

**Final draft
November 2010**

**LEGAL ETHICS AT THE INITIAL STAGE:
A MODEL CURRICULUM**

**Andrew Boon,
Centre for Legal Profession and Legal Services,
School of Law,
University of Westminster,
London.**

Contact: boona@westminster.ac.uk

Contents

Legal Ethics at the initial stage: A Model Curriculum	Page 3
Remit	Page 3
Acknowledgements	Page 3
Executive Summary	Page 4
A. Introduction	Page 7
A Brief History of Professional Ethics in Legal Education	Page 9
The Liberal Law Degree	Page 10
Question 1: A definition of Ethics in the Context of the Qualifying Law Degree	Page 12
Broad and Narrow Definitions of "Ethics"	Page 12
Legal Values and the Moral Context of Law	Page 14
Legal Ethics	Page 15
Conclusion	Page 17
Recommendation	Page 17
Question 2: A Model Ethics Syllabus, including Learning Outcomes, for the Qualifying Law Degree	Page 18
Learning Outcomes	Page 18
Aims and Objectives	Page 18
Knowledge, Skills, Attitudes & Motivation	Page 19
Knowledge & Understanding	Page 19
Attitudes, Values & Virtues	Page 22
Motivation & Character	Page 24
Skills & Capacity for Action	Page 25
Outcomes	Page 26
Aims and Objectives	Page 27
Conclusion	Page 28
Recommendation	Page 29
A Model Curriculum for Legal Ethics – Aims and Objectives of a Legal Ethics Curriculum	Page 30
Aim	Page 30
Objectives	Page 30
Learning Outcomes for a Legal Ethics Curriculum	Page 30
Model Ethics Syllabus	Page 30
Question 3: An Analysis of the most effective way of teaching Ethics, discretely Or Pervasively	Page 32
Ethics as Outcomes or as a Foundation subject	Page 32
Conclusion	Page 36
Recommendation	Page 36
Question 4: A Consideration of the Resource Implications for Law Schools, and Proposals for how the Law Society may be able to assist in overcoming these Issues	Page 37
Conclusion	Page 38
Recommendation	Page 38
Appendices	
Appendix 1 – Joint Statement on Qualifying Law Degrees	Page 40
Appendix 2 – Day One Outcomes for Qualification as a Solicitor	Page 45

Remit

LEGAL ETHICS AT THE INITIAL STAGE: A MODEL CURRICULUM

In March 2009, the Law Society published *Preparatory Ethics Training for Future Solicitors*, a report by Kim Economides and Justine Rogers on the place of ethics in the legal education and training system of England and Wales. The Report recommended that the Law Society “take the lead and encourage the SRA to... make awareness of and commitment to legal values, and the moral context of the law, mandatory in undergraduate law degrees.” It was advised that general, flexible guidance and ‘outcomes’ should be developed. The Report also recommended that “the professional bodies should together consider what support might be offered to law schools to assist them to comply with this flexible guidance”.

The Law Society’s Education and Training Committee endorsed the recommendations. It sought guidance on a number of issues:

A definition of ethics, in the context of the Qualifying Law Degree;

A model ethics syllabus, including learning outcomes, for the Qualifying Law Degree;

An analysis of the most effective way of teaching ethics, discretely or pervasively;

A consideration of the resource implications for law schools, and proposals for how the Law Society may be able to assist in overcoming these issues.

It is requested that this guidance be provided recognising possible barriers and objections to the introduction of a compulsory ethics component.

Addendum

A meeting with the Law Society Education and Training Committee in September 2010 was helpful in providing further information about specific aims, aspirations and concerns. These perspectives are reflected in this report.

Acknowledgements

I am grateful to the Education and Training Committee of the Law Society for the opportunity to do this work and for their helpful and constructive comments on a draft. I am also grateful to David Amos, University of Westminster, Christine Parker, University of Melbourne and Julian Webb, UKCLE and University of Warwick, and those contributing to the event at the Law Society on the 4th November 2010 for their comments.

Executive Summary

1. Many common law jurisdictions now require law students to study legal ethics, as part of a first degree (the 'initial stage' of legal education and training). England and Wales is a notable exception.
2. For the purposes of this discussion 'legal ethics' includes teaching about professional ethics and professional values.
3. Changes in regulation in England and Wales, requiring solicitors to exercise wider discretion in ethical decision making, is one of many reasons to ground law students in ethics at the undergraduate stage.
4. The main difficulty in introducing a legal ethics curriculum is the renegotiation of the joint statement on qualifying law degrees, the agreement between the professions and the academy regarding the common core for the initial stage.
5. The inherent problems may include those usually attending significant change, but, additionally, including reluctance by the academy to accept the legal profession's agenda. Substantive objections to a requirement to teach legal ethics include the propositions that teaching professional ethics introduces a vocational subject to the liberal law degree or that teaching professional values represents an attempt indoctrinate law students. It might also be argued that teaching legal ethics is inconsistent with the purposes of the liberal law degree, whether such purposes are conceived of as inculcating knowledge for its own sake, fostering the general powers of the mind, or producing cultivated men and women.
6. It is argued that pursuing liberal goals does not exclude the possibility of informing students about subject matter that may also be relevant to legal careers, such as the reality of professional roles or the constraints on practitioners' actions imposed by professional ethics.
7. Inculcating values is arguably an inevitable part of education. It is not inimical to liberal education. There may be only broad consensus around the values that may be appropriate for a liberal law degree, for example, those that support taking a critical perspective on the subject of study from a standpoint of liberal neutrality. A curriculum that promoted discussion of professional values in a spirit of critical enquiry would not be indoctrination.
8. A legal ethics curriculum can be consistent with the goals of the liberal law degree. In fact, some examples of a legal ethics curriculum may complement traditional legal subjects in achieving liberal goals.
9. Taking in to account the factors shaping the curriculum for legal ethics at the initial stage, it is recommended that a suitable definition of legal ethics, in the context of the Qualifying Law Degree, is:

'The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.'

10. This definition potentially embraces a wide range of topics. These will be more closely defined by the outcomes that a legal ethics syllabus should seek to achieve and what material it might cover.
11. Learning outcomes are statements describing the knowledge and skills students are expected to acquire as a result of a course of study. The Law Society may be constrained in setting ambitious learning outcomes by the need:
 - (a) to provide students with particular experiences in order to achieve certain outcomes, and
 - (b) to assess that required outcomes have been achieved.
12. A legal ethics curriculum for the initial stage should not be over ambitious, both for reasons of principle and reasons of economy. Bearing in mind the constraints and limitations on undergraduate legal education, it is neither appropriate or feasible to require that the initial stage provide sufficient practical experience to ensure that skills or good habits for ethical practice became habitual. Nor would it be appropriate or feasible to require forms of assessment that attempt to verify the good character and positive motivations of students.
13. Rather, the aim of the ethics curriculum at undergraduate level should be to establish clearly in students' minds the institutions of the legal system, the values that underpin them and the professions' roles in relation to them. This will provide the foundation for students' understanding of, and commitment to, their own professional responsibility.
14. Considering the various issues outlined it is proposed that the aim of a legal ethics curriculum for the initial stage should be:
 - To stimulate students to reflect on the nature of legal ethics,
 - to equip students to behave ethically and to
 - enable them to play an active role in the formation of professional ethics.
15. Objectives that are consistent with these aims are that the ethics curriculum should:
 - a) further appreciation of the relationship between morality and law
 - b) promote understanding of the role of the legal profession in supporting democracy and protecting justice and the rule of law
 - c) provide opportunities for ethical decision-making
 - d) promote understanding the importance of values, including justice, honesty, integrity, critical self-reflection and respect for others
 - e) stimulate reflection on the ethical challenges of practice and lay a foundation for ethical behaviour
16. Learning outcomes that are consistent with these aims and objectives are that students will:
 - a) Explain the relationship between morality and Law,
 - b) Identify values underpinning the legal system,
 - c) Analyse the regulation of the legal services market,
 - d) Debate ethical issues
 - e) Evaluate the institutions, professional roles and ethics of the judiciary and legal professions

- f) Appraise the ethical responsibilities of lawyers
 - g) Recognize and resolve ethical and other professional dilemmas
 - h) Demonstrate awareness of potential ethical issues arising in legal employment
17. A syllabus that is consistent with these aims, objectives and learning outcomes is set out in the Model Ethics Syllabus that follows:

Model Ethics Syllabus

- a. Ethics and Law: Law and morality; Civil and human rights; Life, liberty and security of person; equality before the law; discrimination and diversity.
 - b. System ethics and the administration of justice: democratic values, e.g equality (including equality before the law) freedom, access to and control of power; natural justice; the rule of law; independence of the judiciary, lawyers' responsibilities for defending the rule of law and upholding the administration of justice.
 - c. Regulation of legal services: Structure of the legal services market; Regulators and regulated; Statutory objectives and professional principles; Regulation of entities; Professional responsibility in the workplace.
 - d. Theory of professionalism: Relationship to the state; Market control and reserved activities; Professional ideals.
 - e. Legal professions: Professional values; Professional bodies; Business organisation.
 - f. Professional regulation: Representative and regulatory functions of professional bodies; education, training and conduct; investigation and discipline.
 - g. Professional ethics: Codes of conduct; Duty to the Court and to the administration of justice; Duties to clients; Loyalty; competence; confidentiality; conflicts of interest.
18. There are arguments in favour of both discrete and pervasive delivery of the legal ethics curriculum, but, if the Law Society is to be confident that the specified aims, objectives and learning outcomes are achieved, it is important that a core is delivered and examined discretely.
19. These proposals may be more acceptable to the academy as part of the adoption of an outcomes approach generally in the joint statement, as recommended by ACLEC. This may include the abandonment of a prescribed doctrinal core for law degrees (the so-called seven foundations of legal knowledge).
20. If law schools were not required to teach a specific core, but only to achieve broad outcomes, there is a greater chance that legal ethics would play a central or overarching role in professional requirements for the initial stage, as in other jurisdictions. If however, the joint statement is retained in its current form, Legal Ethics may only receive the treatment the Law Society thinks it requires in degree courses if it becomes a foundation subject.
21. There are a number of avenues the Law Society might pursue in assisting law schools to deliver a new ethics curriculum. Assuming that the proposed aims, objectives and learning outcomes, or something similar, are adopted, such assistance need not take the form of a large financial subsidy.
22. The most valuable assistance that law schools might have in implementing a requirement to teach legal ethics is to receive sufficient notice to facilitate (re) allocation of resources. It would be wise however, to consult widely on the details of any proposal and to seek guidance on particular difficulties that individual law schools might have.

A. Introduction

In England and Wales a number of reports, from the Benson Report in 1979,¹ have recognised the importance of an ethical dimension in legal education and training. Hitherto, it has been the role of the vocational stage to bring together theory and practice² and, in that process, to introduce law students to professional ethics.³

The introduction of law students in England and Wales to professional ethics may be considered overdue. Legal professions in other common law jurisdictions, the US,⁴ Australia⁵ and Canada,⁶ already require professional ethics in first law degrees. There is also, increasingly, recognition of a need for a more intensive focus on a range of professional issues, including roles, identity and values. In the US, for example, a detailed report by the influential Carnegie Foundation recently recommended:

'To build on their strengths and address their shortcomings, law schools should offer an integrated, three-part curriculum:

- (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth;
- (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and
- (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.

Integrating the three parts of legal education would better prepare students for the varied demands of professional legal work.⁷

The strong lead given by other common law jurisdictions in introducing legal ethics to the curriculum raises the issue of why England and Wales has not required any ethics teaching at the initial stage.

For legal professions a commitment to public facing values is important, practically and symbolically. In England and Wales, recent changes in the legal services market make an even stronger case for introducing students to professional ethics at the earliest possible time. The proposed introduction of Alternative Business Structures

¹ Benson, *Final Report: Volume 1*, (1979) para. 39.47 and see Vol.1 para. 3.40.

² *Ibid.* Vol. 1 p.629, para. 39.4. See also See The Hon. Mr Justice Ormrod (Chairman) Report of the Committee on Legal Education (1971) Cmnd. 4595 (Ormrod), para. 109 and The Committee on the Future of the Legal Profession (The Marre Committee) *A Time for Change* (General Council of the Bar and the Law Society: London, 1988).

³ The Legal Practice Course, introduced in 1993, required that lawyerly skills be taught through the 'transactions' of legal practice and small group work with professional ethics as a 'pervasive' subject underpinning these areas.

⁴ R MacCrate 'Preparing Lawyers to Participate Effectively in the Legal Profession' (1994) 44 *Journal of Legal Education* 89. Note that Law in the US is a second degree.

⁵ G Powles 'Taking the Plunge: Integrating Legal Ethics in Australia' (1999) 33 *Law Teacher* 315.

⁶ Federation of Law Societies of Canada Task Force on the Common Law Degree (FLSC, 2009) (<http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf>) last visited 14th September 2010.

⁷ WM Sullivan, A Colby, JW Wegner, L Bond, LS Shulman *Educating Lawyers: Preparation for the Profession of Law* (Stanford, Calif.: The Carnegie Foundation for the Advancement of Teaching, 2007) Recommendation 1 at p8. (http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf)

involves a move to 'entity based' and 'principles-focused' regulation, with the possible abandonment of the traditional, rule-based code. A review of regulation, conducted for the Law Society by Lord Hunt of Wirrall, supports the idea that principled based regulation allows more flexibility and requires 'a greater degree of judgment on the part of the individuals concerned'.⁸ The success of this strategy for improving the ethical performance of the profession depends, possibly to a large degree, on suitable education and training.⁹

There a number of reasons why such a step may be considered timely to introduce an ethical component to law degrees::

- Many professions, medicine, nursing, business, social work, engineering and education, now include ethics in their curriculum.
- The Law Society consultations leading to the Training Framework Review and the resulting, and current, Day One Outcomes promised ethics 'from cradle to the grave' for solicitors. In terms of solicitor education the degree is the cradle.
- There have been few objections to the Day One outcomes, which include explicit references to professional ethics.
- Adopting an ethics curriculum has symbolic importance.
- Other common law jurisdictions are gradually adopting an ethics curriculum, leaving those that do not looking cavalier about professional responsibility.
- High ethical standards guard against consumer complaint, bad publicity and curtailment of privilege.
- In a competitive commercial environment a commitment to high ethical standards gives clients confidence.
- To hold high ethical standards solicitors must be 'ethically literate'.
- As practice becomes more and more diverse, ethics offers curriculum content that will become the common core of the professional education of lawyers.
- The context of practice is becoming more complex and difficult to understand, and will be even more so with the introduction of Alternative Business Structures.
- Solicitors can be expected to be the dominant ethical voice in new business structures and should arguably have broad and sophisticated ethical awareness.
- 'Principles based regulation' leaves more to individual decision-making, meaning that lawyers need to be better prepared to exercise wider discretion.
- The Smedley Report, Hunt Report and various of the SRA's recent consultations have emphasised the importance of reviewing education in the response to the emergent regulatory agenda.
- Economides and Rogers recommended a review of the Joint Statement [on the Qualifying Law Degree¹⁰] to 'see whether any consensus exists, or could be constructed, to make awareness of and commitment to legal values, and the moral context of law mandatory in undergraduate law degrees'.
- Hunt endorsed the Economides-Rogers report and urged that all of its recommendations were taken seriously.
- Ethics scholarship in the US and Australia, where ethics is compulsory in the curriculum, is significantly outstripping that from the UK, certainly in volume.
- Including compulsory ethics in the curriculum will increase the numbers of academics teaching the subject and, potentially, the numbers of researchers, publications and materials, which is of benefit to the profession as a whole.

⁸ Lord Hunt of Wirral *The Hunt Review of the Regulation of Legal Services* para. 2.13. (hereinafter 'the Hunt Review').

⁹ J. Webb 'Being a Lawyer / Being a Human Being' (2002) 5 *Legal Ethics* 130 at 149.

¹⁰ A Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining an Undergraduate Degree para. 2(v). (www.sra.org.uk/documents/students/...stage/academicjointstate.pdf) last visited 13th September 2010.

- A legal ethics curriculum will produce more 'ethically literate' and 'ethically sensitive' lawyers, better able to preserve, adapt and change the ethical traditions of the profession.
- The Chairman of the Legal Services Board has endorsed 'a changed and earlier emphasis on the teaching of professional ethics' as part of a major review of legal education and training.¹¹

In the context of these various pressures for an ethics curriculum at the initial stage of legal education and training, the Law Society commissioned *Preparatory Ethics Training for Future Solicitors*, a report prepared by Kim Economides and Justine Rogers and enthusiastically endorsed by Lord Hunt.¹² The report recommends that ethics be introduced to the legal education process at the earliest stage possible, and that outcomes that would ensure 'commitment to legal values and the moral context of law' be introduced on law degrees.¹³ The report did not propose content or method,¹⁴ suggesting further work on 'how best to introduce ethics and professional responsibility' (recommendation 1). It is the introduction of professional ethics in which the Law Society is particularly interested.

A brief history of professional ethics in legal education

Professional ethics has been part of the LPC since its inception in the 1990s as a 'pervasive' subject, often introduced in a few lectures at the start of the course. A one year vocational course devoted to substantial practical knowledge cannot cover the ground of professional ethics in sufficient detail, nor with the emphasis, that can be taken in a degree course. Further, there is an understandable preoccupation on vocational courses with code obligations, rather than wider issues of regulation.

In England and Wales the issue of whether there should be a professional ethics component at the initial stage has been explicitly on the agenda since 1996, when a report by the Lord Chancellor's Advisory Committee on Education and Conduct (ACLEC) proposed that 'legal values and professional skills' should be one of five key areas developed by legal education in England and Wales.¹⁵ The report was ambiguous about the role that professional ethics might play at the undergraduate stage.¹⁶

The Law Society's 2001 consultation proposed making ethics, knowledge and skills core elements of solicitors' education and training 'from the cradle to the grave'.¹⁷ The Training Framework Review Group, which developed the consultation proposals, subsequently included a requirement that intending solicitors have knowledge of 'the jurisdiction, authority and procedures of the legal institutions and the professions that initiate, develop and interpret the law' of 'the rules of professional conduct' and of the 'values and principles on which professional rules are constructed'.

¹¹ D. Edmonds 'Training the lawyers of the Future – A regulator's view' Upjohn Lecture, 19th November 2010.

¹² Who urged that every recommendation be taken seriously (Hunt Review, Recommendation 73).

¹³ K. Economides and J. Rogers *Preparatory Ethics Training For Future Solicitors* pages 6-8.

¹⁴ S Nelson 'Reflections from the International Conference on Legal Ethics from Exeter' (2004) 7 *Legal Ethics* 159.

¹⁵ With intellectual integrity and independence of mind, core knowledge and contextual knowledge.

¹⁶ A. Boon 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2003) 5:1 *Legal Ethics* 35

¹⁷ Law Society *Consultation: Training Framework Review* (London, Law Society, 2001).

Inclusion in the Day One Outcomes has been insufficient to achieve the introduction of an ethics curriculum in the initial stage of legal education and training, probably because content is neither allocated to stages or to assessment nor specified in the joint statement on qualifying law degrees.

An obvious way to ensure that ethics features in the initial stage is to include it in the 'Seven Foundations of Legal Knowledge', which are set out in the joint statement agreed between the the Law Society, the Bar and the academy as the core of subjects deemed essential study for students seeking qualifying law degree status and smooth progress to vocational courses (see Appendix 1). This possibility is considered later in this report. At this stage it is necessary to note that renegotiating this core with the academy is regarded as difficult.¹⁸ A reason that there may be particular difficulty in including professional ethics is that the 'liberal law degree' is regarded as a general study of law not tied to any vocation. For some, at least, professional ethics necessarily has vocational connotations.¹⁹

Since my brief includes recognising possible barriers and objections to the introduction of a compulsory ethics component, it is necessary to explore in a little more detail the proposition that professional ethics is a vocational subject antithetical to the nature of the liberal law degree.

The liberal law degree

The longstanding orientation of English universities towards liberal educational aims was espoused by the Robbins report in the 1960s.²⁰ In law, the reports by Lord Justice Ormrod²¹ and ACLEC in the 1990s endorsed liberal undergraduate legal study.²² Robbins expressed the aim of liberal education to be fostering the general powers of the mind, whereas Ormrod declared the aim of the 'liberal law degree' to be production of 'cultivated men and women'.²³

Bradney asserts that liberal education remains a 'vaguely held ideal' of legal education, but an ideal nonetheless²⁴ grounded in the pursuit of knowledge for its own sake,²⁵ producing a good citizen rather than a good lawyer, an educated person rather than a good worker.²⁶ As Bradney suggests, however, some opposition to proposals for inclusion of legal ethics in the curriculum may be:

¹⁸ ACLEC anticipated a negative reaction from university law schools to its own proposals (see para 2.5 and see 'Earthworks against ACLEC', SPTL Reporter, Spring 1996). For further discussion see W Twining *Blackstone's Tower: The English Law School* (London: Stevens and Sons/Sweet and Maxwell 1994), J Webb and A Fancourt, 'The Law Society's Training Framework Review: On the Straight and Narrow or the Long and Winding Road' (2004) 38 *Law Teacher* 293, A Boon, J Flood and J Webb 'Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession' (2005) 32 *Journal of Law and Society* 473.

¹⁹ J Webb, 'Inventing the Good: Prospectus for Clinical Education and the Teaching of Legal Ethics in England', (1996) 30:3 *The Law Teacher* 270 at 271.

²⁰ *Report of the Committee on Higher Education* (1963) Cmnd. 2154 (The Robbins Report) paras 24-26

²¹ Ormrod, *supra* at para. 106.

²² ACLEC *First Report on Legal Education and Training* (London, ACLEC, 1996) 57.

²³ *Report of the Committee on Higher Education* (1963) Cmnd. 2154 (The Robbins Report) paras 24-26 and Ormrod, *supra* at para. 106.

²⁴ *Id.* 33.

²⁵ A. Bradney *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Oxford: Hart Publishing, 2003) at p. 37.

²⁶ *Id.* 38-39.

'no more than a coded refusal to accept either the Law Society or Bar Council's right to have any substantial say in the running of the law school; a rhetorical device that is used in the political process of achieving and maintaining autonomy for the academy'.²⁷

Although some may agree that 'the law school does not exist to service the needs of the profession or anyone else',²⁸ to say that professional ethics is incompatible with a liberal ideal is more difficult to justify.

Ormrod made it clear that the pursuit of a liberal ideal does not exclude 'purely vocational or professional knowledge or skills', so long as they are acquired 'not for the value that they have in their own terms but because they facilitate the wider learning that constitutes a liberal education'²⁹ or for their wider possibilities in the search for knowledge'.³⁰ Ormrod thought that, 'the study of legal practice in its most mundane sense can be the basis of a liberal education provided that that education is not primarily concerned with making the student a practising lawyer'³¹ and that the 'practically useful' is welcome on law degrees so long as it was 'taught in such a way as to promote the general powers of the mind'.³²

An approach to teaching professional ethics that does not aspire to make them practising lawyers, but offers an opportunity for students to compare and criticise the theory and practice of law, is consistent with Ormrod's vision of the liberal law degree. Professional ethics is suited to theoretical analysis, and a multi-disciplinary approach, including the introduction of socio-legal material. Understanding more about professional ethics may help students to understand the role that lawyers have in the formation of law. Therefore, professional ethics potentially makes a positive contribution to enabling students to understand law and become critical and constructive citizens.

Some authors argue that legal ethics is a subject more effectively aligned with Clinical Legal Education (CLE), where law students assist real-life clients with legal problems.³³ Others may argue that, even if studying legal ethics is consistent with a liberal legal education, a requirement to undertake CLE would cross the line into preparing students to practice. This proposition is contestable, but, CLE is currently an activity found in relatively few law schools. To a lesser extent, insisting on LPC-type skills simulation might also prove problematic for academically orientated institutions because it leans too far towards the practical.

The position of institutions that eschew any connection with practical law in the law degree might be summarised by Whitehead, a mathematician and philosopher closely identified with social liberalism:

²⁷ Bradney identifies John Henry Newman as the source of the ideas shaping British universities. He quotes Newman's view that a liberal education 'apprehends the great outlines of knowledge, the principles on which it rests, the scale of its parts, its lights and its shades, its great points and its little... A habit of mind is formed which lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation and wisdom.' (Id. 32).

²⁸ *Id.* at 125.

²⁹ *Id.* at 41.

³⁰ *Id.* 44.

³¹ *Id.* 44.

³² *Supra.*

³³ J Webb, 'Inventing the Good' (*supra.*), A. Boon 'Ethics in Legal Education and Training' (*supra.*), N .Duncan 'Responsibility and ethics in legal education' in R Burridge, K Hinett, A. Paliwala and T. Varnava (eds) *Effective Learning and Teaching in Law* (London: Routledge, 2002).

The justification for a university is that it preserves the connection between knowledge and the zest for life, by uniting the young and old in the imaginative consideration of learning. The university imparts information, but it imparts it imaginatively... The initial discipline of imagination in its period of youthful vigour requires that there be no responsibility for immediate action. The habit of unbiased thought, whereby the ideal variety of exemplifications is discerned in its derivation from general principles, cannot be acquired when there is the daily task of preserving a concrete organisation. You must be free to think rightly and wrongly, and free to appreciate the variousness of the universe undisturbed by its perils...

The way in which a university should function in the preparation for an intellectual career, such as modern business or one of the older professions, is by promoting the imaginative consideration of the various principles underlying that career. Its students then pass into their period of technical apprenticeship with their imaginations already practised in connecting details with general principles. The routine then receives its meaning, and also illuminates the principles which give it that meaning. Hence, instead of a drudgery issuing in a blind rule of thumb, the properly trained man has some hope of obtaining an imagination disciplined by detailed facts and necessary habits.³⁴

Proposals for introducing professional ethics to the initial stage must consider the integrity of the liberal law degree. Preserving a liberal orientation maintains the discipline as a university subject, with concomitant advantages in terms of research capacity, status and the attractiveness of law careers to high level candidates. Studying professional ethics is not necessarily inconsistent with a liberal legal education and would provide a counterpoint to more conventional subjects.

This report outlines the possible shape of a legal ethics curriculum, with outcomes and an outline syllabus. It then considers effective implementation. The need to ensure that the initial stage pays due attention to ethics, may create an opportunity to reconsider the core of legal study. This may be the time to move to an outcomes approach for first degrees, as recommended by ACLEC, with legal ethics overarching. It argues that, if it is decided that a core of foundation subjects must be retained, legal ethics should be added to this core. The questions that the Law Society raises are now considered.

Question 1: A definition of ethics, in the context of the Qualifying Law Degree

There are many potential definitions of ethics and legal ethics. Whichever definition is adopted obviously has implications for both the syllabus and outcomes of a curriculum. It is therefore appropriate to consider some sources of, approaches to and frameworks for definition and what implications adopting these would have for curriculum content and outcomes.

Broad and narrow definitions of 'ethics'

There are various possibilities for a treatment of ethics within the curriculum. For example, students could be introduced to the following disciplines and subjects:

³⁴ A N Whitehead *The Aims of Education and other essays* (London: Ernest Benn Ltd, 1962) pp.139-140.

Morality - a study of standards of behaviour that we want others to observe and so are bound by ourselves, including moral rules about keeping promises and ideals such as truthfulness and fairness.

Moral theory - the exploration of morality as a rational undertaking.

Ethics – *inter alia* determining moral courses of action (normative ethics), how moral capacity and agency develops (moral psychology), observance of values (descriptive ethics)

Social ethics - social responses to problems to which society does not have a definitive answer.

Professional ethics – applying morality and social ethics to relevant occupations.

Delivering courses that establish a sound theoretical basis in these areas might require some expertise drawn from another part of a University; a Philosophy Department (moral theory) or a Sociology Department (social ethics). Not all Universities have such departments. The exception to this, of course, is the professional ethics of lawyers, the expertise for delivery of which might be found in a number of law schools.

In *Preparatory Ethics Training for Future Solicitors* Economides and Rogers' initial chapter (1.1 The ethical deficit in modern legal education and practice) talks generally of ethics, but the context of the report is placed firmly in the field of professional ethics. In the introduction in a paragraph defining 'legal ethics' Economides and Rogers state:

'We broadly agree with the definition advanced by O'Dair (2001: 5; see also Shaffer, 2001) that the study of legal ethics should involve the *critical* examination of:

"the arrangements made by society for the delivery of legal services and in particular of the legal profession, its structures, roles and responsibilities (sometimes termed as macro legal ethics); the roles and responsibilities of individual lawyers in the provision of legal services together with the ethical implications of those roles (sometimes termed micro legal ethics); and the wider social context, especially the philosophical, economic and sociological context in which lawyers work with a view to identifying and, if possible, resolving the ethical difficulties which face professional lawyers so to enable them to view legal practice as morally defensible and therefore personally satisfying."³⁵

This broad definition of legal ethics transcends the limitations of the Code and makes it possible to better prepare lawyers for future practice so that they have the capacity to perceive ethical dilemmas that may call into question professional judgments and possibly threaten professional standards ... Whilst we should not be too rigid about which element is taught at which stage, it would seem preferable if 'macro legal ethics' were tackled in degree courses with the detail of 'micro legal ethics' and the professional code considered subsequently.³⁶

This definition provides a broad ambit for an ethics curriculum at the initial stage. However, the exclusion of any reference to "micro legal ethics' and the professional code' at undergraduate level seems arbitrary and unnecessary.³⁷ Some aspects of professional conduct could usefully illuminate the critical examination of the first head (macro ethics). Omitting any reference to code obligations would be an unnecessary impediment to a study of the third head. For example, 'identifying and... resolving the ethical difficulties which face professional lawyers' would be problematic without providing some examples of what these difficulties are.

³⁵ R. O'Dair *Legal Ethics: Text and Materials* (London: Butterworths, 2001) p.5.

³⁶ Economides and Rogers p16.

³⁷ According to Parker, Australian courses tend to introduce both micro and macro perspectives.

If it were thought important to avoid overlap between the stages, any coverage in the initial stage could be calibrated with the vocational stage. However, the essential differences in the purpose of teaching ethics in the two stages, is broader than whether or not professional codes are referred to. The differences lie in relation to content (for example, the initial stage would be more contextual than the vocational stage), orientation (for example, the initial stage would take a more critical perspective) and application (for example, the vocational stage would involve application in simulated and real life situations).

In addition to professional ethics, it is important to consider what else the undergraduate degree might usefully contribute to law students' education, and, in particular, what is implicit in Economides and Rogers' proposing 'legal values and the moral context of law' as a focus for the initial stage.

'Legal values and the moral context of law'

Social and cultural values might be determined by looking at what is considered important or valuable in society so, arguably, the secular values of wealth, consumerism, competition and individualism. BurrIDGE and Webb note that "legal values" is an ill-defined, seldom debated term and one which remains underdeveloped. They argue that no values are exclusively legal and that those, like truth or justice, that may be associated with law, are also found in other disciplines, professions or epistemologies, expressing underlying moral values.³⁸

BurrIDGE and Webb identify two sources of values that might inform the study of law. The second is a contextual understanding of how law works, including norms and doctrines.³⁹ This is the kind of context that is implicit in most current degree programmes, particularly those offering English Legal System, Legal Methods or Jurisprudence. The second is not explicitly found at undergraduate level, although it may be said that it is implicit in the core; the role of law in 'maintaining democracy and equipping society with the structures, principles and processes for the preservation of justice in human affairs'. This emphasis echoes ACLEC, which proposed that students should 'fully appreciate the essential link between law and legal practice and the preservation of fundamental democratic values'⁴⁰ and Kronman, who argued that the ultimate value of legal education should be democratic individualism,⁴¹ highlighting the link between democracy and law. A programme derived from this connection would be consistent with the macro ethics focus, dealing with, for example, the rule of law and human rights and the lawyer's responsibilities in relation to these institutions. '[T]he structures, principles and processes for the preservation of justice' again suggests a focus on legal system, but also on the legal professions and their social role(s).

A course on the moral context of law might draw on moral and social theory, for example, the relationship between norms and law.⁴² Law's response to mistreating or killing animals,⁴³ for example, would generate student debate. It is difficult to make a persuasive argument for a professional body insisting on such material in qualifying law degrees, unless there is some significant and demonstrable link between studying ethical theory and outcomes in which the profession has a legitimate interest. It is arguable, for example, that students might be familiarised with ethical argumentation. It is also arguable that some material, for

³⁸ R. BurrIDGE and J. Webb 'The Values of Common Law Education: Rethinking, Rules, Responsibilities, Relationships and Roles in the Law School' (2007) 10 *Legal Ethics* 72.

³⁹ *Id.* pp. 92-93.

⁴⁰ ACLEC 1996 Report, *supra*. para. 1.5.

⁴¹ A. Kronman, *The Lost Lawyer* (Cambridge, MA, Belknap Press, 1993).

⁴² P. Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965).

⁴³ P. Singer, *Practical Ethics* 2nd Edition (Cambridge, Cambridge University Press, 1993) Chs. 4 and 5.

example, on equality and diversity,⁴⁴ would be relevant to the public policy goal of encouraging 'an independent, strong, diverse and effective legal profession'.⁴⁵

Brownsword identifies a range of possible approaches for integrating a legally related ethics in the conventional law curriculum,⁴⁶ each reflecting different theoretical positions. *Legal idealism* seeks the link between moral and legal argumentation in teaching positive Law. The *intersectionist* position recognises instances when legal and moral issues meet and the academic taking such a position examines the elasticity of legal argumentation in such circumstances. The *liberal* position does not seek to prepare for a specific vocation, but to produce cultivated individuals with an ethically informed and critical understanding of law and social institutions. *Contextualism* advocates teaching the context, economic, social, political or ethical, in which the problems addressed by law arise.

The idealist or intersectionist approaches are likely to arise in a course on jurisprudence or philosophy of law.⁴⁷ Jurisprudence has many possible dimensions including the basis and nature of law, principles and theories of the legal system or the relationship of the legal system with society. However, as Brownsword acknowledges, were ethics content of programmes too abstruse or rarefied, Law students might object that they registered for Law, not moral philosophy.⁴⁸ Brownsword concludes that the contextualist or liberal perspective might embrace the study of the role of lawyers in delivering legal services.

It is argued that distinctively 'legal values' flow from the role of law and lawyers in defending democracy and justice. Translated to the specific virtues of lawyers, this suggests emphasis on integrity (as illustrated by the duty to the court), courage (the willingness to advance unpopular causes) and altruism or generosity (putting client interests first or providing legal services *pro bono publico*).⁴⁹

Legal ethics

In general usage 'legal ethics' is not a precise term. In the US it is usually associated with the professional ethics of lawyers, but it is potentially broader than this. An example of the potential breadth of the term legal ethics is the organisation of streams for the forthcoming 5th International Legal Ethics Conference in Banff, Canada.⁵⁰ These are:

Culture, Ethics & Society

This stream will include papers and panels in relation to topics such as lawyering for and by indigenous peoples, legal ethics in the developing world, cultural competence, socio-economic barriers to legal services, legal ethics and civil law, and cultural and social issues related to judging and the judiciary.

⁴⁴ J. Rawls *A Theory of Justice*, (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1971), R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1996).

⁴⁵ Legal Services Act (2008) s.1(1).

⁴⁶ R Brownsword 'High Roads and Low Roads, Mazes and Motorways' (1999) 33 *The Law Teacher* 269.

⁴⁷ Or '[a] subdivision of philosophy of law dealing with ethical questions concerning the administration of justice within a society'. (www.gnosisarts.com/nj-philosophical-practitioner). Philosophy generally concerns the rational investigation of questions about existence and knowledge and ethics.

⁴⁸ Brownsword, *supra*, at 281-3.

⁴⁹ Such lists are likely to split opinion. For example, Parker suggests that caring (for the ordinary, paying client) is more appropriate than generosity in describing the value underlying the lawyer/ client relationship.

⁵⁰ International Legal Ethics Conference 5, Banff, Alberta July 12-14, 2012.

Empirical Approaches to Legal Ethics

This stream will include papers and panels involving empirical analysis of questions related to the structure of the legal profession, law firms, lawyering, judging and the judiciary.

Philosophy and Legal Ethics

This stream will include papers and panels relating to jurisprudence, philosophy of law and their intersection with questions arising in legal and judicial ethics.

Regulation of the Profession(s)/Ethics and Education

This stream will include papers and panels related to self-regulation, shifting regulatory models, effective methods of regulating lawyers, regulation by lawyers of other legal service providers, regulatory theory, continuing legal education, ethics teaching and regulation of law schools.

In the context of England and Wales, an important reference point is the ACLEC, which stated that intending lawyers should show commitment:

'... to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to promoting equality of opportunity, and to ensuring that adequate legal services are provided to those that cannot afford to pay for them.'⁵¹

The website of the Journal *Legal Ethics*, describes its focus as:

'... broad enough to encompass empirical research on the ethics and conduct of the legal professions and judiciary, studies of legal ethics education and moral development, ethics development in contemporary professional practice, the ethical responsibilities of law schools, professional bodies and government, and jurisprudential or wider philosophical reflections on law as an ethical system and on the moral obligations of individual lawyers.'

The legal ethics curriculum might also include a social ethics perspective, placing the focus on role and rules in a wider context (for example, exploring how professions serve the public interest, how they should be regulated and what kinds of constraint they should be under). In the current environment, where Law is being conceived as a 'legal services market' there is also arguably a case for a more explicit focus on the regulation of the market, including the relationships between lawyers and others. This might form part of an introduction to 'general system ethics' which has been advocated for the initial stage.⁵² It might also include material, for example, on natural justice, judicial ethics and the rule of law, and incorporate an understanding of the professional privileges and obligations of lawyers, the statutory and other obligations to which they are subject and the organisations in which they work.⁵³ A curriculum built on such material would, it is suggested, be something that a legal profession would have a legitimate interest in having prospective entrants understand.

At this point it is necessary to return to Economides and Rogers' view that it would be 'preferable if 'macro legal ethics' were tackled in degree courses with the detail of 'micro legal ethics' and the professional code considered subsequently.' The word 'detail' could be significant, because it does not proscribe a broad introduction to the code or its contents.

⁵¹ ACLEC Report 1996 para. 2.4.

⁵² J. Webb 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed' in K. Economides (ed.) *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart, 1998) 272 at 292.

⁵³ The future will see occupations other than lawyers within the same entity subject to a common regulatory regime."Institutional ethics" refers to an organization's articulation, application, and evaluation of values and moral principles related to its practices, procedures, and policies. See for example R Greenwood and C. R. Hinings, 'Understanding Radical Organisational Change: Bringing Together the Old and the New Institutionalism' (1996) 21 *Academy of Management Review* 1022.

It is important, however, to be clear. In my view, it would be unduly restrictive to exclude any consideration of codes at the initial stage as a point of principle. It would be strange, for example, to consider the lawyer's duty to the administration of justice without also considering the duty to the court and, in doing so, consulting the code requirements and case law. What is important is that such references to the code are, at the initial stage, set in a wider context. This is consistent with the broad aims of ethics curriculum and with the role of the vocational courses in requiring detailed analysis and application of the code.

Conclusion

The most obvious core of a definition for a legal ethics curriculum for inclusion in law degrees is a contextual and critical study of the role and values of the legal system and the values and ethics of the legal profession. Such a focus necessarily includes professional ethics.

Recommendation:

It is recommended that a suitable definition of ethics, in the context of the Qualifying Law Degree is:

‘The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.’

It will be noted that this definition does not include study of the legal system as such. There is obviously a case for including such a topic in the undergraduate curriculum, but a detailed knowledge of the system is not necessary, for example, for students to consider the system's underlying values.

Question 2: A model ethics syllabus, including learning outcomes, for the Qualifying Law Degree

Learning outcomes

In higher education, learning outcomes are statements describing the knowledge and skills students acquire as a result of a course.⁵⁴ Learning outcomes should be 'measurable', that is, students should demonstrate that each outcome has been met by summative assessment. It is sometimes considered acceptable, however, to say that some outcomes *should* be achieved.⁵⁵

It is assumed that the Law Society wishes to set assessed outcomes. This is relatively simple for the elementary intellectual skills, for example, knowledge and understanding outcomes, which can be assessed by multiple choice questions. The more complex intellectual skills, analysis, synthesis and evaluation, while still susceptible to written assessment, may need a more finely tuned assessment instrument, like a problem question.

Outcomes that move beyond those demonstrable in examinations, for example, 'effective oral communication' may require additional resources. Verification of the development of specific interpersonal skills may require an observed performance. Similarly, attitudes and attitudinal change is difficult to verify by assessment (see below).

Learning outcomes flow from the aims and objectives of a course. Therefore, having ambitious aims or objectives, like 'improving the quality of ethical decision making in practice' might involve setting outcomes that assume the practice opportunities presented in a clinical setting. Even then, uniformity of student experience is unlikely, presenting difficulty in specifying practical experience with precision and in achieving equality of experience in assessment. Further, a learning outcome such as 'responding appropriately to ethical dilemmas in real life situations', requires an assessment opportunity that is difficult and expensive to establish.

Aims and objectives:

The Law Society's aim in seeking to include legal ethics in the initial stage is to begin the process of professional preparation at the earliest possible stage and to provide a foundation on which subsequent stages can build. There are many possible outcomes that are consistent with this aspiration, relating broadly to the knowledge, skills, attitudes and motivation of prospective entrants to the profession. Each of these types of outcome are now considered in terms of the kinds of curriculum and delivery that might be implicit in requiring them.

⁵⁴ See, e.g. QAA policy on programme specifications - October 1999 (<http://www.qaa.ac.uk/academicinfrastructure/programspec/progspec.asp>) last visited 6th September 2010.

⁵⁵ see www.heacademy.ac.uk/assets/ps/documents/primers/primers/ps0091_writing_learning_outcomes_mar_2005.pdf. For example, Schedule 1 of the joint statement sets out generic learning outcomes for degree work, but it is not known, for example, whether the oral skills of students (see Schedule 1 A(v)) are summatively assessed across all law degrees.

Knowledge, skills, attitudes and motivation

Knowledge and understanding

In *Preparatory Ethics Training for Future Solicitors* Economides and Rogers do not suggest specific material for a curriculum in legal values and the moral context of law. The approaches that they say might inform their legal ethics curriculum (formal, theoretical, clinical, humanistic) have sources attached to each. For formal approaches the primary material is the code, but Economides and Rogers consider this too narrow. As examples of the humanistic approach, they cite representations of lawyers in literature, films and television, but conclude that such material could offer 'a severe distortion of reality'.⁵⁶ They suggest that a theoretical approach would draw on ethical theory (citing Kantian,⁵⁷ consequentialist,⁵⁸ aretaic,⁵⁹ postmodern⁶⁰ or feminist⁶¹), but conclude that this may confuse students and fail to produce good lawyers.⁶²

Economides and Rogers do identify material that could support a course in professional ethics. Their reluctance to suggest that professional ethics form part of law degrees anticipates resistance from the academy, on which they conclude, 'in our view the key to overcoming academic resistance is to show how ethics actually reinforces the goals of a liberal education by deepening understanding and respect for core legal values whilst at the same time preparing students for situations they will encounter in the so-called real world'.⁶³ This seems to imply some coverage of professional ethics. What else is covered flows from the proposed definition of legal ethics.

The definition of ethics previously advanced is:

'The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.'

There is considerable overlap between this definition and the Day One Outcomes, which require that students have knowledge of:

'the jurisdiction, authority and procedures of the legal institutions and the professions that initiate, develop and interpret the law' of 'the rules of professional conduct' and of the 'values and principles on which professional rules are constructed'.⁶⁴

There is also some overlap of the definition with the Quality Assurance Agency's Law Benchmark Statement,⁶⁵ which requires, in its knowledge section, *inter alia*, that students '...

⁵⁶ *Id.* 25

⁵⁷ The deontological approach holds that one should do things because they are right, regardless of consequences.

⁵⁸ Holds that the outcomes of actions are the test of their morality.

⁵⁹ An approach to ethics emphasizing character and human excellence or virtue, as opposed to moral rules or consequences.

⁶⁰ Represents diffuse responses to the uncertainty, consumerism and flexibility of modern life, based around cultural moral relativism, ideas such as naturalism, evolution and atheism, and values such as individuality and self-fulfilment.

⁶¹ Attempts to revise traditional ethics to better reflect women's moral experience.

⁶² Economides and Rogers p.25.

⁶³ *Id.* p26

⁶⁴ Solicitors Regulation Authority *Day One Outcomes for Qualification as a Solicitor* Version 2, April 2007.

should be able to explain the main legal institutions and procedures of that [legal] system. It is obvious that lawyers and their professions are part of the legal system and its institutional framework. The constraints they operate under reflect the values and principles of the system.

The reluctance to embrace professional ethics may flow from confusing that teaching that subject would involve excessive focus on codes, an approach which is considered naive and superficial.⁶⁶ An approach more in tune with the academic values of the law degree is a critical study of legal professions as intermediate bodies in civil society.⁶⁷ Arthurs sees dangers in encouraging students to critique lawyers and their professional ethics,⁶⁸ but to deny them this opportunity seems unduly cautious.

An important aim of a legal ethics curriculum should be to equip students to transform the system rather than to simply replicate it,⁶⁹ a task that is not really within the compass of the vocational stage. The rationale, strengths and weaknesses of professionalism provide a context for discussion. Through dialogue, students can build greater commitment to and engagement in professional issues. In this way it may be possible to lay the foundation for more profound ethical discourse in the profession generally.⁷⁰

Adopting an outcomes approach without specifying a syllabus would encourage the content of any legal ethics component of qualifying law degrees to be broad and diverse. In the US, the ABA specifies only outcomes for professional responsibility components of law degrees (see below).

Australia provides a useful point of comparison, because the Law Admissions Consultative Committee specifies the core requirements for academic legal education and practical legal training, known respectively as the “Priestley Eleven” and the “Priestley Twelve”. The academic stage requires content exclusively focused on professional ethics, as follows:

ETHICS AND PROFESSIONAL RESPONSIBILITY

Professional and personal conduct in respect of a practitioner's duty:

- (a) to the law;
- (b) to the Courts;
- (c) to clients, including a basic knowledge of the principles relating to the holding of money on trust; and
- (d) to fellow practitioners.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should include knowledge of the various pertinent rules concerning a practitioner's duty to the law, the Courts, clients and fellow practitioners, and a

⁶⁵ This enables the academic community to describe specific subjects and the standards for the award qualification and the attributes and capabilities of graduates.

⁶⁶ S. Bundy ‘Ethics Education in the First Year: An Experiment’ (1995) 58 *Law and Contemporary Issues* 19 says that US ethics courses tend to be legalistic, stressing the external rather than the internal regulation of lawyers’ (at p31).

⁶⁷ HW Arthurs ‘Why Canadian Law Schools Do Not Teach Ethics’ in *Ethical Challenges* 105.

⁶⁸ *Id.*

⁶⁹ Goldsmith and Powles, *supra*, at 416. K Economides ‘Learning the Law of Lawyering’ (1999) 52 *Current Legal Problems* 392 at 410.

⁷⁰ A Boon, ‘Four Reports’ *supra*.

basic knowledge of the principles relating to the holding of money on trust.

Australian law schools devise their own schema of objectives and interpretation of how to approach this content. The University of Melbourne, for example, implemented the following:

Objectives Statement

By the end of this subject, students should be able to:

- Understand different moral approaches to legal ethics and be able to apply them to fact scenarios;
- Understand and critically analyse the way that lawyers' ethics and conduct are regulated in Australia (particularly Victoria), including disciplinary process;
- Know the professional conduct standards that regulate lawyers including those relating to conflicts of interest, confidentiality and duties owed to the client, and be able to apply them to fact scenarios;
- Be able to identify conduct and ethical issues that arise in legal practice in particular situations, be able to identify the different ways in which they could be resolved, and the arguments for and against those different resolutions;
- Be able to decide on, explain and justify the way in which they personally would resolve conduct and ethical issues in particular situations in a way that is appropriately respectful of other points of view;
- Be able to identify and explain what practical actions they would need to take to carry out that resolution in a practical situation.

Generic Skills Statement

On completion of the subject students should have developed in the following skill areas:

- Evaluation and synthesis of competing theories, rationales and ideas to resolve practical problems;
- Openness to new ideas and critiques of received wisdom;
- Ability and self confidence to comprehend complex concepts, to express them lucidly, whether orally or in writing, and to confront unfamiliar problems.

Capacity to engage in constructive professional and public discourse, to accept professional, social and civic responsibilities and to speak out against prejudice, injustice and the abuse of power.⁷¹

The Federation of Law Societies of Canada also specifies an outline syllabus for programmes leading to the vocational stage:

ETHICS AND PROFESSIONALISM

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

- a. the duty to communicate with civility;
- b. the ability to identify and address ethical dilemmas in a legal context;
- c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,
 - i. circumstances that give rise to ethical problems;
 - ii. the fiduciary nature of the lawyer's relationship with the client;
 - iii. conflicts of interest;

⁷¹ I am grateful to Christine Parker for this outline.

- iv. duties to the administration of justice;
- v. duties relating to confidentiality and disclosure;
- vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and
- vii. the importance and value of serving and promoting the public interest in the administration of justice.

These extracts show the degree to which other common law jurisdictions specify the content of professional ethics teaching for the initial stage. The degree of detail varies, but is consistent in requiring treatment of core ethical duties. This is generally brief enough to allow law schools to provide their own context, emphasis and detail. To the extent that outcomes are expressed they tend to be at the level of awareness and understanding. Demonstrating knowledge and developing understanding and awareness are conventional learning outcomes in higher education and should be a central part of the legal ethics curriculum.

Attitudes, values and virtues

Exposure of students to values, with the implication that these values may be adopted, is an inevitable part of education.⁷² Yet, attempts to explicitly instill specific values are controversial, implying a kind of 'moral indoctrination'.⁷³ This is deemed to be inconsistent with the liberal tradition, unless the values inculcated reinforce that tradition.⁷⁴ BurrIDGE and Webb identify intellectual freedom, emancipation, creativity and cultural literacy as values for liberal education generally. Cownie champions the capacity for critical self-examination,⁷⁵ or 'the examined life', in which 'nothing is accepted merely because it is handed down by tradition, but everything is questioned, and only beliefs which can be rationally justified are accepted'.⁷⁶ The

failure to explicitly identify values to be promoted by legal education usually means that values are inexplicit or potentially negative from the point of view of professional formation.

The ethical orientation of solicitors are firmly stated in rule 1 of the Solicitors Code of Conduct 2007 and from this it is possible to infer underlying values. Boon and Levin identify altruism (public service/ promoting the moral autonomy of clients), independence and justice.⁷⁷ Evans and Palermo suggest personal values, such as honesty, and moral values

⁷² Cownie argues that discussion of values pervades much of modern legal scholarship, sometimes framed in policy terms, including in books that superficially appear to be purely doctrinal (F Cownie '(Re) Evaluating values: A response to BurrIDGE and Webb' (2008) 42:3 *The Law Teacher* 302)

⁷³ Pue suggests that '[e]ven if we studiously avoid talk of "moral enterprise," "explicitly religious" underpinnings, or a wish to cultivate "virtue," the notion that morality lurks somewhere around the educational enterprise can be discomfiting for many educators (WW Pue 'Legal education's mission' (2008) 42: 3 *The Law Teacher* 270 at 274)

⁷⁴ BurrIDGE and Webb argue that liberal education can be an education *in* values rather than just an education *about* values (at 85) and that seeking to inculcate values is acceptable provided it is done in a way that does not infringe the principle of neutrality ('On Liberal Neutrality, the Value of Experience and the Loneliness of the Long-Distance Academic' currently appearing at <http://warwick.academia.edu/JulianWebb/Papers/106996/On-Liberal-Neutrality--the-Value-of-Experience-and-the-Loneliness-of-the-Long-Distance-Academic> (last visited October 14th 2010).

⁷⁵ F Cownie 'Alternative Visions in Legal Education' (2004) 6 *Legal Ethics* 159 at 174.

⁷⁶ F Cownie '(Re) Evaluating values: A response to BurrIDGE and Webb' (2008) 42: 3, *The Law Teacher* 302 at 303.

⁷⁷ A. Boon and J. Levin *The Ethics and Conduct of Lawyers in England and Wales* (2nd Edition) (Oxford: Hart Publishing, 2008).

such as truth and justice,⁷⁸ Burridge and Webb propose equality, fairness and humanity. Webb, writing on his own, proposes integrity, loyalty and respect for others.⁷⁹

It is arguable that all of the values discussed above, including the general values of liberal education, might be enhanced by study of professional ethics in the initial stage. For example, it is difficult to see how students might lead an 'examined life' if they do not fully understand their role as lawyers. Therefore, an ethics curriculum will legitimately promote particular values, some of which are liberal educational values (e.g. open enquiry) and some of which are liberal professional values (e.g. justice).

Members of a profession observe standards demanding specific virtues, habits of thought and behavior. A profession has a strong interest in potential entrants understanding the cultural values it holds and, thereby, attuning them to their professional role. It will be said that a large minority of law students do not aspire to be lawyers. Since professional life is apparently a shock to many lawyers, informing prospective entrants what that professional role requires⁸⁰ is potentially important for those who are, and those who are not, sure of their future careers.

Setting out to change students' values is a different proposition, both from the point of view of the integrity of the liberal first degree and from the point of view of practicability. Not all institutions would be able to achieve the small group sizes or clinical activity envisaged by Burridge and Webb, for example:

'Creating new but conventionally delivered lecture and seminar programmes addressing legal ethics and values will invariably be of limited effect. The more conventional modes of learning may raise some awareness of values and moral dilemmas, but they do little to increase the felt—or as Collier would have it, the “existential”—quality of more profoundly deep learning experiences. Even effective learning *about* values would benefit from learning processes that will enable a felt experience of, rather than a mere intellectual acquaintance with, those values.

If education is to go further, to enable students in true liberal fashion to reject unreflective customary beliefs and to sustain their continuing search for meaning and integrity in their lives, then the experiential dimension is critical. Students need to be given opportunities to participate directly in activities that uncover and engage their values and/or oblige them to confront some degree of inter-personal value conflict. Intensive, small group learning, based around a range of print or other media that are designed to encourage debate about values appear to have some effect, but practical activities like mentoring or other appropriately focused clinical or community involvement may have a stronger impact by virtue of the deeper engagement of students in “real world” decision-making.'

Setting explicit learning outcomes in terms of demonstrating *commitment* to values or *changing* attitudes or values is likely to be barrier to acceptance. Assessment of attitudes and values is controversial and unreliable and there would be cost implications in requiring programmes geared to changing attitudes or values. For these various reasons, it is suggested that promoting certain professional values is valid and feasible, but requiring that students demonstrate *commitment* to values, or *changing* attitudes or values, should not be a goal of the initial stage.

⁷⁸ A Evans and J Palermo 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year—2001—of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103.

⁷⁹ J Webb 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 28 *Journal of Law and Society* 134 at 142-4.

⁸⁰ See Boon 'Four Reports', *supra*.

There is every reason to take discussion of the values of legal education further. For the present, it is proposed that the legal ethics curriculum focuses on knowledge and understanding of the explicit and implicit values underpinning the legal system and professional ethics.

Motivation and character

One of the primary purposes of legal professions in requiring ethics education is to establish appropriate professional behaviour in potential entrants. It may be argued that there is no point teaching students about ethics at the initial stage unless this can be shown to have actually changed behaviour so as to build the character of the individual.

The consensus in the literature is that character and virtues are developed through the repetition of reasoned actions.⁸¹ Ideally, this involves performing a role under supervision, so that difficulties, dilemmas and temptations can be discussed. Donald Schon proposes a widely accepted model for one-to-one 'coaching' of reflection; seeing relationships between means, methods and results.⁸² This is a classic rationale for student law clinics providing 'an environment in which every aspect of legal work can be the object of the most painstaking planning, reflection and review.'⁸³ Kupfer describes the application of this model to a clinical programme in which she draws out the ethical issues confronted by her students.⁸⁴ This is an argument for linking a requirement to teach ethics with clinical or other resource intensive activity.

Rest argues that real life ethical decision-making derives from four distinct capacities of the individual:

recognition of an ethical issue;
judgment, in identifying ethical actions;
motivation, to act accordingly;
character, to see the action through.⁸⁵

It is unlikely that resources will be available to support high levels of experiential learning.⁸⁶ There are, however, indications that less resource intensive activity can have positive

⁸¹ Most authors agree that 'professional moral character' can only be built by making responses habitual; the conscious exercise of discretion during repeated ethical decision-making (W. Simon 'Ethical Discretion in Lawyering' 101:6 *Harvard Law Review* 1083, E.W. Myers "'Simple Truths" About Moral Education' (1996) 45 *The American University Law Review* 823, J. Webb, 'Inventing the Good: Prospectus for Clinical Education and the Teaching of Legal Ethics in England', (1996) 30:3 *The Law Teacher* 270, D. Nicholson 'Making lawyers moral? Ethical codes and moral character', (2005) 25:4 *Legal Studies* 601).

⁸² DA Schon, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (London, Jossey-Bass Publishers, 1987) at 17, DA Schon, *The Reflective Practitioner: How Professionals Think in Action* (New York, Basic Books, 1983). For discussion regarding the initial stage see A Boon, 'Skills in the Initial Stage of Legal Education: Theory and Practice for Transformation' in J Webb and C Maughan (eds.), *Teaching Lawyers' Skills*, London, Butterworths 1996).

⁸³ M Meltsner and G Shrag, 'Scenes from a Clinic', (1978) 127:1 *University of Pennsylvania Law Review* 1. See also DR Barnhizer, 'The Clinical Method of Legal Education: Its Theory and Implementation' (1979) 30 *Journal of Legal Education* 67. D Boud and D Walker 'Promoting Reflection in Professional Courses: the Challenge of Context' (1998) 23 *Studies in Higher Education* 191.

⁸⁴ SG Kupfer, 'Authentic Legal Practices', (1996) 10:1 *Georgetown Journal of Legal Ethics* 33.

⁸⁵ J Rest 'Background: Theory and Research' in J Rest and D Narvaez (eds.) *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ & Hove: Lawrence Erlbaum Associates, 1994) and discussion by Webb, *supra*, 290-2.

⁸⁶ See Pue, *supra*.

outcomes, for example on moral reasoning.⁸⁷ Development of recognition and judgement are assisted by discussion.⁸⁸ Motivation can also be supported to some extent by discussion and by working through hypothetical scenarios and simulations.

While higher levels of ethical performance, the third and fourth steps in the Rest hierarchy, will require practical experience, this may be specified for subsequent stages of education and training, like the period of work-based learning or even the post-qualification (CPD) phase.

The link between good habits and motivation and character is another reason for introducing professional ethics at the initial stage. The initial stage is appropriate to achieving recognition of the importance of ethics, the issues that arise and ways of tackling problems. It can also provide some experience for the exercise of sound judgement and lay the foundations of professional character. It is for subsequent stages, including CPD, to build an infrastructure, giving meaning to the 'cradle to grave' metaphor.

Skills and capacity for action

There is broad agreement that clinical legal education (CLE) is valuable in developing skills and students' capacity for judgement,⁸⁹ by providing experience for opportunities for analysis and evaluation though discussion. CLE can be important in promoting public service motivation or a 'public interest sub-culture' in the law school, perhaps counteracting a cynical attitude in some students.⁹⁰

There would be several problems in mandating CLE as a requirement of undergraduate legal study. First, such a move would have distinctly vocational overtones, departing from the focus of liberal education on developing the mind.⁹¹ Second, CLE is expensive to deliver, requiring more intense supervision than almost any other learning activity in law.⁹² Third, clinic usually demands supervision by practitioners. Most institutions would not have anyone suitable who was available for the intensive commitment required.

⁸⁷ Cunningham, a US academic, shows that requiring students to act in the role of moral decision-maker, combining theory with experiential teaching, and with only limited reliance on professional codes, had a positive effect on moral reasoning (CD Cunningham "How can we give up our child?" A practice-based approach to teaching legal ethics', (2008) 42: 3 *The Law Teacher* 312).

⁸⁸ As experience of teaching and learning on the LPC attests (N Fletcher, *Equality, Diversity and the Legal Practice Course: Research Study 49* (London, The Law Society, 2004) 58-60).

⁸⁹ See previous section and Michael Robertson, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' (2005) 8 *Legal Ethics* 222 at p227-8. A. Jones Teaching legal ethics in context (see <http://www.ukcle.ac.uk/resources/teaching-and-learning-strategies/teaching/>) last visited 5th September 2010.

⁹⁰ A. Boon 'Four Reports' *supra*, C. Parker 'What do they learn when they learn legal ethics?' *Legal Education Review*, 12 (1 & 2), 2001, 175-205.

⁹¹ This is a contestable proposition, but one that is unlikely to be resolvable. Burridge and Webb, like Robbins and Ormrod, dispute the idea that a liberal education cannot be relevant to a vocation. They recognise that some consider training the mind a sufficient goal of a liberal education, but this, they argue underplays the importance that education can play in developing a capacity for action (Burridge and Webb, *supra*. p86).

⁹² Law is funded on a basis that assumes a less intensive delivery mode than, for example, the sciences.

Bearing in mind that to set mandatory outcomes would require all qualifying law degree students meet them, insisting on CLE would be a step too far in prescribing an ethics curriculum. Some institutions offer some students clinic, while most would say it is impossible and incompatible with their mission. Accepting this limitation potentially limits the aims, objectives and outcomes of ethics education in the initial stage.

Outcomes

In determining the desired outcomes of an undergraduate ethics curriculum it is necessary to consider whether appropriate learning experiences can be delivered to support the achievement of outcomes and which outcomes can be verified by assessment. The means can be left to the ingenuity of the provider. It would be foolish, however, to ignore the viability of what is required in the light of the resource constraints that providers operate under.

The additional resources which various commentators agree are almost a pre-requisite of attempts to build motivation, character, attitudes and values are unlikely to be available. This suggests that implementing teaching methods and assessment that aim to achieve and test for such outcomes should perhaps be deferred until the vocational stage. The Legal Practice Course enjoys a good staff/student ratio compared to many undergraduate courses and, together with the period of work based learning, may offer better circumstances for the intensive interaction envisaged.

Australia is a model for this approach, the vocational stage prescribing the lawyers' skills of Problem Solving, Work Management and Business Skills, Trust and Office Accounting, with a range of practice areas. Ethics appears pervasively and with an independent curriculum, and the learning outcomes are more active (for example, 'demonstrated', 'discharged', 'complied', 'maintained') as follows:

Ethics and Professional Responsibility

Descriptor: An entry level lawyer should act ethically and demonstrate professional responsibility and professional courtesy in all dealings with clients, the courts, the community and other lawyers.

Element Performance criteria

The lawyer has competently;

1. Acting ethically

- identified any relevant ethical dimension of a particular situation.
- taken action which complies with professional ethical standards in that situation.

2. Discharging the legal duties and obligations of legal practitioners

- identified any duty or obligation imposed on the lawyer by law in a particular situation.
- discharged that duty or obligation according to law and good practice.

3. Complying with professional conduct rules

- identified any applicable rules of professional conduct.
- taken action which complies with those rules.

4. Complying with fiduciary duties

- recognised and complied with any fiduciary duty, according to law and good practice.

5. Avoiding conflicts of interest

- identified any potential or actual conflict, as soon as is reasonable in the circumstances.
- taken effective action to avoid a potential conflict or, where a conflict has already arisen, dealt with it in accordance with law and good practice.
- taken appropriate action, where applicable, to prevent such a conflict arising in the future.

6. Acting courteously

- demonstrated professional courtesy in all dealings with others.

7. Complying with rules relating to the charging of fees

- identified any rules applying to charging professional fees.
- complied with those rules, where they are relevant.
- maintained records and accounts in accordance with law and good practice.

8. Reflecting on wider issues

- reflected on that lawyer's professional performance in particular situations.
- brought to the attention of an employer or professional association any matters that require consideration or clarification.
- recognised the importance of pro bono contributions to legal practice.
- demonstrated an awareness that mismanagement of living and work practices can impair the lawyer's skills, productivity, health and family life.

Explanatory Note

This competency standard applies to:

- ethics;
- statutes and general law relating to the duties and obligations of legal practitioners;
- written and unwritten rules of professional conduct;
- written and unwritten rules of professional courtesy.

The duties and obligations imposed by law on legal practitioners include duties:

- of confidentiality;
- to maintain competence;
- to act honestly;
- not to mislead the court;
- not to pervert the course of justice or the due administration of justice.

Conflicts of interest commonly arise between:

- joint venture partners;
- directors and shareholders of a company;
- trustees and beneficiaries in a family trust;
- parties to any transaction where their interests potentially differ.

Deferring the more ambitious aims and outcomes of an ethics curriculum to the vocational stage has the additional advantage of avoiding having to specify 'practitioner activity', such as interviewing or negotiating, in the initial stage.

Aims and objectives

Learning outcomes spring from aims and objectives and it is therefore important to consider the point of an ethics curriculum for undergraduate lawyers. Some inspiration for appropriate objectives might be gained from the report by the American Bar Association task force (The MacCrate Commission), which in 1992, proposed four key professional objectives for legal education in American universities:

- providing competent representation,
- promoting justice, fairness and morality,
- maintaining and improving the profession and
- taking personal responsibility for one's own professional development.

Law students in the US undertake a law degree following a first degree, and are therefore more committed to legal careers. The current rationale for the English law degree dictates a less vocational orientation. While, therefore, the Law Society obviously hopes that an early

commitment to ethics will increase competent and ethical performance in practice, it is sensible to see the overarching aim of an ethics curriculum in terms of the development of students' understanding of law as well as their ethical awareness and sensibility.

Parker describes an undergraduate law course in ethics at Melbourne with aims that students would:

1. learn to identify the rules and norms that lawyers should apply in practice;
2. judge what roles lawyers do play in society and the justice system, and what roles lawyers ought to play; and
3. develop the skills necessary for ethical practice including skills for deliberating and negotiating with colleagues about ethical and social issues, effective client communication and other client care skills, and negotiation skills.

She suggests that such outcomes are achievable and that:

‘... we might be able to improve their learning outcomes by more explicitly teaching them a *reasoning or judgment process* that connects the application of rules about ethics, and a critical standpoint on rules and regulatory institutions, with personal values in the context of the skills required for the everyday practice of law. In other words, it is probably important for us to stop worrying so much about the content of what we teach in legal ethics courses — rules balanced against theory balanced against skills. Instead, we should focus some more attention on making explicit to our students the underlying assumptions, tools, and processes of thinking that we use, both in practice and in scholarship, to put life, theory, and rules together to make moral judgments about both specific individual practices and the practices of the whole profession.’⁹³

Conclusion

It is difficult to settle on a specific curriculum without clear aims. For the reasons considered above, it is proposed that the aims of the ethics curriculum at the initial stage should not be over-ambitious. They should be to establish clearly in students' minds the institutions of the legal system, the values that underpin them and the professions' roles in relation to them. This will provide the foundation for students' understanding of their own professional responsibility. It is therefore suggested that the appropriate aspiration for qualifying law degrees in England and Wales is to:

- further appreciation of the relationship between morality and law
- promote understanding of the role of the legal profession in supporting democracy and protecting justice and the rule of law
- provide opportunities for ethical decision-making
- promote the values of justice, honesty, integrity, critical self-reflection and respect for others
- stimulate reflection on the ethical challenges of legal practice and lay a foundation for ethical behaviour

⁹³ C. Parker ‘What do they learn when they learn legal ethics?’ *supra*.

These aims are obviously susceptible to change and refinement. They are intended as a basis for discussion.

Recommendation

On the basis of these aims it is recommended that the Law Society adopt a model curriculum for delivering legal ethics, based on, though not necessarily identical to, that appearing below.

A model curriculum for Legal Ethics

Aims and objectives of a legal ethics curriculum

Aim

To stimulate students to reflect on the nature of legal ethics, equip students with the knowledge and understanding to behave ethically and to play an active role in the formation of professional ethics

Objectives

To:

- further appreciation of the relationship between morality and law
- promote understanding of the role of the legal profession in supporting democracy and protecting justice and the rule of law
- provide opportunities for ethical decision-making
- promote the values of justice, honesty, integrity, critical self-reflection and respect for others
- stimulate reflection on the ethical challenges of practice and lay a foundation for ethical behaviour

Learning outcomes for a legal ethics curriculum

At the end of this course students should be able to:

- Explain the relationship between morality and Law,
- Identify values underpinning the legal system,
- Analyse the regulation of the legal services market,
- Debate ethical issues
- Evaluate the institutions, professional roles and ethics of the judiciary and legal professions
- Appraise the ethical responsibilities of lawyers
- Recognize and resolve ethical and other professional dilemmas
- Demonstrate awareness of potential ethical issues arising in legal employment

Model Ethics Syllabus

- a. Ethics and Law: Law and morality; Civil and human rights; Life, liberty and security of person; equality before the law; discrimination and diversity.
- b. System ethics and the administration of justice: democratic values, e.g equality (including equality before the law) freedom, access to and control of power; natural justice; the rule of law; independence of the judiciary, lawyers' responsibilities for defending the rule of law and upholding the administration of justice.
- c. Regulation of legal services: Structure of the legal services market; Regulators and regulated; Statutory objectives and professional principles; Regulation of entities; Professional responsibility in the workplace.

- d. Theory of professionalism: Relationship to the state; Market control and reserved activities; Professional ideals.
- e. Legal professions: Professional values; Professional bodies; Business organisation.
- f. Professional regulation: Representative and regulatory functions of professional bodies; education, training and conduct; investigation and discipline.
- g. Professional ethics: Codes of conduct; Duty to the Court and to the administration of justice; Duties to clients; Loyalty; competence; confidentiality; conflicts of interest.

This syllabus does not specify the orientation of material, although some aspects of it will inevitably be socio-legal.

It would be possible to disaggregate some elements e.g. section (a) for pervasive delivery. It would also be possible to separate the outcomes from the other elements of this course programme if an outcomes approach were adopted.

Question 3: An analysis of the most effective way of teaching ethics, discretely or pervasively

The issue of how best to deliver a professional ethics curriculum has been widely debated in the US. The main choice is seen as a subject taught in its own right, discretely, or as a 'pervasive' topic, that is, something that appears as part of the delivery of other subjects. Both methods have advantages and disadvantages.

Discrete delivery raises the profile of a subject, as with the seven foundations, ensuring that it is taken seriously. Discrete delivery also has the disadvantage that the material might only be delivered once and, if delivered early, could be forgotten, unless reinforced. If delivered at the end of the degree, some students may be a little more cynical and the opportunity to engage them at the earliest opportunity, when they are less so, will be lost.

A measure that would address the problems of early or late delivery would be to deliver legal ethics as a half subject in each of at least two years of the degree.

A criticism of discrete delivery of mandatory subjects is that staff and students may not like them. Delivered badly, classes could be boring or descend into lessons on meeting the 'letter of the ethical requirement',⁹⁴ establishing negative attitudes to ethics.

Pervasive delivery underlines the importance of material in a different way, by making it ubiquitous. Pervasive delivery risks failure to establish a firm foundation, with the material being lost or not delivered appropriately by lecturers more interested in the main subject. There are problems of credibility and potential difficulties in ensuring that material is assessed adequately if there is no single assessment.

The advantages and disadvantages of each method may grow or diminish depending on the objectives one is seeking to achieve. If for example, it was an objective that students had a solid understanding of the grounding in professional ethics it would be better to deliver the subject discretely. If it were important that students understood the moral dimensions of law, pervasive delivery would be useful in highlighting instances occurring throughout the curriculum.

The advantages of discrete and pervasive delivery might be optimised by using both methods to deliver different parts of the curriculum or to achieve different goals. Thus, for example, a foundation of professional ethics could be laid discretely, perhaps as a half subject, with 'the moral dimensions of law' taught pervasively.

Ethics as outcomes or as a Foundation subject

Requiring discrete delivery of Legal Ethics would necessitate adding it to 'the seven foundations of legal knowledge'. The rationale for the foundations in the current joint

⁹⁴ D L Rhode, 'Ethics by the Pervasive Method', (1992) 42 *Journal of Legal Education* 31.

statement is that they represent 'fundamental doctrines and principles which underpin the law of England and Wales' (See Annex 1, Schedule 1a(i)). They may also provide a broad based introduction to Law, the building blocks necessary for future specialisation, a preparation for practice, or all of these.

In 1996 the ACLEC report recommended that 'law schools should be left to decide for themselves, in the light of their own objectives, which areas of law will be studied in depth... [and] ...which (if any) shall be compulsory'.⁹⁵ The report was hailed by the committee chair as an opportunity to 'renew' the liberal law degree,⁹⁶ but was pre-empted by the decision, taken the year before, to add European Union Law as a foundation subject. This made the implementation of ACLEC's proposals, or further change to the joint statement, unlikely within a decade.⁹⁷

In fact, ACLEC's proposals were ambiguous about the place of professional ethics in the initial stage. Although much of the discussion hinted that this was an inevitable part of the proposals, it was not made explicit.⁹⁸

There have been suggestions for other additions to the seven foundations over the years. Proposing that Legal Ethics be added may re-open these debates, for good or ill. Increasing specialisation calls the existing seven subjects into increasing doubt but, as Birks argued, the retention of that core ensures that undue academic resources are focused on a few subjects, possibly at the expense of others.

In the case of the seven foundations, familiarity breeds content. Building a consensus for a new core might prove difficult. The alternative of setting outcomes for legal ethics would arise if the fixed core were abandoned, as envisaged by ACLEC. In that case, it would be feasible to have professionally determined outcomes for legal education in which legal ethics figure prominently, as also envisaged by ACLEC.

Putting Legal Ethics on the same basis as other compulsory material, i.e. the Foundation Subjects, would create an expectation that it would be delivered in the same way, that is, typically, discretely and over the course of the year. Prescribing ethics as outcomes would create an expectation that it would be delivered pervasively.

The experience of introducing the Day One Outcomes supports the case for discrete delivery as a Foundation subject. Section A of the Day One Outcomes, which contains material usually delivered at the initial stage, requires that students have knowledge of:

'the jurisdiction, authority and procedures of the legal institutions and the professions that initiate, develop and interpret the law' of 'the rules of professional conduct' and of the 'values and principles on which professional rules are constructed'.⁹⁹

Despite this, Economides and Rogers noted that only 18 law degrees and 5 mixed degrees offer 'ethics' in their courses. This suggests that the take up of the outcomes statement has

⁹⁵ ACLEC 1996 Report, para 4.19.

⁹⁶ B. Hepple *The Renewal of the Liberal Law Degree* (1996) 55 *The Cambridge Law Journal* 470.

⁹⁷ P. Birks 'Compulsory Subjects: Will the Seven Foundations Ever Crumble?' [1995] 1 *Web Journal of Current Legal Issues*.

⁹⁸ A. Boon 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2003) 5:1 *Legal Ethics* 35 at 39.

⁹⁹ Solicitors Regulation Authority Day one outcomes for qualification as a solicitor Version 2, April 2007.

been spasmodic at undergraduate level or that course teams assume that this material will be covered at the vocational stage. In fact, very few LPC courses would cover this material as this outcome intends. This probably means that this material is not being covered anywhere in many students' legal education.

It is not uncommon, when curriculum requirements are not specified in detail, that intended coverage is not achieved. During the early years of ethics teaching in Australia, teachers of legal ethics and professional responsibility were found to be 'relatively uncommitted to their development, success and implementation'.¹⁰⁰ Some schools did not offer much teaching and had not adopted innovations developed in the United States. It is quite predicable that if the professional bodies persevere with the seven foundations, but set only broad outcomes for an ethics curriculum, there may be little discernible impact on the legal education actually delivered.

If the Law Society were to decide to set only outcomes for the ethics curriculum, it should do so in the context of a reconsideration of the joint whole statement. The main issue would be whether to abandon the seven foundations and set only outcomes for qualifying law degrees. A valid point of comparison for this model is the US, where the American Bar Association (ABA) prescribes only outcomes and no specific content for accredited law courses. These are postgraduate courses, usually a JD (*Juris Doctor*), leading to a Bar exam for the State in which the candidate intends to practice. While no subjects or content is identified, a common pattern is to have a compulsory programme in year one comprising Civil Procedure, Constitutional Law, Contract, Criminal Law, Property, Torts, Legal Research and Legal Writing, followed by optional programmes in succeeding years.

The student learning outcomes for ABA accredited degrees contain a significant element of professional ethics and professional responsibility. This is specified in far greater detail than other content, as follows:

- (a) A law school shall identify, define, and disseminate the learning outcomes it seeks for its graduating students and for its program of legal education to enable its students to participate effectively, responsibly and ethically in the legal profession.
- (b) The learning outcomes shall be consistent with and support the stated mission and goals of the law school. The learning outcomes shall include:
 - (1) knowledge and understanding of the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
 - (2) proficiency as an entry level practitioner in:
 - (i) legal analysis and reasoning, legal research, problem solving, written and oral communication in a legal context;
 - (ii) the ability to recognize and resolve ethical and other professional dilemmas; and

¹⁰⁰ M Le Brun, "Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching" (2001) 12 *Legal Education Review* 269, R Johnstone and S Vignaendra Learning Outcomes and Curriculum Development in Law (2003) (A report commissioned by the Australian Universities Teaching Committee (AUTC))
http://cald.anu.edu.au/docs/AUTC_2003_Johnstone-Vignaendra.pdf

Alternative One

- (iii) a sufficient depth and breadth of other professional skills that the law school identifies as necessary for effective, responsible and ethical participation in the legal profession.

Or Alternative Two

- (iii) a sufficient depth and breadth of other professional skills that the law school identifies as necessary for effective, responsible and ethical participation in the legal profession, which shall include trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, factual investigation, organization and management of legal work, and drafting.
- (3) knowledge and understanding of:
- (i) a lawyer's ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
 - (ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and
 - (iii) a lawyer's responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them;
- (4) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals. The additional learning outcomes may be targeted for all students or only for students choosing particular courses of study.

In Canada, where the syllabus for Ethics and Professional Responsibility is prescribed (see above), the Federation of Law Societies of Canada Task Force concluded:

'... that the Federation leave it to law schools to determine how their graduates accomplish the required competencies. It has concluded, however, that the Federation should require applicants seeking entry to bar admission programs to demonstrate that they have had specific instruction in ethics and professionalism, in a stand-alone course dedicated to the subject. Ethics and professionalism lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.'¹⁰¹

These examples illustrate a more flexible approach to establishing the core of legal study. It would enable law schools to develop particular specialities reflecting the market and interests of their students. In reality, most Schools would probably continue to deliver the existing core, together with additional material to meet requirements in relation to the legal ethics curriculum. The flexibility permitted may, however, be attractive to the academy.

¹⁰¹ *Supra.*

Conclusion

In introducing an ethics curriculum, The Law Society will have a series of negotiations to conduct, with the SRA, the Bar, the Joint Academic Stage Board (JASB), the law schools and the LSB. It may be desirable to keep a number of options open.

Of the various available possibilities, it is likely that adding outcomes to the joint statement would be the easiest way forward. This, however, would not necessarily bring desired results.

If the joint statement is maintained in its present form, Legal Ethics will only receive the attention that the Law Society thinks the subject requires, if it becomes a Foundation subject.

Since further expansion of the professional core is likely to be resisted in principle, it would be wise to decide whether to accept that Legal Ethics should not increase coverage of the professional core beyond the one and a half years' study (or 180 credits) currently required in the joint statement.¹⁰² This would either involve dropping or amalgamating existing foundation subjects or requiring less coverage of each.

An alternative course of action would be to amend the joint statement to conform to the Day One Outcomes (with these being slightly amended to more completely reflect whatever Legal Ethics component it is decided is appropriate). This would clarify that the requirement that students study:

‘the jurisdiction, authority and procedures of the legal institutions and the professions that initiate, develop and interpret the law’ of ‘the rules of professional conduct’ and of the ‘values and principles on which professional rules are constructed’¹⁰³

relates to the initial stage.

A further option would be to abandon subject specification in favour of broad outcomes in the joint statement.

Since the best course of action may depend on support at the Joint Academic Stage Board, it would be sensible for the Law Society or SRA to discuss with the responsible parties at the Bar whether there is a mutual interest in this agenda and how best to take it forward.

Recommendation:

That a substantial core of the Legal Ethics curriculum be delivered discretely, preferably as a full Foundation subject.

If this is not possible, the Law Society should consider the following options: that the Legal Ethics curriculum be delivered as a half Foundation subject with pervasive delivery of other, substantial elements or that the joint statement be revised to conform to the Day One Outcomes (as amended to reflect the proposed ethics curriculum), or that the joint statement specifies the outcomes of legal education only, leaving providers to propose appropriate ways of achieving those outcomes.

¹⁰² *Supra.* Para 2.(v).

¹⁰³ SRA Training Framework 'Day One Outcomes', *supra.*

Question 4: A consideration of the resource implications for law schools, and proposals for how the Law Society may be able to assist in overcoming these issues

Economides and Rogers note that there are presently adequate publications on the market for delivery of professional ethics at degree level. These might be supplemented by additional materials held on line by the Law Society or at some other site, for example, by the UK Centre for Legal Education.

The Hunt report made some further recommendations that might also support the ethics curriculum by improving the resources available. The Law Society might, for example, provide a forum for discussions within the profession about ethical standards, values and dissemination,¹⁰⁴ give greater prominence to Solicitors Disciplinary Tribunal (SDT) rulings¹⁰⁵ and provide regular email updates and other forms of direct communication.¹⁰⁶ Other resource implications for Law Schools depend on the aims, objectives and outcomes specified for the ethics curriculum.

Even assuming that the Law Society accepted the outcomes and syllabus recommended here, many law Schools might argue that they do not have presently have the resources to add a new subject to the curriculum. There are two issues here. The first is an internal one of redeploying staff, since only the same amount of teaching time would be needed. The second issue is expertise and development cost. It is possible that the Law Society might help to develop subject expertise by helping in 'training the trainers'. Hunt recommended replacing call centre guidance with named individuals or groups,¹⁰⁷ and these might contribute to this project. Second, the Law Society might contribute to developing materials and providing a site for such materials online. Third, the Law Society needs to consider the lead time necessary before any change is implemented.¹⁰⁸

Delivering some of the more ambitious aims of an ethics curriculum might involve additional resources. If, for example, it were decided that every law student were to have clinical experience the cost would be substantial. It would be too risky to set such an aim expecting to use volunteer practitioners, for example. The Ford Foundation apparently put up \$18 million to offer clinical experience across US law Schools. Providing the resource to support small group tutorials would also be a substantial cost. Admissions to straight law degrees are approaching eighteen and a half thousand.¹⁰⁹ That represents 1,156 tutorial groups of 16. To halve those groups for the whole cohort for a period of ten weeks would cost over £460,000 per annum,¹¹⁰ assuming a modest cost of around £40 per hour for part time visiting lecturers.

¹⁰⁴ Hunt Review, Recommendation 77.

¹⁰⁵ *Id.* Recommendation 49-51 (see also M. Buck 'Situational ethics' *Solicitors Journal* 26/145 6th July 2001)..

¹⁰⁶ *Id.* Recommendation 55.

¹⁰⁷ Hunt Review, Recommendation 56.

¹⁰⁸ When European Union was added to the seven foundations a lot of resentment was caused because only nine months was given of the change (see Birks, *supra*).

¹⁰⁹ J. Hodges 'Number of students starting law courses reaches new high' *Legal Week* (<http://www.legalweek.com/legal-week/news/1560826/number-students-starting-law-courses-reaches>) last visited 13th September.

¹¹⁰ Costs could be substantially higher if all non-single honours programmes and Graduate Diploma courses are included.

Conclusion

The costs that might be incurred by Law Schools in delivering a legal ethics curriculum would depend on what is required by the Law Society. If the conclusions and recommendations set out thus far are accepted, there would not be a need for significant additional resources. It is suggested that investment should be made in raising the profile of ethics in the profession generally and in creating resources to support a stronger focus on professional ethics at training and post qualification stages. It is suggested that the Law Society remain open minded about the form that any assistance might take. If resources are available, financial or material assistance might be offered on an *ad hoc* basis in response to bids, much as the City Solicitors Educational Trust assists by funding posts to deliver core subjects.

The greatest single practical difficulty for Law Schools would lie in developing expertise to deliver the curriculum and redirecting personnel. The feasibility of implementation therefore lies in the lead time allowed before curriculum change takes effect.

Recommendation

That the Law Society explore with the Law Schools:

- a) What timescale for the implementation of proposals is reasonable and
- b) Whether financial or other assistance is necessary to deliver the ethics curriculum and, if so,
- c) What form such assistance might take.

Andy Boon
September 2010

Appendices

Appendix 1 - Joint Statement on Qualifying Law Degrees

Appendix 2 - Day One Outcomes for Qualification as a Solicitor

Appendix 1

A Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining an Undergraduate Degree (with footnotes removed)

1. Under the Courts and Legal Services Act 1990 (as amended) the Law Society and Bar Council are responsible for laying down the qualification regulations in respect of those seeking to qualify as solicitors and barristers. The Law Society and Bar Council have agreed to act jointly in respect of the first or academic stage of training where that stage is satisfied by the completion of a degree or approved CPE course. This document sets out the conditions which must be satisfied in respect of undergraduate degree courses.
2. Following consultation with the Association of Law Teachers (ALT), the Committee of Heads of University Law Schools (CHULS) and the Society of Public Teachers of Law, (SPTL) the Law Society and Bar Council (the professional bodies) will recognise a course of study leading to the award of an undergraduate degree as satisfying the requirements of the initial or academic stage of training if:
 - i. The institution providing the course of study satisfies the professional bodies that adequate learning resources are provided to support the course of study, the professional bodies having regard to any advice of the Joint Committee on Standards in Legal Education or similar successor body.
 - ii. The higher education institution awarding the degree of which the course of study is part has degree awarding powers conferred by the Privy Council.
 - iii. The standards of achievement expected of students undertaking the course of study are set at or above the minimum level of performance as set out in the QAA Benchmark Standards for Law Degrees in England, Wales and Northern Ireland.
 - iv. The course of study includes the study of legal subjects for the equivalent of not less than two years out of a three year or four year course of study, (for example, a student must gain not less than 240 credits in the study of legal subjects in a 360 or 480 credit degree programme) but existing mixed degrees that are currently recognised as qualifying law degrees under the Joint Announcement of January 1995 shall continue to be recognised for students embarking on such courses before a date to be specified when alternative arrangements for mixed degrees are agreed. Such date shall not be before 1 September 2001.
 - v. The coverage of those legal subjects referred to in the professional bodies' qualifying regulations as the Foundations of Legal Knowledge³ must involve not less than one and a half years study ie the coverage of the Foundations shall amount to not less than 180 credits. Courses involving the study of aspects of the English Legal System will be allowed to count towards these 180 credits. The remaining half year or 60 credits in law must be achieved by the study of legal subjects. A legal subject means the study of law broadly interpreted. The professional bodies reserve the right, after consultation with the university law schools to amend the list of Foundations.
 - vi. The course of study will normally be spread over the full duration of the degree course. Some study of legal subjects will be expected to take place in the final year of the degree course.⁵

- vii. The course of study will be one which satisfies the external examiners of the degree programme of which it forms part that, in addition to the Areas of Performance set out in the Benchmark Standards, the students on that course of study should have acquired the knowledge and general transferable skills set out in Schedule One.
3. Any law school which has problems in meeting the requirements of this Statement should contact the directors of training of the professional bodies who will consult with the heads of CHULS, ALT and SPTL. Where necessary, the outcome of the consultation will be reported to the respective training committees whose decision will be final.
4. The professional bodies reserve the right to issue guidance, either directly or through the providers of their vocational courses, to persons considering entry to the vocational stage of training of those areas of law that students enrolling on the vocational courses are expected to have current knowledge.
5. The institution offering the course of study will provide the professional bodies with any information about the course they may require to enable them to discharge their responsibilities under the Courts and Legal Services Act and this Statement and will permit representatives of the professional bodies to visit the institution to discuss any aspects of the course with representatives of the institutions, members of the course team and students enrolled on the course.
6. The professional bodies reserve the right to withdraw recognition from any course of study that fails to comply with the conditions set out in this Statement or fails to meet minimum standards prescribed by QAA.

SCHEDULE ONE

The knowledge and transferable skills which should be addressed in any course of study leading to the award of a degree recognised by the Law Society and General Council of the Bar as satisfying the initial or academic stage of training are as follows:

a. Knowledge

Students should have acquired:

- i. Knowledge and understanding of the fundamental doctrines and principles which underpin the law of England and Wales particularly in the Foundations of Legal Knowledge;
- ii. A basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered and the personnel who practice law;
- iii. The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between them in a number of particular areas;
- iv. The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters; and to apply the findings of such work to the solution of legal problems; and

- v. The ability to communicate these, both orally and in writing, appropriately to the needs of a variety of audiences.

b. General Transferable Skills

Students should be able:

- i. To apply knowledge to complex situations;
- ii. To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them;
- iii. To select key relevant issues for research and to formulate them with clarity;
- iv. To use standard paper and electronic resources to produce up-to-date information;
- v. To make a personal and reasoned judgement based on an informed understanding of standard arguments in the area of law in question;
- vi. To use the English language and legal terminology with care and accuracy;
- vii. To conduct efficient searches of websites to locate relevant information; to exchange documents by email and manage information exchanges by email;
- viii. To produce word-processed text and to present it in an appropriate form.

SCHEDULE TWO

The Foundations of Legal Knowledge are:

- a. The key elements and general principles of the following areas of legal study:
 - i. Public Law, including Constitutional Law, Administrative Law and Human Rights;
 - ii. Law of the European Union;
 - iii. Criminal Law;
 - iv. Obligations including Contract, Restitution and Tort;
 - v. Property Law; and
 - vi. Equity and the Law of Trusts.

In addition, students are expected to have received training in legal research.

Supplement to Joint Statement

Mixed degrees, conversion of courses and senior status degrees

Background

1. The Application to the Lord Chancellor by the Law Society and Bar Council of 2 August 1999 containing the Joint Statement on the Academic Stage of Legal Education specifically excluded "conversion courses, mixed degrees and senior status degrees" (para 4). This Statement covers those degrees.

The general provisions

2. All conversion courses, mixed degrees and senior status degrees which satisfy the requirements of the Joint Statement are recognised in the same way as other law degrees.
3. The Learning outcomes set out in Schedules One and Two of the Joint Statement shall be required for all conversion courses, mixed degrees and senior status degrees. Certain of the general transferable skills (notably items vii and viii) may be demonstrated through exercises in non-law subjects.
4. The remainder of the Joint Statement shall apply to conversion courses, mixed degrees and senior status degrees with the modifications set out as below.

Mixed degrees

5. In any case where there is doubt as to whether there is sufficient appropriate credit, this will be considered on an ad hoc basis under the provisions of para 3 of that Statement.

Senior status degrees

6. Senior status degrees cover both undergraduate and postgraduate law degrees for students who have already obtained an undergraduate degree (or equivalent) in another subject.
7. Such degrees will be recognised provided that the student undertakes no less than 220 credits in the study of legal subjects and that the student satisfies the requirements of para 2 (v) concerning the Foundations of Legal Knowledge.

Conversion courses

8. Approved courses leading to the Common Professional Examination are recognised. Such courses are expected to provide an equivalent to the Foundations of Legal Knowledge set out in para 2 (v) within the one-year period of study. Page 8 of 8

Implementation

9. It is proposed that this Statement will come into force in September 2002

Appendix 2

Solicitors Regulation Authority

Day one outcomes for qualification as a solicitor

Version 2, April 2007

At the point of admission, a solicitor should be able to demonstrate:**A Core knowledge and understanding¹ of the law applied in England and Wales**

Knowledge of:

- the jurisdiction, authority and procedures of the legal institutions and professions that initiate, develop, interpret and apply the law of England and Wales and the European Union;
- applicable constitutional law and judicial review processes;
- the rules of professional conduct, including the Solicitors' Accounts Rules; and
- the regulatory and fiscal frameworks within which business, legal and financial services transactions are conducted.

Understanding of:

- Contract law;
- Torts;
- Criminal law;
- Property law;
- Equitable rights and obligations;
- Human rights; and
- The laws applicable to business structures and the concept of legal personality.

(¹ Knowledge should be demonstrated by the ability to explain, in relation to a particular area: key principles, facts, rules, methods and procedures. Understanding requires demonstration of higher level skills: working with, manipulating and applying knowledge in familiar and unfamiliar situations.)

B Intellectual, analytical and problem-solving skills

The ability to:

- review, consolidate, extend and apply knowledge and understanding;
- frame appropriate questions to identify clients' problems and objectives, and to obtain relevant information;
- evaluate information, arguments, assumptions and concepts;
- identify a range of solutions;
- evaluate the merits and risks of solutions;
- communicate information, ideas, problems and solutions to clients, colleagues and other professionals; and
- initiate and progress projects.

C Transactional and dispute resolution skills

The ability to:

- establish business structures and transfer businesses;
- seek resolution of civil and criminal matters;
- establish and transfer proprietary rights and interests;
- obtain a grant of probate and administer an estate;
- draft legal documentation to facilitate the above transactions and matters; and

- plan and progress transactions and matters expeditiously and with propriety.

D Legal, professional and client relationship knowledge and skills

Knowledge of:

- the legal services market; and
- commercial factors affecting legal practice.

The ability to:

- undertake factual and legal research using paper and electronic media;
- use technology to store, retrieve and analyse information;
Version 2, April 2007 Page 3 of 3 www.sra.org.uk
- communicate effectively, orally and in writing, with clients, colleagues and other professionals;
- advocate a case on behalf of a client;
- exercise solicitors' rights of audience;
- recognise clients' financial, commercial and personal priorities and constraints;
- exercise effective client relationship management skills; and
- act appropriately if a client is dissatisfied with advice or services provided.

E Personal development and work management skills

The ability to:

- recognise personal and professional strengths and weaknesses;
- identify the limits of personal knowledge and skills;
- develop strategies to enhance professional performance;
- manage personal workload;
- employ risk management skills;
- manage efficiently, effectively and concurrently a number of client matters;
and
- work effectively as a team-member.

F Professional values, behaviours, attitudes and ethics

Knowledge of the values and principles upon which the rules of professional conduct have been developed.

The ability to:

- behave professionally and with integrity;
- identify issues of culture, disability and diversity;
- respond appropriately and effectively to the above issues in dealings with clients, colleagues and others from a range of social, economic and ethnic backgrounds; and
- recognise and resolve ethical dilemmas.