legal method anywhere, and none to legislation or interpretation. At only one was regular, week-by-week preparation demanded (UNSW). While I had some good teachers, nowhere did I find anything as stimulating as the method represented by Twining and Miers' work. But I hasten to add that this was 20+ years ago, and of course I may just have been unlucky. In particular, I intend no slur on the teaching at UNSW, without which I might not have persevered in the law.

also thoroughly revised and re-edited their work, incorporating references to and discussion of recent legislation, cases and secondary materials, and rewriting for style as well as substance.[12]

Flow of Argument

The fourth edition is reorganised to clarify its structure and to emphasise its treatment of legislation. The third edition had just two parts: the first with the case study extracts and questions, the second with the instructional material. The fourth edition includes the extracts and questions in Part One, like the third edition, but splits Part Two of the third edition into two: Part Two, dealing with rules in general; and Part Three, dealing more specifically with the interpretation of legislation and the common law. The argument of the text now flows more clearly, emphasising the authors' conviction that legal rules are best understood as a species of social rule, and not as a genus all of their own. The new edition also emphasises the common features of legal interpretation, whether applied to legislation or case law (for example, the relevance of standpoint to each), by framing its treatment of legislation and case law by the concluding chapter on legal reasoning in general.

Treatment of Legislation

The treatment of legislation is more prominent in the fourth edition. An indication of this changed emphasis is that the two chapters devoted to the subject (chs 7, 8) now *precede* the chapter on the interpretation of cases (ch 9).[13] More significantly, in the fourth edition much of chapter 7 on legislation (ch 9 in the third edition) is reorganised and a significant amount rewritten, with new material added to increase its length by about a third. While some of the material is not particularly relevant in the Australian context (for example, the addition of the section on "the European dimension" and the changes to the material relating specifically to UK legislative processes), there are two additions of significance. The first of these is an expanded section dealing with

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12 A few typographical errors caught my eye, all in new material (where one would expect them, if anywhere) – p 190 n 15 ("secton"); p 207 ("the rule may be appear"); p 274 ("in the exactly").

13 Similarly, the Table of Statutes appears *before* the List of Cases in the latest edition. Of course, this could just be the new publisher's (Butterworths) different house style.

the criticism of "too many and too detailed laws", in which the greater use of "framework" primary legislation together with extensive subordinate law-making power is noted and criticisms of the approach are thoughtfully assessed. (241-44)

The second addition deals with plain English drafting style. (245-53) The authors note that drafters' "reservations [about plain English] are least in New Zealand and Australia" and are partial to the assessment of plain English proposed by former Chief Parliamentary Counsel for Australia, Ian Turnbull.[14] The section on plain English gives a useful history of the reasons for the detailed black-letter style, and a balanced assessment of advantages and risks involved in plain English reform. There is, however, an unfortunate tendency to conflate "plain English" drafting with "general principles" drafting (or at least to regard the latter as the most desirable form of plain English). The authors appear to take their cue from Turnbull, whose views on the topic are quoted at length.

It is inherent in the general principles approach that the policy of the law (or of the relevant part of the law) is indicated in terms of the "principles" which are to govern the implementation of the law. Consequently, in my view a "general principles" draft may communicate its policy (or purpose) more directly than a traditional "black letter" draft that avoids a direct statement of policy for fear of including words that have no specific job to do. But that is not to say that a "plain English" detailed approach to drafting the same law might not succeed in conveying that policy just as clearly (or even more so, given the opportunity to flesh out that policy with "detailed" context). Plain English drafting (of any sort) does not shy clear of the inclusion of unnecessary words, when those words can be justified as clarifying the meaning of the law (and, in particular, its purpose).

As I see it, the most important feature of general principles drafting is the effect it has on delegating the task of determining the scope and meaning of the statute to whichever government official, tribunal or court has the function of applying it. Depending on the context, this may be advisable or inadvisable. But it is primarily a policy choice, not a stylistic preference.[15]

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14 The Commonwealth Office of Parliamentary Counsel began to initiate a number of "plain English" drafting reforms under Mr Turnbull, developed with enthusiasm by his successor, Ms Hilary Penfold.

15 Of course, the sponsor of the Bill may be guided by advice from the drafter about the implications of drafting it in detail or by using

At any event, it is pleasing to see that the new edition canvasses these important current issues, to read the views of these distinguished authors, and (one must admit) to see due credit given to developments in Australia and New Zealand.

Assessment

This text is invaluable for the light it sheds on legal interpretation and in its approach to teaching the topic. The latest edition improves the book in a number of ways. It is no mere "touch-up" either, but a thorough review of all aspects of the text, with improvements in organisation and in its detailed treatment of particular topics.

The standpoint of Twining and Miers' work is, of course, predominantly that of the United Kingdom legal system; most important case studies and examples emanate from that jurisdiction or are viewed from the United Kingdom legal perspective.[16] The lack of local materials and Australian context is most keenly felt, perhaps, in the chapter on legislation, which contains a relatively detailed commentary on the United Kingdom situation. We still lack in Australia a general text on legislation which takes this approach. An Australian edition of Twining and Miers' work, remedying these deficiencies, would doubtless be preferable for use in Australian law schools.

But this ought not to prevent its use here, or elsewhere in the common law world: we share traditions and conventions of rule-handling. However frustrating it is not to have home-grown case studies, and having to skate over the treatment of European community law, this text remains, in my estimation, of great value for Australian students and teachers of interpretation and jurisprudence. One would also hope that it is read – with pleasure – by a few members of that elusive audience mentioned almost in passing in the Preface: those "non-lawyers who are concerned about problems of handling rules in their professional and personal lives". (x)

In short, Twining and Miers' work remains that rare commodity in the law – a significant contribution to its field; an inspirational primer; and a text that is a joy to read.

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general principles. But my point is that drafting in general principles is not, primarily, a matter of plain English. General principles drafting may lead to *less* direct communication of the effect of the law to the citizen, as it tends to abdicate the task of explaining how the law is intended to work in practice.

16 It is pleasing, however, to find a new example from an Australian text — on the laws of cricket (D Fraser, *Cricket and the Law* (1993)): 12-13.