

## Conference on Educating Lawyers for Transnational Challenges

May 26-29, 2004

### Discussion paper for session: Is There A Curricular Core for the Transnational Lawyer?

Title: Some Reflections on How, Why and What to Teach

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#### Issues

This paper raises a sequence of issues; then provides some possible answers to three of them. The issues, which are interrelated, are as follows:

1. The conference appears to focus on the education of practicing lawyers. Is it reasonable to assume that our students will practice law (when, in some jurisdictions at least, there is evidence that a great number of law students never do).<sup>1</sup> Does this matter?
2. Some of the conference papers refer to the teaching of skills. Is there a consensus that skills should be taught and learned in the curriculum? Indeed, is there consensus on what we mean by the term “skills”? Does it make a difference?
3. What skills should be taught and learned in the curriculum to equip students for the challenges of transnational practice?
4. How should skills be taught? I do not mean by what methodology (for I think it fair to say that there is broad agreement that skills are best taught and learned by experiential learning methods). The real question is how should skills teaching and learning be incorporated (or woven) into the curriculum? Is one way better (and more affordable) than another?
5. Should we not also teach, for each skill, the theory relating to the relevant skill; cross-cultural implications for practice; and issues of ethics, values and professional responsibilities? If yes, then which theories, values and issues should we teach and how?

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<sup>1</sup> Taylor estimates “that on average only three in four law students plan to work as legal practitioners”: Taylor L, “Skills – Kind Inclusion and Learning in Law School” (2001) 3 *UTS Law Review*, Legal Education in Australia: Current Issues and Developments 85 at 89.

Karl Mackie succinctly encapsulated these issues in the phrase “Why, how and what to practise”.<sup>2</sup> Mackie formulated this phrase with specific reference to skills teaching and learning, hence his use of the word “practise” (with practice being an integral part of skills teaching methodology). However, the issues in skills course design are essentially the same as for any other course. The decision-making sequence can be expanded to suit almost every educational endeavour and to include multiple design issues, such as, “For what purposes should what be taught in what sequence to whom by whom using what methods in what milieu with what resources and with what feedback?”<sup>3</sup>

What follows is one possible response to three of the issues raised above, namely:

1. What skills should be taught and learned within the curriculum to equip students for the challenges of transnational practice?
2. How should skills be integrated within the curriculum (and what are the possible advantages and disadvantages of those approaches)?

### **Learning objectives**

Ideally, at the completion of their legal studies, all law students will have developed the skills needed to:

1. Conduct effective interviews with clients and to advise clients appropriately in relation to relevant substantive and procedural law.
2. Comply with relevant procedural law.
3. Use a range of information search and retrieval systems, and to apply relevant information technology software.
4. Conduct research into legal problems.
5. Find, analyse, interpret and apply the law to particular facts.
6. Analyse and solve legal problems:
  - By identify issues

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<sup>2</sup> This formed the topic of Mackie’s influential chapter, Mackie K, “Lawyers’ Skills: Educational Skills” in Mack K, Gold N & Twining W, *Learning Lawyers Skills* (London: Butterworths, 1989) 8.

<sup>3</sup> Wade J H, “Legal Skills Training: Some Thoughts On Terminology and Ongoing Challenges” (1994) 5 *Legal Education Review* 173 at 173.

- By finding, evaluating, selecting and using factual information constructively
  - By analogizing and distinguishing precedents, and by extracting and synthesizing underlying principles and policy
  - By interpreting relevant legislation.
7. Formulate and present legal argument persuasively.
  8. Communicate effectively using written and spoken words.
  9. Draft a range of legal and non-legal documents.
  10. Plan, strategize, organize and prepare for interviewing, negotiation, mediation and litigation.
  11. Negotiate in a variety of situations.
  12. Represent clients in a range of dispute resolution procedures including mediation and litigation.
  13. Comply with and meet the ethical and professional responsibilities of lawyers to the court, to a client, to the legal profession, and to the community.
  14. Work alone and independently.
  15. Work co-operatively and productively as a member of a team.
  16. Prioritise, administer, organise and manage their professional commitments.

### **Emerging approaches to skills integration**

Skills can be integrated into the curriculum in a variety of ways. The following (not mutually exclusive) approaches to skills integration are in use in Australian law schools:<sup>4</sup>

1. **Combined.** Skills are taught in combination with substantive law subjects. Skills and substance can be designed to support and supplement each other, while at the same time, achieving their own objectives and learning outcomes.
2. **Separate** (also referred to as free-standing or stand-alone). Skills are incorporated into the curriculum as discrete subjects or units. Although skill units are often based in substantive law, they are not attached or confined to

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<sup>4</sup> This analysis first appeared in Wolski B, "Why, How, and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum" (2002) 52 *Journal of Legal Education* 287.

any designated substantive law subject, and they are not necessarily designed to further substantive law objectives.

3. **Spotlighted.** Some skills are taught in substantive law subjects, while others are separated into discrete units for special attention or spotlighted teaching.
4. **Compulsory.** Whether they are part of substantive law subjects or separate subjects, skill components are compulsory (or effectively so because of requirements for admission to practice). Students must complete them satisfactorily to obtain their degree.
5. **Optional.** Students may choose whether or not to do skill components.
6. **Incremental.** Skills are taught in blocks and built up over the course of study. Students begin with simple introductory tasks and gradually go on to more complex activities.
7. **Lead-skill.** A particular skill (or a cluster of associated skills such as legal analysis, research, and writing) is emphasized in each year of the degree program through attachment to a core substantive subject. More skills are added as students progress through their studies.
8. **Ad hoc.** Skills teaching takes place somewhere (either as part of substantive subjects or as separate units) and sometime at the initiative of individual teachers.
9. **Systematic.** Skills teaching is planned, structured, and coordinated throughout the course of study. Agreed-on skills are taught at an agreed-on time and place. Skills teaching is sustained over time even though individual teachers may come and go.
10. **General.** Skill development takes place in a general way through particular forms of assessment such as essays, assignments, and seminar presentations in substantive law courses.
11. **Specific.** Specified skills are expressly targeted for formal teaching and assessment.
12. **Intentional.** Skills training takes place purposefully and consciously through specially designed teaching and learning activities.
13. **Unintentional.** Skills training takes place only as a by-product incidental to substantive law subjects.
14. **Broad-based.** Students are introduced to a wide range of skills such as problem-solving, legal research and analysis, information technology, writing

and drafting, communication, interviewing, negotiation and dispute resolution, advocacy, and organisation and management.

15. **Narrow-based.** Skills teaching is limited to a single skill or a cluster of associated skills such as research and writing.

In practice, skills programs range along a continuum from broad-based programs at one end to narrow-based programs at the other end. Legal research, writing, and analysis are compulsory components of the curriculum at virtually all law schools in Australia. They may appear (intentionally or unintentionally) as part of an introductory substantive law subject or as a separate unit. This emphasis (on what has been called “the traditional trio of basic skills”)<sup>5</sup> may well be appropriate, as research, writing, and analysis are repeatedly identified as the most basic skills needed by competent lawyers. These skills are also of immediate practical relevance to students and foundational to their subsequent studies.

Most law schools also offer their students some opportunity to develop advocacy skills through participation in moots. Moots may be offered as separate compulsory subjects, as required components of compulsory substantive law subjects, as optional forms of assessment in substantive law subjects, as limited-enrolment electives, or as part of extracurricular competitions.

Training in skills such as client interviewing and negotiation, which are not traditionally associated with academic study, is not so widespread. Where it does take place, it tends to be optional rather than compulsory, and ad hoc rather than systematic. It often occurs as coordinators of particular substantive law subjects, at their own initiative, incorporate a skill component into their subjects as a form of interim assessment.

Some schools offer specialist skill-based electives such as Trial Advocacy, Appellate Advocacy, Alternative Dispute Resolution and Legal Clinic. These electives are generally limited enrolment courses that are offered intermittently and can be taken by only a small percentage of the school’s students.

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<sup>5</sup> Silecchia L A, “Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?” (1996) 100 *Dickinson Law Review* 245 at 257.

## **Some potential benefits and disadvantages of various approaches**

Each of the approaches to integration mentioned above has potential benefits and disadvantages. Since the approaches are not mutually exclusive, some schools have developed hybrid models of integration that combine the best features of several of the approaches.

Some authors favour a combined approach to skills integration, one where skills are taught in combination with substantive law subjects (preferably through specific and intentional efforts rather than merely as an incident of substantive law teaching). The learning of relevant skills can encourage students to adopt a deep or achieving approach to theoretical learning and so enhance the learning of substantive law. An understanding of theory allows students to apply and reflect in depth upon the application of skills.<sup>6</sup> As DeJarnatt wrote,

The effect [of teaching a skill in a single substantive context] is synergistic: students learn doctrine by using it practically and learn practical skills through an increasingly familiar branch of doctrine. Their ability to confront more difficult analytical issues grows as their grasp of the substance increases. It is easier to incorporate realistic ethical and professional responsibility concerns when the students learn enough of a substantive area to become familiar with its inherent issues and can understand its cutting-edge concerns. The students must get deep enough into the area to recognize how much they do not know.<sup>7</sup>

However, a combined approach to integration requires a relatively high degree of planning and coordination between course coordinators of different substantive law subjects over a relatively long period of time. Skills are best developed when there is linked progression in the structure of skills learning. When skills are combined with substantive law subjects, links have to be forged between those subjects in the curriculum that contain skill components. The creation and maintenance of links

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<sup>6</sup> DeJarnatt S L, "In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing" (2000) 50 *Journal of Legal Education* 50 at 56.

<sup>7</sup> *Ibid.*

across subjects in the curriculum can be a challenge in an environment where little planning and cooperation takes place among teachers.

It may be easier to create and maintain linked progression in the structure of skills learning if skills are taught in discrete units that are unattached to particular substantive law subjects. With this approach, there is no need for co-ordination and planning across substantive subjects in the curriculum, although the skill components themselves should still be planned, coordinated, and linked.

Additionally, a free-standing model of integration may demonstrate to students that legal problems do not come in neat packages conveniently confined to one substantive area of law. As one author noted in relation to this model of skills teaching, it can assist students to understand the interconnectedness of various areas of law, and provide them with practice at identifying and dealing with “points of contact and convergence between legal areas”.<sup>8</sup> The disadvantage of this approach is that students have only a limited knowledge of relevant substantive law with which to work and as such, the synergy that DeJarnatt spoke of may not take place. It is unlikely that skill activities will further the objectives of relevant substantive law areas. Finally, it is possible that students, lacking an in-depth knowledge of relevant substantive law, will only engage with skill activities in a very superficial manner.

Compulsory programs ensure that all students are exposed to the same basic skills training, regardless of elective choices. However, depth may be sacrificed in an effort to bring some skills teaching to all students, especially if the program is also broad-based, touching upon a wide range of skills. Optional programs allow for more in-depth coverage but only a limited number of students will be exposed to it.

In practice, resource constraints (and the limited amount of time available to both teachers and students) limit the ability of schools to offer a broad-based compulsory skills program. Consequently, schools tend to adopt a position somewhere in between, that is, to provide compulsory training for all students in a narrow range of

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<sup>8</sup> Cassimatis in Gygar T & Cassimatis A, *Butterworths Skills Series - Mooting Manual* (Sydney: Butterworths, 1997) 129.

skills (such as research, writing and analysis) and optional (and usually limited enrolment) training in skill areas such as interviewing and negotiation.

There is a valid argument that not all students require the same exposure to skills teaching and learning. A spotlighted approach allows schools to integrate compulsory and optional skill components. Those skills considered essential for all students can be taught in compulsory substantive law subjects or stand-alone units; those skills considered more relevant for some students than for others (such as skills involved in trial advocacy) can be taught in discrete optional units.

More sophisticated variations on this theme are possible. In one skills program with which I am familiar, a range of essential skills are specifically taught and assessed in a number of designated compulsory substantive law subjects throughout the law degree. The skill components together comprise a separate subject (which while separate, cannot be described as free-standing or stand-alone). Skills training also takes place in a more general way with skills such as problem-solving, fact identification, legal analysis and reasoning, research, and written and oral communication being developed, though with less specificity, through items of interim assessment such as written assignments and essays, and tutorial and seminar presentations in many other substantive law subjects in the law degree. A number of skills-based electives (including ADR, Negotiation and Mediation, Trial Advocacy and Appellate Advocacy) are also offered for students with a special interest in particular areas.

An incremental approach is desirable because skills take time to develop; they are acquired “gradually by practice”.<sup>9</sup> Ideally, students are introduced to a range of skills early in their degree and they are given multiple opportunities to practise those skills in increasingly complex situations. Similar benefits may be achieved with a lead-skill approach, if each new skill (or skill cluster) that is added is linked to existing skill units. Both approaches have the additional benefit of assisting students to see the relevance of theory at the time they commence their studies. Both approaches are intended to give students an early sense of achievement and the confidence to tackle more difficult tasks. Both approaches tend to be systematic rather than ad hoc in nature. Consequently, a possible disadvantage of each approach is that a relatively

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<sup>9</sup> Mackie, above n 2, at 9.

high degree of planning and coordination among relevant teachers is required over an extended period of time.

A systematic approach is desirable (and preferable to an ad hoc one) because skills are best developed when there is “linked progression in the structure of skills learning”,<sup>10</sup> that is, when there is “‘linked progression’ of tasks, skills, information and methods”.<sup>11</sup> Wade had exactly the same point in mind when he observed that skills teaching requires “systematic curriculum structure,”<sup>12</sup> that is, a structure in which “neophyte skills acquired in one course will be revised, reinforced, built upon in subsequent courses”.<sup>13</sup> A systematic approach to skills teaching and learning is also desirable to ensure consistency and continuity in skills teaching and learning so that all students receive exposure to essential skills teaching regardless of when, in their degree, they undertake particular subjects.

However, a systematic approach will not suit all law schools. It is unlikely to be achieved without a high level of centralized planning, coordination and cooperation, especially where skills are taught in connection with substantive law subjects. Cooperation between the coordinators of different substantive law subjects is needed so that coordinators know what to revise, what to reinforce, and where and with what to build in order to create and maintain linked progression in the structure of skills learning. A systematic approach (and linked progression) is unlikely to be achieved when skills teaching takes place on an ad hoc basis at the discretion of individual teachers.

Systematic skills programs are generally high maintenance programs. This is especially so where skills are taught in combination with substantive law subjects. In order to design and implement a systematic skills program, schools may need to:

- Appoint a person (preferably a full-time continuing member of academic staff) to coordinate and police the program.
- Appoint staff with recognized expertise in skills teaching and in particular skills areas to design, teach, and assess skill components.

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<sup>10</sup> Ibid at 18.

<sup>11</sup> Ibid.

<sup>12</sup> Wade, above n 3, at 183.

<sup>13</sup> Ibid.

- Give teaching (or other credit) to those members of staff who teach skills. Allowance has to be made for the time- and labour-intensity of teaching skills when calculating a teacher's credit hours.
- Allow skills teachers to "control" (in consultation with coordinators of substantive subjects) factors such as the time devoted to skills teaching, the weight attached to skill components, the learning objectives considered important, the content, and the teaching and assessment methods used to teach skills. In this way, they ensure that these factors do not vary with subject coordinators and that agreed-on skills are appropriately taught at an agreed-on time and place within the curriculum.
- Ensure that substantive subject coordinators are willing to live with some loss of autonomy over their subjects. Ideally, substantive subject coordinators will participate in all phases of the process of teaching and learning skills: in the planning, teaching, and assessment of skills. It is particularly important that subject and skill coordinators work together in designing and assessing simulations because skill coordinators are often not experts in the particular substantive law area.

Despite the potential benefits of a systematic skills program, expansion in skills programs in many law schools will have to take place on an ad hoc basis. Skills teaching are both labour and resource intensive. Where resource-intensive interim assessment is not normally used and where there are several hundred students enrolled in a subject (as is the case in large well-established schools),<sup>14</sup> skills (beyond those that are an incident of the learning of substantive law) may have to be introduced gradually on an ad hoc basis by individual subject teachers making room in their subject for a skills component.

The shape and form of a law school's skills program will depend on the size of the school, the staff/student ratio, and the number of years that the school has been established (it may be harder to implement a program "where the teaching status quo

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<sup>14</sup> Bentley D, "Mooting in an Undergraduate Tax Program" (1996) 7 *Legal Education Review* 97 at 120.

has been established for some time”).<sup>15</sup> It will also be affected by factors such as resources, educational and organizational mission, and the expectations and needs of students.<sup>16</sup>

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<sup>15</sup> Hyams R, “The Teaching Of Skills: Rebuilding - Not Just Tinkering Around The Edges” (1995) 13 *Journal of Professional Legal Education* 63 at 77.

<sup>16</sup> MacCrate R, “Keynote Address - The 21st Century Lawyer: Is There a Gap to be Narrowed?” (1994) 69 *Washington Law Review* 517 at 524.