

2011

**Good Practice Guide
(Bachelor of Laws)**

**ETHICS AND PROFESSIONAL RESPONSIBILITY
(Threshold Learning Outcome 2)**

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**UNIVERSITY OF
TECHNOLOGY SYDNEY**

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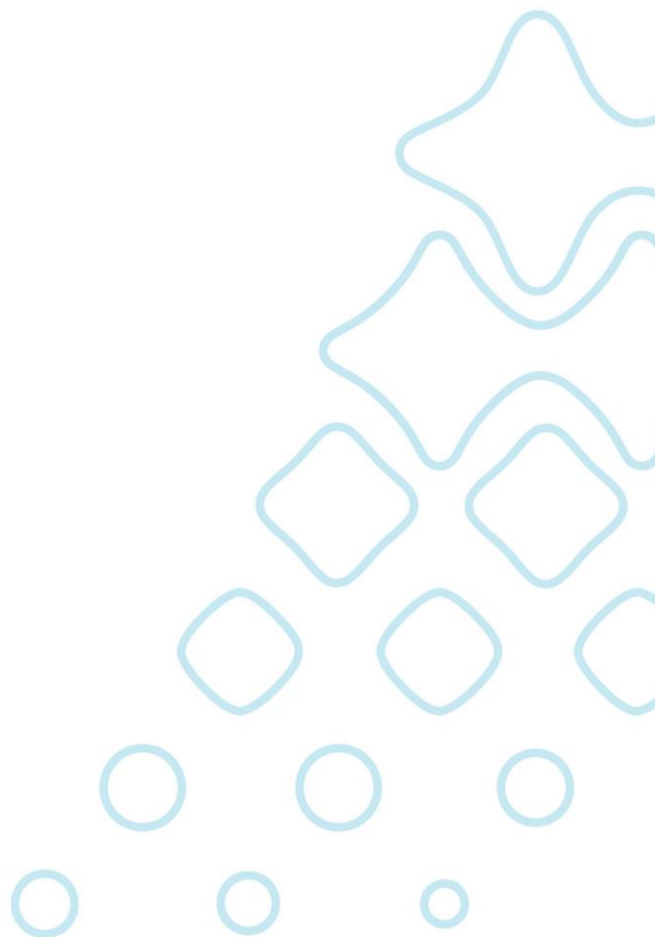
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Introduction

This Good Practice Guide was commissioned by the Law Associate Deans Network to support the implementation of Threshold Learning Outcome 2: Ethics and professional responsibility.

The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws were developed in 2010 as part of the Learning and Teaching Academic Standards (LTAS) Project, led by Professors Sally Kift and Mark Israel.¹ TLO 2: Ethics and professional responsibility is one of the six TLOs developed for the Bachelor of Laws. All six TLOs are:

- TLO 1: Knowledge
- TLO 2: Ethics and professional responsibility
- TLO 3: Thinking skills
- TLO 4: Research skills
- TLO 5: Communication and collaboration
- TLO 6: Self-management

The TLOs were developed having reference to national and international statements on the competencies, skills and knowledge that graduates of a degree in law should have, as well as to the emerging descriptors of the Australian Qualifications Framework (AQF) for Bachelors Degrees (Level 7) and Bachelors Honours Degrees (Level 8).²

TLO 2: Ethics and professional responsibility

Graduates of the Bachelor of Laws will demonstrate:

- (a) an understanding of approaches to ethical decision-making
- (b) an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts
- (c) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community
- (d) a developing ability to exercise professional judgment.

Throughout Australian universities, the teaching of ethics and professional responsibility in the undergraduate law degree may occur in many stages: in a foundation law subject, as a standalone subject, via the pervasive method throughout the degree, or as a capstone year subject.

The focus of the TLOs is to ensure the minimum threshold standards of performance, achievement or attainment at the bachelor qualification level. TLO 2 represents what a law graduate is expected to know, understand and be able to do ethically.

¹ Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010*, Australian Learning & Teaching Council (December 2010) <http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf>.

² Ibid. See relevantly the Notes on TLO 2 at 14-16 and the sources and relevant equivalent or contributing statements to TLO 2 that are summarised at 34-36.



The background to learning and teaching in ethics and professional responsibility within an international and comparative perspective is summarised in the UK Law Society report on Preparatory Ethics Training for Future Solicitors (Economides & Rogers 2009). The report sets out the development of ethics in Anglo-American legal education and includes an annexure of Australian legal ethicists' experiences in teaching legal ethics. See also the List of Resources under Development of Ethics in Legal Education.

This Good Practice Guide is a resource for academics who teach ethics and professional responsibility, in whatever shape or form, to facilitate student learning and the development of skills as set out in TLO 2:

- an understanding of approaches to ethical decision-making
- an ability to exercise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts
- an ability to exercise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community
- a developing ability to exercise professional judgment.

This Guide includes information about both the subject matter (ethics and professional responsibility) and how best to teach it (educational theory and practice).

Authors

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Part 1: Literature review

Approaches to ethical decision-making

The literature in this area focuses on how law teachers must ensure they ethically engage their students and educate them to make good decisions. Academic writing around ethics often draws on the philosophy of ethics. Part of the discussion about what to teach in ethics and professional responsibility focuses on the value of teaching the fundamental approaches to ethical decision-making. An overview of the theories of consequentialism and deontology is given by Bagaric and Dimopoulos (2003). As well, Cassidy acknowledges the theories of consequentialism, the basis of which is the justification for an action (act, actor, consequences) if it increases human happiness (Bentham quoted in Cassidy 2006-2007, p641) and deontology, the basis of which is adherence to rights and responsibilities (rules) to achieve good outcomes (Keenan quoted in Cassidy 2006-2007, p641). Cassidy proposes that character, based on virtue ethics founded by Aristotle, is an essential element to moral judgment and indeed 'bridges the gap' between the two theories.

Being an ethical lawyer involves much more than being familiar with the rules of professional responsibility. Fuller (1981) once wrote that 'the best definition I ever heard of a lawyer ... is a man that helps people'. Ethical decision-making is critical to good lawyering. (Robertson 2005). According to Rhode (1992), the efforts of educators to 'sharpen' students' 'abilities to recognise and resolve professional dilemmas in the classroom' might help students to develop the sorts of skills they would need as practitioners during their professional careers. Robertson (2004) suggests that teachers encourage students to learn that lawyers need constantly to make judgment calls that often involve personal choices. Further, that the role of personal values in the professional role needs to be emphasised rather than suppressed. Whilst the belief that ethics comes from within the individual, there is the idea that it is useful to establish some sort of framework for dealing with ethical problems (Parker 2001).

Robertson (2004) outlines a conceptual framework and identifies three approaches:

- The 'knowledge of professional rules' as highlighted in the Priestley Report (1992). This involves focusing on a discrete ethics subject (Armer 1998).
- The 'ethical dilemma' approach as articulated in the MacCrate Report (1992) which states that 'competent, ethical practice requires more than just knowledge of the applicable rules and principles of professional responsibility'. Much ethical decision-making in the legal professional role, it can be argued, is not constrained by clear, comprehensive and unambiguous rules (Hutchinson 1999).
- The 'judgment' approach. This expands on the two earlier approaches and recommends embedding ethical judgment by focusing as broadly as possible across the curriculum. A recognition that ethical questions will arise in every subject, and a failure to recognise this, an omission. Further, an acceptance that lawyers are constantly required to make choices in the work that they do for their clients and that much decision making inevitably calls for consideration of ethical standards (Robertson 2004). Coverage should focus not only on preparing students to address moral dilemmas but also on the structural conditions that create or exacerbate those dilemmas (Rhode 1992).



Implementation

As Menkel-Meadow (1991) opines,

Law teachers 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.

Luban (1995) highlighted the difficulties associated with teaching ethics to law students. He referred to the condescension with which legal ethics is often taught and refers to ethics teaching as a 'nagging ache'. Luban recommends that the best way to teach legal ethics is to incorporate moral judgment. The point is not just to increase awareness of ethical norms but to subject them to critical scrutiny (Rhode 1992).

Webb (1998) discusses whether the first year: introductory subject for law students should be modified to include the teaching of ethical issues. For example, this would include the study of the various roles of the lawyer (principally as protector of justice), explore notions of justice, and introduce ethical theories and practical aspects of ethical decision-making (Henriss-Anderssen 2002). Students, however, will more than likely not be able to grasp the full dimensions of professional dilemmas in the first year (Rhode 2002).

What are the desirable learning outcomes?

Students will possess a knowledge of ethics, knowledge of the basic ethical rules, an ability to offer appropriate solutions to ethical dilemmas, and generally conduct oneself in an ethical manner (Christensen & Kift 2002).

Pervasive method

The pervasive method involves the introduction and integration of ethics into each area and aspect of the curriculum. By infusing ethics throughout the curriculum, the pervasive method responds directly to the call for joining professionalism with legal analysis from the beginning of students' legal education (Carnegie Report). Further, '[e]thics is not just an appendage to law, it is at the very heart of the matter, and must become part and parcel of the entire program.' (Link 1989). The primary rationale for addressing ethical issues throughout the curriculum is that they arise throughout the curriculum (Rhode 1992). Ethics must be a continuing presence.

The concept of a vertical subject

In practical terms, a 'whole-of-curriculum' approach to learning and teaching in legal ethical responsibility could assume many different forms. The vehicle in which students' learning opportunities in legal ethics are carried and expressed may be conceived as an identifiable, supplementary subject (a 'vertical subject') (Christensen & Kift 2000) that spans the entire curriculum. A 'vertical subject' is ancillary to the regular courses in the curriculum – courses like contract, torts and equity etc – and it runs throughout the curriculum from students' first semester through to the last. It aims to encourage student learning in ethics at multiple stages of the student's experience *within* the regular courses (Robertson 2009).

Discrete 'legal ethics' subject ('capstone')

The aim is to retain the full import of the professional conduct rules in context (Henriss-Anderssen 2002). A final year legal practice subject should be retained within the curriculum (Rhode 1992). This could also serve as a 'capstone' for the



ethics vertical subject. As far as possible, ethics learning from the earlier courses should be revisited in comprehensive learning and assessment activities within this specialist final year subject.

Assessment

Robertson (2009) suggests ways in which the law curriculum can be designed to improve law students' ethics learning opportunities and outcomes in the area of professional ethical responsibility. The implementation of this curriculum-wide approach should subsequently be evaluated at various stages, using a range of evaluative measures. He also makes a few observations and, assuming these are valid, suggests five possible curriculum-wide learning objectives for legal ethics. All assessment of learning in legal ethics must 'align' squarely with the curriculum and program learning objectives.

An ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts

An understanding of what is meant by professional contexts

'By viewing legal ethics as an isolated body of doctrine, ethics discourse severs ethics from practice and practice is the only place where legal ethics is meaningful.' (Rubinson 2001, p1225)

What is a professional context? This question is part of the ongoing debate about the purpose of a law degree, which, simply stated, is whether a law degree is to provide a qualification to enable graduates to work as lawyers in legal practice, to provide knowledge and skills relevant to the law, or to do both. We know that many of our graduates will not work as lawyers. We also know that the nature of the legal profession is changing. For a general discussion of legal education, see Twining (1967), and for changes to the legal profession, see Sherr (2000).

Annual reports from professional law bodies present statistics on the types of employment, in which solicitors are engaged. Non-traditional positions, such as in multi-disciplinary and incorporated legal practices and in-house counsel, are increasing. Graduates are also taking on positions that do not require a practising certificate. Despite these tensions as to the purpose of a law degree, the underlying common thread tells us that, for law graduates, their career destinations will be in a 'professional context'.

Professional context encompasses the legal environment in which lawyers practise law and where the learning and teaching of ethics and professional responsibility is directly relevant. Learning and teaching of ethics and professional responsibility is also applicable in a professional context where law graduates are not working as lawyers. For a discussion as to the value of teaching ethics to law students who may not practise law see "How Can We Give Up Our Child?" A Practice-Based Approach to Teaching Legal Ethics' (Cunningham 2008).

Within professional contexts, lawyers are challenged by the changing nature of their roles. Within those roles, there are ethical issues, either of a grand scale (ethics of the environment) or on a micro scale (ethics of the moment). The role of legal ethics teachers is to facilitate the learning that enables students to begin to construct a response to these ethical issues. A diverse overview of the role of legal ethics teachers is given by Menkel-Meadow (1991), Luban & Millemann (1995-1996), Pearce (1997-98), Parker (2004) and Robertson (2009).



Professional contexts include:

1. Duties to, and relations with, others who usually have a reliance on, and trust in, professionals; and
2. the making of decisions that impact on others, considered in part (d).

The 'duty matrix', discussed by Parker and Evans (2007), builds on the common and statute law and professional codes of conduct rules relating to lawyers' duties to various stakeholders, namely the Court and the administration of justice, the client, third parties, colleagues and the public. Good ethical decision-making must consider the subtleties of different legal environments. The Ethics textbooks in the List of Resources, give some attention to several professional contexts, including criminal law, family law, corporate counsel and government lawyers. Journal articles and web resources address specific practice areas and cohorts of lawyers, such as:

- prosecutors (require virtues of 'courage, fairness, honesty and prudence' and an adherence to 'moral integrity' to ensure justice is maintained – Cassidy 2006)
- government lawyers (are required to ensure that the Rule of Law is 'honoured in the administration of society' – Waldron 2010)
- tax lawyers, family lawyers, corporate lawyers and public interest lawyers (Rhode & Luban 2008)
- non-adversarial lawyers, particularly in mediations and collaborative law matters (Fortin 2009, Macfarlane 2009)
- pro bono lawyers, criminal defence lawyers, insurance defendant lawyers, corporate lawyers, government lawyers (Martyn & Fox 2008)
- guidelines produced by associations, for example, family lawyers (Law Council of Australia 2010); government lawyers (NSW Law Society 2010).

For a helpful discussion as to the need for ethics learning around a professional context, see the Carnegie Report (2007).

An ability to recognise and reflect upon ethical issues

The ability to recognise and reflect upon ethical issues is an incremental one that builds on students' development as they progress through their degree. The first level of skill, knowledge and values required of students is the ability to recognise ethical issues. Teaching students to recognise ethical issues includes a familiarity with the professional codes of conduct rules and how they operate/apply. However, research in legal education has overwhelmingly found that ethics teaching needs to be broader and deeper than the rules. Students need an understanding of the framework of ethics and professional responsibility to enable them to determine and develop their own framework to manage ethical issues.

Because of their general applicability to practising lawyers, the rules do not focus on specific professional contexts, other than civil and criminal (and within criminal, rules specific to prosecutors). Reviews of rules in various jurisdictions have taken place in the last decade or so, demonstrating the importance placed on the rules by professional associations (American Bar Association: Ethics 2000 project; The Law Council of Australia: Model Rules of Professional Conduct and Practice: 2002; NSW Bar Association: Amended Barristers' Rules 2011).

In relation to an understanding of the framework of ethics and professional responsibility, Australian textbooks such as Lamb and Littrich (2011), Dal Pont (2009) and Ross (2009) provide commentary on, and examples of, the identification and application of ethical issues to specific professional contexts, including relations



with colleagues and third parties, criminal defence lawyers and large firms. Overseas jurisdictions including the UK (Nicolson & Webb 2000), Canada (Hutchinson 2006) and the USA (Rhode & Hazard 2006) address similar ethical issues as Australian practitioners in a professional context. These texts provide an analysis of the context in which the law and lawyers operate to enable students to recognise ethical issues.

The second level of skill, knowledge and values required of students is the ability to reflect upon ethical issues. Reflection on ethical issues is addressed by scholars in several contexts. Luban and Millemann (1995-1996) focus on moral philosophy and personal morality, Pearce (1998) on a social context, Shaffer (2001) on religion and Parker and Evans (2007) on analytical approaches to the practice of law.

Several writers offer insight into the environment in which students can be encouraged to reflect on the role of lawyers which, in turn, is designed to allow them to reflect on their future role as a lawyer. Rhode's (1985) research into the role of moral character, in particular as to admission and discipline, and Rubinson's (2001) discussions on the life of a lawyer, including client, practice, economic and institutional pressures, combined with collegiality and the workplace environment, provide teachers and students with authentic readings that facilitate reflection, discussion and further reflection.

A developing ability to respond to ethical issues

The third level of skill, knowledge and values required of students is the ability to respond to ethical issues. Assisting students to develop the ability to respond to ethical issues includes the provision of resources and the learning environment in which to practise recognition of, reflection on and response to ethical issues. Clear learning objectives (Robertson 2005) and an incremental development of objectives, subject content, assessment and feedback (Christensen & Kift 2000, Robertson 2009) are crucial to the student development of the skills, values and knowledge to manage and respond to issues around ethics and professional responsibility.

Measuring the effectiveness of students' ability to recognise, reflect upon and demonstrate a capacity to respond to ethical issues is undertaken through assessment. Relevant examples of ethics assessments in Australia and Anglo-American Universities are given in the UK Law Society's report referred to in the Introduction. Assessment models are also offered by Evans (2011), Parker and Evans (2009), Parker (2001 & 2003) and Rubinson (2001), for example, 'doing ethics' includes hypotheticals with a focus on the interaction of the lawyer to others, in particular the client; clinical teaching; simulations and role plays, case studies, problem method and judicial opinions.

Promoting justice and service

The public character of the legal profession

The literature on the professional responsibilities of lawyers has long stressed their responsibilities to promote the cause of justice and the ethic of professional service. Thus, Roscoe Pound wrote that the defining quality of all professions is that their primary purpose is '[p]ursuit of the learned art in the spirit of a public service' (Pound 1953, p5). Law's connection with justice, its role in distributing power and rights and calling the exercise of each to account, means that its practice is more firmly impressed with the claims of the public interest and service than most other callings. The public nature of the legal profession springs

fundamentally from the fact ... that private individuals cannot secure justice without the



aid of a special professional order to represent and to advise them. To this end lawyers were instituted, as a body of public servants, essential for the maintenance of private rights. (Reed 1921,p3)

One highly visible expression of this responsibility is in the American Bar Association's model rule 6.1 that every lawyer has a professional responsibility to provide legal services to those who cannot afford to pay although this commitment has been challenged as more rhetorical than real (Rhode 1999 and 2011, Cummings 2011, pp6-14, Abel 1981, pp685-86). The Australian legal profession has expressed similar commitments albeit in more cautious aspirational terms: the Australian National Pro Bono Aspirational Target sets a voluntary standard of 35 hours of pro bono legal work per lawyer per year (National Pro Bono Resource Centre).

Implications for legal education: Responsibility for inculcation of justice orientation and service ethic

To law schools falls the responsibility of inculcating the 'social responsibility which rests upon a public profession' (Stone 1934, p14). This responsibility calls on law schools to impress on students that law is closely related to the pursuit of justice with individual and collective responsibilities to place professional skills at the service of justice and fellow citizens. Law schools do not discharge their heavy responsibilities by imparting academic proficiency and practical legal skills alone, as necessary as these elements are. Max Radin expressed justice's centrality to legal education succinctly: 'the lawyer's task is ultimately concerned with justice and ... any legal teaching that ignores justice has missed most of its point' (Radin 1937,p688 quoted in Walsh 2008, p119).

The literature on justice identifies distinct conceptions of justice to which lawyers have a special responsibility. The first is the

macrolevel conception of institutional justice associated with basic rule of law values: individual rights enforcement — encompassing both private (contract and property) and public (civil and political) rights, and requiring judicial independence and access to the legal process — as well as political accountability associated with multi-party democracy, checks and balances and robust civil society. (Cummings 2011, pp14-15)

The second conception concerns the microlevel relationship between individual lawyer and client and calls for zealous and effective representation. A third concerns the fairness and distributional effects of legal and social ordering.

The professional and academic literature expresses the justice and service dimension to legal education in distinct but sympathetic voices. In the United States the MacCrate Report emphasised the responsibility to ensure that adequate legal services are available to those unable to afford them (MacCrate 1992, Value § 2.2) Martha Nussbaum asserts a wider responsibility for lawyers

in their professional capacities, servants of all of a democracy's citizens. Placed in a position of trust and great strategic importance, they must be able to understand and articulate the concerns of all parts of a diverse society. They also have a large role in securing social justice for previously marginalized and victimized groups. (Nussbaum 2011).

Brainerd Currie identifies as the pre-eminent duty of a law school 'to help its students to understand the significance of the lifework they have undertaken' and, quoting Oliver Wendell Holmes, 'to live greatly in the law' (Currie 1969, pp 55, 56). The Carnegie Foundation Educating Lawyers report spoke similarly of the need to



engage the moral imagination of students as they move towards professional practice [and] insofar as they fail to make systematic efforts to educate towards a central moral tradition of lawyering, legal education may inadvertently contribute to the demoralisation of the legal profession and its loss of a moral compass. (Sullivan et al 2007, p140)

It has also been suggested that the idea of service to others provides a sustaining ethic, a source of meaning and satisfaction in a stressful professional life (Redmond 2010, p3).

This responsibility cast upon law schools poses a particular challenge because the literature also reveals a disturbing body of evidence on the negative effect that legal education has on student idealism and the values commitments which students bring to law school. Christine Parker finds in the research literature evidence of the weakening of student idealism and social justice commitment while at law school and that during their education many law students replace a justice-oriented consciousness with a cynical, game-oriented consciousness (Parker 2001, pp180-81 citing Daicoff 1997, pp1405-1406, Erlanger et al 1996, p851, Goldsmith 1993, Granfield 1992, Stover 1989). Adrienne Stone also concludes that 'the powerful experience of legal education can rob students of a valuable commitment to the public interest' (Stone 1999, p74). Kim Economides has tracked the 'rise of cynical legal studies' in England (Economides 1997). More positively, however, in Tamara Walsh's 2006 empirical study of law students at the University of Queensland, 'most students did not explicitly state that their desire to use the law to achieve social justice outcomes, or to engage in public interest practice [nominated as the main reason for entering law school by 23.9% of respondents, the largest group], had diminished over the course of their legal studies' (Walsh 2008, p133, p131).

Means for cultivating in students the capacity to recognise and reflect upon justice and service responsibilities of lawyers and law students

The literature reveals a diversity of means for cultivating in students an awareness of the wider responsibilities of lawyers and for addressing cynicism about the connection between legal practice and social and personal ideals of justice. These means may be divided into curricular initiatives and those of a programmatic or extra-curricular nature.

Curricular initiatives

Dedicated subjects on concepts of justice and access to justice

Some writers advocate that the curriculum must encourage students to think seriously and rigorously about the concept of justice and its relation to law, the legal system and the rule of law (Breen 2007). This study might be pursued in a dedicated subject, pervasively throughout the curriculum or in both forms. If introductory subjects provide a foundational view of different conceptions or theories of justice, they will inaugurate a conversation that continues across the curriculum on law's relation to justice. Other scholars argue the need for a similar curricular treatment of issues around access to justice including an understanding of how the law affects those who cannot afford its protection (Rhode 2011, p16).

Vertical and pervasive curricular approaches

A body of research literature explores the merits of teaching ethics through a discrete subject, pervasively throughout the law program or through a vertical approach with treatment spread across the whole of the curriculum in a structured manner (Robertson 2009, Wonch 2006). Some writers emphasise the importance of commencing in first year of law studies and building through later years (Henriss-Anderssen 2002, Barnaby 2004, Moran 2010). Several Australian law schools adopt



a 'whole of curriculum' approach to legal ethics (Davis 2008, pp 18, 21, 29, 31, 35, 45 and 56).

Law school clinical legal experience and experiential instruction outside a law school clinic

In US law schools, the primary means of promoting a justice and service ethic is through the provision of clinical legal experience to students. However, although virtually every US law school offers one or more clinical programs, it is estimated that only one in three US law students has a clinical experience (Breen 2007, p43). In Australia, where resource and other constraints limit the creation of law school clinics, that proportion is likely to be much lower. However, several Australian law schools complement clinical legal education, or compensate for its absence, by offering opportunities for supervised clinical experience in an external clinic or other forms of experiential learning involving personal exposure to the reality of law and justice, for example, through court and gaol visits. In all forms attention is given to developing the ability to reflect ethically on the experience, commonly through use of reflective journals (Davis 2008, pp 11, 53).

The evidence of student experience of clinical education is very positive. The experience of contact with and the taking of supervised responsibility, however minor and briefly, for real clients and their problems touches student attitudes. Nicolson provides empirical evidence that

a clinical experience may encourage the development of an attitude of ethical professionalism [and that] combining ethical teaching with live-client clinics, particularly extra-curricular clinics with a social justice orientation, may enable law schools to positively influence the development of students' moral character ... at least in evidencing factors conducive to character development, such as the influence of role models, the experiencing of moral crises, and feelings of satisfaction and regret accompanying clinic experiences. (Nicolson 2011, pp 172, 183)

Other studies have pointed to the influence of clinical experience upon the moral reasoning of student participants (Abramson 1993 and Hartwell 1994-95, cited in Nicolson). Describing the single evening session in an Australian law school clinic that students in a large compulsory ethics subject were given, Parker wrote:

Scratch the surface of these cynical, world-weary law students with one client interview session, and we find that most of them regain some enthusiasm and idealism. They entered the [Kingsford Legal Centre conducted by UNSW] nervous – out of their comfort zone. They came out with a new sense of commitment to client contact, at least, and for some a better understanding of disadvantage and justice issues. (Parker 2001, p193)

Exposure to clinical experience in such settings, even in the form of a single interview session with real clients, is one of the most effective correctives for cynicism and the erosion of justice and service ideals. It is difficult to overstate 'the affective experience of sympathy for a disadvantaged client in a clinical setting' (Breen 2007, p52) as a means of conveying to students the possibilities and responsibilities of legal practice. The Carnegie Foundation Educating Lawyers report considered that 'much of the humanizing and inspiring aspects of the law have always resided in actual contact with clients and their needs' (Sullivan et al 2007, p33). Chavkin goes further to argue that 'experience is the *only* teacher' (Chavkin 2011). Certainly, the first professional experience appears to have a shaping influence on the formation of professional values. If a student's first experience of legal practice is in a public-interest setting or otherwise puts into practice idealistic conceptions of legal work and service, this has a powerful influence in nurturing idealism and justice orientation in later professional choices (Evans 1999, pp 182, 199; Stover 1989, p109, cited by Parker 2001, p193).



The use of case studies of professional work, simulations and interactive discussions

The Carnegie Foundation Educating Lawyers report advocated the use of the ‘well-elaborated case studies of professional work [that] engage the moral imagination of students as they move towards professional practice’ that medical, business and engineering schools employ so widely (Sullivan et al 2007). There is evidence of the successful use of such methods in Australian instruction in professional responsibility (Parker 2001). Tamara Walsh advocates greater use of role play or simulations as tools to give students a sense of the reality of legal practice (Walsh 2008, p141).

Programmatic / extra-curricular means to promote justice and service commitment

Law school initiatives to promote justice and commitment to community service in professional practice need not be confined to curricular or for-credit programs. Indeed, the scope for extra-curricular programs is extremely broad. The range of current forms includes the curriculum-based forms but extends beyond them.

Volunteer clinical legal exposure and other experiential learning

The beneficial role of practical experience in a community legal centre or other public interest setting on student values has been noted above. These benefits are not confined to law school clinics or formal externship programs. Indeed, Nicolson’s study showing positive influence on the development of students’ moral character was conducted on students in an extra-curricular social justice clinic setting (Nicolson 2011). Other studies show that the students whose idealism was maintained through law studies were those who had direct experience of public interest or community legal service during their studies or who retained earlier links to such organisations (Stover 1989, p109, cited by Parker 2001, p193). Parker writes that this ‘suggests that one of the most important things law schools could do to educate law students to be ethical and socially aware lawyers is to encourage public interest subcultures within the law school’ (Parker 2001, p192).

These initiatives and the provision of clinical experience need not, therefore, be confined to for-credit law school clinic and externship programs. Strong models exist of voluntary programs offering supervised clinical experience in service settings. Pro Bono Students Canada <<http://www.probonostudents.ca/>> offers the most developed program of law student volunteer opportunities, currently for 1400-1500 students serving up to 400 organizations; this national program, with chapters in 21 law schools, provides professional legal assistance to vulnerable populations and individuals and seeks to nurture a pro bono service ethic among participating students. An Australian pilot program, Pro Bono Students Australia, operates on a much smaller scale at the School of Law at the University of Western Sydney <http://www.uws.edu.au/law/sol/associated_bodies/pro_bono_students_australia/>. Some other Australian law schools have established volunteer programs that encourage and assist students to find voluntary placements in legal practice settings with public interest or community service missions. Some also encourage students from the earliest stage of their studies to seek volunteer opportunities in non-legal service settings simply for the beneficial affective experience of engagement with those in need (Brennan Justice and Leadership Program 2011). These early experiences are powerful influences on the values expressed in later legal practice (Evans 1999, pp 182, 199).

Reflections on law and social justice

Other programmatic initiatives support a culture in the law school student community of concern for justice and of the value of a service orientation in professional work, formally embedded in a structure of reflection and study as well as a commitment to



action. These include visiting speaker programs exploring the concept of justice, contemporary social justice issues, understanding of the rule of law and other topics that extend the formal curriculum outside the classroom. Instances operate at most law schools, often under the aegis of the law students' society or conducted by the faculty in partnership with them (Brennan Justice and Leadership Program 2011).

A developing ability to exercise professional judgment

Moral decision making requires more than identifying the appropriate principles and values, and it requires more than analysing arguments. Being smart has little to do with it. Rather, moral decision making involves identifying which principle is most important given the particularities of the situation, and this capacity is precisely what we mean by judgment. (Luban & Milleman 1995-1996, p39)

The exercise of professional judgment calls for a unique form of decision-making. Professional judgment requires ability beyond knowledge of the rules and an understanding of lawyers' duties to an ability to reconcile personal values and morality with knowledge and understanding. Rhode's (2003) writings around moral judgment and the role of 'character' offer insight into the basis of professional judgment, namely the ability to draw on professional and personal resources in a 'morally-challenging time'.

The exercise of professional judgment is an essential part of a lawyer's practice. In the study of law it can be succinctly described as 'the need to know' and 'the need to be able to do' (Robertson 2009). Given that many law graduates will not enter the traditional legal profession, a useful starting point for understanding professional judgment is the general ethical decision-making model, including an instructive diagram, offered by Preston (2007).

Specifically to law, legal ethicists discuss professional judgment as the 'art of good judgment' (Luban & Millemann 1995-1996), the exercise of personal character (Cassidy 2006), having confidence in taking responsibility or being 'ethically astute' (Robertson 2005) and having an understanding that 'discretion is an inevitable and regular feature of the practitioner's role' (Robertson 2004).

Bagaric and Dimopoulos (2003) suggest that, to be transparent and consistent, ethical decisions must be made by an overarching moral theory from which general legal principles and professional rules can be applied. Their approach to ethical decision making is tested in three specific ethical dilemmas, the duty to perform pro bono work, whether the cab-rank rule imposes a duty to act for unpopular clients and whether there should be a resolve between representing guilty clients and misleading the court.

The importance of fostering law students' ability to exercise professional judgment is identified in the Carnegie Report (Summary, p8) as:

Legal education needs to be responsive to both the needs of our time and recent knowledge about how learning takes place; it needs to combine the elements of professionalism – conceptual knowledge, skill and moral discernment – into the capacity for judgment guided by a sense of professional responsibility. Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice.

In response to the Carnegie Report, Cunningham and Alexander (2011) discuss three projects, involving clinical education, the first year curriculum and simulated and real practical experiences, undertaken by three US law schools, that focus on learning and teaching how to exercise professional judgment. The writers discuss the application of Rest's theory of moral behaviour to the exercise of professional



judgment:

Although the ability to identify ethical issues (the first capacity), to reason to the contextually appropriate decision in the face of conflicting values (the second capacity), and to internalise professional identity to motivate moral commitment (the third capacity), are all necessary to the exercise of professional judgment, actual and effective implementation, the fourth capacity, is also required. (p10)

As with part (b), this component of the TLO is based on incremental learning and assessment in order to support and encourage a developing ability to exercise professional judgment. This ability is acknowledged by scholars as an ongoing journey of reflection. Rubinson states that 'Ethical decision-making is an integrative and discursive process that occurs over time' (p1215) and Graham discusses 'that keen sense of moral judgment that comes from years of experience and repeated critical reflection on our own action as well as the actions of others' (p49).

The challenges associated with assessing a developing ability and the complex skill of professional judgment are addressed by legal ethicists and provide guidance for planning subjects and courses around ethics and professional responsibility.

The identification and analysis by Parker (2003) and with Evans (2009) of four approaches to 'ethical reasoning in legal practice' provide a useful starting point for legal ethics teachers in facilitating students' ability to discuss, reflect on and construct a framework for ethical decision making. The four approaches of adversarial advocate, responsible lawyer, moral activist and ethics of care are offered as a method or a diagnosis tool by which to develop an ethical framework to facilitate the exercise of professional judgment.

Another useful starting point for learning and teaching professional judgment in an ethics subject (objectives/outcomes, scaffolded learning, assessment task and assessment criteria) is in the CALD paper on 'Some Innovations in Assessment in Legal Education' (Owen & Davis 2009). See also Griffith University's 'Griffith Graduates Ethical Behaviour and Social Responsibility Toolkit'. As well, some of the textbooks in the resource list have a specific focus on ethical decision-making (Wolski 2009, Webb & Nicolson 2000, Parker & Evans 2007).

The ability to exercise professional judgment develops from awareness and acknowledgment of personal values, an understanding of legal principles, professional codes of conduct and guidelines as well as an understanding of the consequences of decisions. The skill of developing a framework, as a law student, in which to approach ethical decisions in order to exercise professional judgment in a positive and robust way is part of the wider context of professionalism. Exposing law students to the notion of professionalism, as well as to the role of lawyers in society, assists in developing the ability to make decisions, explain the reasons for the decision and to commit to the decision made. Wonch (2006) discusses the meaning of professionalism, the way it can be 'infused' into the curriculum and the application of ethics modules to the subject of torts.

Several scholars (Luban & Milleman 1995-1996, Parker 2001 & Cunningham 2008) suggest that clinical legal education is the most favourable environment for students to experience and learn about professional judgment. Robertson (2009) believes that professional judgment can also be practised and assessed through experiential learning.



Part 2: Summary of key points

An understanding of approaches to ethical decision-making

- Literature suggests that a framework should be in place when dealing with ethical problems (Parker 2001 & Robertson 2004).
- This conceptual framework includes: 'The knowledge of professional rules' (Carnegie Report); the ethical dilemma approach (MacCrate Report) and the judgment approach (Robertson 2004 & Rhode 1992).
- Further, in order to successfully implement into the curriculum, ethics should be taught as a first year introductory subject (Christensen & Kift); via the pervasive method (Rhode 1992) and as a final year discrete capstone subject (Rhode 1992).
- There are challenges with teaching ethics. Both students and teachers may find legal ethics teaching a disappointment (Luban 1995). Student apathy, resistance, or even sometimes hostility might also be encountered (Robertson 2009).
- Models of teaching may be difficult to implement into the law schools (Robertson 2009).
- Assessment of ethics must align with the curriculum and program learning objectives (Robertson 2009).

An ability to exercise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts

- The substantial body of research concludes that ethics should be weaved throughout the degree, described as the 'pervasive method' or and as a 'whole of curriculum' approach.
- A developing ability requires an integrated and incremental approach to learning and teaching in ethics.
- An understanding of, and the ability to practise, professionalism is essential to the study of law given the increasing diversity of career destinations for law graduates and the increasing number of law graduates who will not practise law in the traditional context.
- Reflective judgment is a key part of learning about ethics.
- A developing ability requires an integrated and incremental approach to learning and teaching in ethics.

An ability to exercise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community

- The most powerful outcome of the research literature concerns the possibly stifling effect of academic legal education upon student justice orientation and the restorative influence of direct experience with real clients especially in personal plight legal contexts. These contacts may, but need not, be in law school clinics but may take a variety of external or not-for-credit forms. It is the direct contact with clients that most contributes to the maintenance and growth of the personal commitment to the promotion of justice and community service orientation in later professional work.



A developing ability to exercise professional judgment

- Professional judgment is a distinct form of decision-making, separate from legal problem-solving. It requires an ability to respond to morally significant issues based on an analysis of competing interests and values.
- Professional judgment calls on an individual's ability to draw on their understanding of the law, including the rules, and on personal virtue and character.
- The role of legal ethics teachers to facilitate student learning and to assess this aspect of ethical practice is difficult, due to the complexity of professional judgment and the focus on the developing ability.



Part 3: Further work

An understanding of approaches to ethical decision-making

- What is the most effective method based on the theories and approaches to decision-making for facilitation of student learning?
- How are the approaches to ethical decision-making incrementally developed through the degree and, at the same time, connected to the notion of professionalism?

An ability to exercise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts

- The need to expand on international ethical challenges in professional contexts, including competing rules, regulatory structures.
- Further academic work on the role of clinical education, and alternatives, in learning and teaching around professional context.
- Development of a learning theory around an ethics 'vertical subject' (Robertson 2004).
- How to achieve an acceptable (to the profession, the regulator and the academy) blend of scholarly knowledge and practice-oriented education.
- The scope of professional context and the purpose of an undergraduate law degree to encompass professionalism beyond that of lawyers admitted to practice.
- Role of law schools in addressing mental health, well-being and resilience for students and the profession.

An ability to exercise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community

- Many questions in this area are unexplored. How many students are currently having exposure to legal experience in a community service environment, in law school clinics and other legal and non-legal settings, and what is their perception of that experience and influence on their later professional outlook? Do the US studies on the loss of student idealism and justice consciousness reflect the Australian position? If so, what are the principal contributing factors in law school method and culture and how may they be ameliorated? Do law schools need to rethink their attitude to social justice and the place of values in legal education if they are to inculcate 'the social responsibility which rests upon a public profession' (Stone 1934, p14)?

A developing ability to exercise professional judgment

- What is best practice for learning and teaching professional judgment, including clinical and experiential legal education?
- The design of effective feedback and assessment methods for determining students' developing ability to exercise professional judgment.
- Is there a tension between ethics as a subject and as an outcome?
- How to incorporate the diversity and changing nature of the profession into the delivery of an undergraduate law program?



Resources

National

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