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PREPARING ETHICAL LAWYERS: A PRESCRIPTION AND A PRACTICAL PROPOSAL

Nigel Duncan

DRAFT – NOT TO BE CITED

This report represents an attempt to respond to the identification of the desideratum of the introduction of aspirant lawyers to professional ethics.¹ It reports on the findings of an international survey of law schools and proposes an international resource which will assist interested colleagues in collaborating in legal ethics education. The project was funded by a National Teaching Fellowship² provided by the UK Higher Education Academy to the author in 2004. I brought to the task an interest in providing experiential education through which students are encouraged to think deeply about ethical issues and gain experience of teaching by conventional classes, simulations and live clinical work on undergraduate and postgraduate academic law degrees and on the Bar Vocational Course.³ Few law graduates are introduced to any deep discussion of professional legal ethics. The UK professional courses, only one year long and strongly focused on practice skills, attempt to ensure student knowledge of the Codes, recognition of ethical dilemmas, and Code compliance in relation to those dilemmas. However, there is a limited attempt to venture deeper or more broadly into underlying principles.⁴

This arises from a problem which manifests itself in various forms in legal education in most jurisdictions. Law, although one of the longer-standing disciplines within universities, has struggled to gain recognition as an academic discipline in the fullest sense of the word. Students and the professions put pressure on law schools to provide vocational training to prepare the former for legal practice. This, however, can lead to narrow and minimally intellectual programmes. University law schools have therefore resisted such pressures and instead design degree courses that use law as a vehicle for ensuring that their students receive a more rounded education. Nonetheless, demands may be imposed by the professions. In the USA, where considerable academic autonomy is the norm,

¹ Report developed from a presentation given at the Third International Legal Ethics Conference, Gold Coast, Australia, July 2008.

² The current Fellowship scheme is described at www.heacademy.ac.uk/ourwork/professional/ntfs (accessed 19 May 2010).

³ The postgraduate professional course that aspirant barristers must pass before entering pupillage.

⁴ For one such attempt, see Nigel Duncan, 'The Letter and Spirit of the Code' in Ros Carne (ed), *Professional Conduct* (Oxford University Press, 2009) 47.

Professional Responsibility is the one required course of the JD.⁵ In Australia, law degrees must teach all 11 of the ‘Priestley Eleven’⁶ subjects required by the profession (which include Professional Conduct) if they are to qualify for practice, and students must receive further postgraduate training focused on legal practice.⁷ In the UK degrees must contain the ‘foundations of legal knowledge’.⁸

The focus of this project was therefore on ways of incorporating professional legal ethics into the undergraduate curriculum in the UK context. This, it was hoped, would provide insights which would also be of value in jurisdictions where legal education was differently structured.

The original goal was to prepare a document (or group of documents), which was to be uploaded to the website of the UK Centre for Legal Education.⁹ This would be an open-access source for law teachers to use. It would present different ways of addressing legal ethics within the curriculum, encompassing curriculum design, subject content and learning goals, and presenting arguments in respect of each. In addition, concrete examples of learning methods and materials were to be provided for colleagues to adopt or to adapt as they chose.

My previous work in the field¹⁰ had led me to realise that a wide variety of approaches were being used in different contexts. My editorship of *The Law Teacher*, and engagement with organisations

⁵ American Bar Association Standard 302(a)(5), www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf (accessed 19 May 2010).

⁶ The Priestly Eleven are: Tort Law, Criminal Law, Contract Law, Administrative Law, Company Law, Civil Procedure, Evidence, Equity and Trusts, Real and Personal Property Law, Federal and State Constitutional Law, and Professional Conduct and Basic Trust Accounting (my emphasis).

⁷ Nigel Duncan and Susan Kay, ‘Addressing Lawyer Competence, Ethics and Professionalism’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, forthcoming 2010).

⁸ Public Law (including Constitutional Law, Administrative Law and Human Rights); Law of the European Union; Criminal Law; Obligations (including Contract, Restitution and Tort); Property Law; and Equity and the Law of Trusts. Students are also expected to have appropriate expertise in Legal Research Skills, the English Legal System and another area of legal study. This is required by the Joint Statement of the Bar Standards Board and the Solicitors Regulation Authority; see www.barstandardsboard.org.uk/assets/documents/JAS%20Handbook%202010.pdf (accessed 19 May 2010)

⁹ For details of this organisation, see www.ukcle.ac.uk/index.html (accessed 19 May 2010).

¹⁰ Nigel Duncan, ‘Principles in Practice: Ethics and Clinical Methods’, in H Brayne, N Duncan and R Grimes, *Clinical Legal Education* (Blackstone Press, 1998); ‘Responsibility and Ethics in Professional Legal Education’ in R Burridge et al (eds), *Effective Learning and Teaching in Legal Education* (Kogan Page, 2002); ‘Ethical Practice and Clinical Legal Education’ (2005) 7 *International Journal of Clinical Legal Education* 7; ‘Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales’ (2004) 20 *Georgia State University Law Review* 911; ‘Training and Licensing Lawyers in England and Wales’ (2005) 74(4) *Bar Examiner* (2005) 16.

active in the field,¹¹ had also broadened my insights. To build on this foundation, the project incorporated three main activities.

One was to conduct a study tour to a number of universities in Australia and New Zealand where colleagues had actively addressed the need to focus on professional legal ethics teaching.¹² The second was to test out ideas by running workshops with delegates at conferences concerned with legal education.¹³ The final activity was to conduct a survey, which is presented in detail below.

Survey of Legal Ethics Teaching

Pilot Interviews

One of the conferences at which I was holding workshops was organised by the Global Alliance for Justice Education (GAJE), held in Cordoba, Argentina in 2006.¹⁴ Sara Chandler and I conducted interviews¹⁵ of delegates who taught law students. The questions we asked included:

- Whether the teaching of professional ethics was mandatory (and if so, whether mandated by the state or by the professional body).
- Whether professional ethics was taught, and if so, whether it:

¹¹ Specifically, in 1994, the Practice, Profession and Ethics subject section of the SPTL (now SLS) (see www.legalscholars.ac.uk/sections/section_homepage.cfm?id=9); the UK Clinical Legal Education Organisation (www.ukcle.ac.uk/resources/clinic/index.html); and, in 1996, the Global Alliance for Justice Education (www.gaje.org). All websites accessed 19 May 2010.

¹² I visited colleagues at University of Canterbury, Christchurch; Griffith University; University of Queensland; Monash University; La Trobe University; Deakin University; University of Melbourne; Flinders University; and the Australian Law Reform Commission. I am grateful to colleagues for their offers of facilities, access to materials, and their ideas and proposals.

¹³ These consisted of role-play and brainstorming sessions and focused on how to use materials drawn from my own students' clinical experiences to offer valuable learning to students unable to have that experience directly.

¹⁴ This conference series brings together legal educators with a particular interest in social justice issues (and often in clinical learning methods) with those working in social justice-oriented NGOs. I delivered workshops to explore methods of learning about ethical behaviour with three groups of learners: undergraduate students; students on professional programmes (designed and presented by Sara Chandler); and practitioners post qualification (designed by Adrian Evans). This particular conference was attended by delegates from 26 jurisdictions, which prompted our decision to conduct the interviews.

¹⁵ The conference and interviews are reported more fully in Sara Chandler and Nigel Duncan, 'Learning Professional Ethics—An International Perspective' (2006) 9 *Legal Ethics* 160.

- took place in the classroom,
- took place in the form of a clinical activity,
- was assessed, and if so, how.
- Whether the aim was simply to learn a Code or to address other issues, such as underlying values, social justice issues, etc.
- Where clinical methods were used, how students were prepared for ethical dilemmas and how supervision addressed problems in practice.

We treated this process as one of piloting our questions. The process of asking the questions itself alerted us to inadequacies in the ways in which we had expressed our requests and also to further questions that we should be asking. We met at the end of each day to compare our results and to adjust our questions in the light of our experiences.

First survey: questionnaire

As a result of the pilot we designed a questionnaire for electronic delivery to two groups of respondents. One was formed of appropriate academics in each UK law school. The second, more random group consisted of as many contacts as we could discover in non-UK jurisdictions. This list included members of the GAJE alliance, a number of personal contacts, and others suggested to us by colleagues. Thus, the survey can make no claim to be representative. The international survey is also skewed towards clinicians and others interested in active learning methods.

The survey instrument started with a request for contact details and then asked whether the employing institution was a UK law school or not. Those attached to UK law schools were then asked a series of questions designed to address the standard structure of law programmes in the UK. Academics from non-UK law schools were asked similar information, but in a more general framework to cater for different course structures. In both cases respondents were asked where (if at all) legal ethics was taught and, if so, whether it was taught within specific modules or pervasively.

All respondents were asked whether the teaching of ethics was regulated, and if so by whom. The survey then turned to learning methods and asked the following questions. Wherever 'Other' was an alternative there was an opportunity for respondents to explain their differing practice.

- Is ethics taught in the classroom?
- Is ethics taught in a clinic?
- What learning methods are used to teach ethics (select all that apply)
 - Lecture

- Problem-solving scenarios
- Small group workshops
- Clinic supervision discussions
- Clinic seminars
- Other
- Who teaches ethics?
 - Academic staff alone
 - Practitioners alone
 - Both academic staff and practitioners
- What is the content of the teaching of ethics? (select all that apply)
 - Formal sources, eg: Code of Conduct, Rules of Professional Conduct
 - Social context, eg: Discrimination, poverty.
 - Philosophical context
 - Other
- What books, teaching materials and other sources do you use for the teaching of ethics?

We then gave respondents an opportunity to express themselves more fully:

- If you have any observations on the teaching of professional ethics in your jurisdiction or in your institution, please feel free to present them here. Your observations will remain anonymous.
- If you have any suggestions for the effective teaching of ethics please feel free to present them here. Your suggestions will remain anonymous.

Finally, we anticipated further contact with interested participants and asked:

- Would you be willing for us to contact you in order to discuss further issues concerning the teaching of professional ethics?

Over 95 per cent of those who responded to the survey answered in the affirmative, which provided a basis for a more qualitative follow-up questionnaire (see below).

First survey: findings¹⁶

¹⁶ Please note that some respondents only answered questions selectively. The numbers do not, therefore, necessarily add up.

We received 85 responses to our first survey, of which 38 were from UK law schools and 47 were from other jurisdictions. The breakdown of international respondents was as follows:

USA	25	Chile	1
South Africa	5	China	1
Australia	3	Japan	1
Argentina	3	Kuwait	1
Nigeria	3	Poland	1
India	2	Russia	1

Answers to the question about the content of ethics courses are summarised below. The reader is asked to bear in mind that respondents could choose as many responses as they wished:

Figure 1: What Content is Addressed?

This indicated a strong preponderance for addressing formal sources such as the Codes in all jurisdictions, particularly in the USA. The sample is too small to draw conclusions about the relative interest in other content, but the social context appears to be of greater interest than the philosophical context, except in the USA.

The underlying reasons for these choices were shown by respondents' statements regarding desired learning outcomes:

- 'motivate students to use their legal skills to ensure justice'
- 'identify their own deeply-held ethical priorities and ... acquire the courage to apply them'
- 'coherent self-view as lawyers ... make their own moral choices'
- 'learn about the ethical demands of the legal profession and examine how these demands impact on their own moral standards and reasoning'
- 'an ability to question and assess, rather than accept uncritically, professional rules'
- 'an alternative way to look at legal rules and their operation and set them in a wider context'

The learning methods adopted were as follows, showing a remarkable consistency across the different jurisdictions. However, it should be noted that the preponderance of clinicians amongst the respondents may explain both the consistency and the relatively high proportion of clinic supervision and clinic seminars as learning methods.

Figure 2: Learning Methods

Again, it is interesting to compare this pattern with comments about learning methods made by participants in our second survey. A number of participants were concerned to warn against practices they had found ineffective:

‘ethics should not be taught in large classes!’

‘I find the lecture method very discouraging. I can’t think of a worse way to facilitate learning about ethics. Problem-solving scenarios are a little better; but the best methods by far are experiential’

‘memorization of abstract rules, removed from conflicting pressures of practice, does not constitute learning about ethics’

There were also positive recommendations:

‘cost/time-effective: ... small group workshops using problem-solving scenarios’

‘... main delivery ought to be clinical discussions and clinical seminars’

The fact that a high proportion of the respondents were clinicians did not, however, prevent them from supplying warnings about the difficulties of live clinical work:

‘they may well limit how radical a solution can be advanced (for insurance and professional conduct reasons)’

However, solutions were also proposed to this:

‘Ideally students will be required to build on their live client experience by undertaking analysis and reflection of ethical issues ... taking the discussion further and adding rigour and consistency through the use of hypothetical extensions to the real life experience and by structured seminar type discussions with a requirement for advance preparation.’

Questions about whether ethics should be taught pervasively or in discrete modules produced a number of interesting findings. The first related to UK legal education. Those teaching on academic degrees predominantly used discrete modules (27 as opposed to 6 working pervasively). However, this was reversed on the professional courses (3 taught on discrete modules as opposed to 11 taught pervasively).

The other finding will not surprise readers of the considerable literature on the pervasive teaching of legal ethics. Most respondents wanted a combination of the two, analogous to Deborah Rhode’s

‘ethics by the continuing method’.¹⁷ This could involve dedicated modules early in a student’s legal education, a requirement that some, at least, of the other modules address legal ethics within the context of the substantive area being studied, and a later module, perhaps clinically-focused.

Respondents to our second survey, however, were sceptical as to whether this was likely to be widely achieved. Some obstacles were identified as:

‘not enough time in the curriculum ...’

‘not going to happen as lecturers with no interest or education in legal ethics will not teach it’

‘teaching ... would have to be far more ... respected in academe. As long as scholarship is the only coin of the realm, that can’t happen’

Others did propose what was required to achieve this change:

‘persistent faculty dialog may produce incremental change’

‘initially, it will involve a high degree of communication and co-operation within the law school’

‘acquiring political power in the law school ... is the only ultimately effective method’

However, these are not simple goals, nor is anyone likely to regard them as easy to achieve.

The second survey: questionnaire

The high proportion of respondents who indicated their willingness to participate in further discussion prompted a second survey designed to give respondents the opportunity to express more considered views and to offer concrete examples of their approaches. We asked the following questions:¹⁸

In our survey we asked about content. The results were:

- Formal rules: 94%
- Social context: 68%
- Philosophical context: 65%
- Other (inc. life skills, personal morality and psychology of ethics): 26%

Please explain what you think are the most valuable learning outcomes to be sought from the study of ethics in the law curriculum, and why.

¹⁷ Deborah Rhode, ‘Ethics by the Pervasive Method’ (1992) 42 *Journal of Legal Education* 31, 53.

¹⁸ Most of these started with a presentation of the findings from the first survey as the context for the question that followed.

We asked whether ethics was taught pervasively or in one or more discrete modules. The results were:

- UK law schools:
- Pervasive: 30%
- One or more modules: 70%
- Non-UK law schools:
- Pervasive: 13.5%
- One or more modules: 86.5%

Please say which you think to be the more effective, and why.

What proposals do you have for achieving the method you prefer in practice?

We asked what learning methods were used. The results were:

- Lecture: 92%
- Problem-solving scenarios: 85%
- Small group workshops: 57%
- Clinic supervision discussions: 52%
- Clinic seminars: 39%
- Other (inc. socio-economic surveys): 26%

What methods or combination of methods do you favour for achieving your learning goals and why?

One concern expressed by a respondent was: 'the controversy between the content of teaching and the poor quality of professional conduct, including the low level of professional responsibility'.

Are there any tensions between what is taught at law school and what is practised in the profession? If so, please give examples and explain the impact.

We would greatly appreciate it if you were willing to forward any case studies. We envisage two types of case study:

- case studies used effectively with your students;
- case illustrations of learning methodologies.

If you are willing to do so, please say whether we have permission to make use of them in presentation and publications, and if so, whether you wish to have them attributed to you or to remain anonymous.

Second Survey: Findings

We received 34 responses from nine jurisdictions.

Some of the findings that relate to issues arising from the first survey have been presented above. Others are not susceptible to statistical presentation. Most take the form of practical examples of teaching materials or methods of addressing ethical issues and present a wide variety of proposals. Many assume levels of funding which are not available outside the wealthier institutions in the developed world, but there are alternatives. One, from a developing country, involved students travelling out to villages in order to carry out a socio-legal report on the status of the poor people in the village. This could then be used as the basis of Street Law projects or to support campaigning on social justice issues of specific relevance to those people. This is not the place for a presentation of these and other proposals, although they are intended to become part of the resource that I present in the following sections of this paper.

Summary

This survey was uneven and on a small scale. It did, however, tend to confirm that the teaching of legal ethics was patchy and often restricted to Code-compliance at stages of education recognised as clearly vocational in aim. While there were isolated examples of deeper approaches, few patterns could be discerned.

A positive outcome of the survey was the variety of approaches suggested and the willingness on the part of many respondents to share their materials and ideas. It is this, together with the results of the other work undertaken as part of the National Teaching Fellowship project, that informed developments in plans for disseminating findings.

Developing Effective Dissemination

The activities described above provided fresh insights into the issues surrounding the teaching of legal ethics and a considerable number of examples of good practice, in terms of curriculum design, student learning activity, arguments for introducing legal ethics into the curriculum, and particular approaches to doing so. However, the limitations of the work made it clear that I had only scratched the surface. What is more, it became clear that the initial goal of my National Teaching Fellowship project carried a fundamental limitation. Not only was my capability limited, the material would quickly become out of date. Law and legal ethics are fast-moving areas and new developments in the understanding of student learning are constant. The data and proposals were likely to become quickly dated. Moreover, I wanted to continue to engage the practitioners of legal ethical education in the process of dissemination, and, through that, in a continuing debate. This raised the suggestion that a live interactive process was necessary in order to mine the wealth of experience within our academic

community.

Transforming Legal Education

The solution was provided by Paul Maharg. His book, *Transforming Legal Education*,¹⁹ considerably informed by the work of John Dewey, provides a deeply-theorised analysis of how we might, using developing technologies and our imagination, transform for the better the legal education we currently know. The book concludes with an Afterword, in which the author suggests a pragmatic approach to the problem that law schools face. He quotes Twining's summary of the law school dilemma:

'In all Western societies law schools are typically in a tug of war between three aspirations: to be accepted as full members of the community of higher learning; to be relatively detached, but nonetheless engaged, critics and censors of law in society; and to be service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society's messes.'²⁰

This goes to the root of the ethics project in legal education. Maharg identifies four key areas: experience, ethics, technology, and collaboration, which he suggests might be the basis for beginning to transform our educational practice. He explains how experiential learning might be used as a 'foundation for the development of both professionalism and a commitment to democratic behaviour'.²¹

He proposes that ethics are inseparable from experiential learning and goes on to explore how technology might act as an effective tool and how the principle of collaboration might inform the use of that tool.

This final section of the book, however, is not simply designed as text. It includes a fictional sequence featuring a law student one generation on from those who study with us now. She learns through a computer-generated simulation programme, which is based on the applications available to us today, although considerably developed. Whether or not this genuinely reflects the future reality of legal education, it shows how the four key areas identified above might work together. Furthermore, Maharg provides us with a tool which will enable us to begin to work on those key areas. He has designed a website associated with the book, which contains a wiki divided into those four sections.

A wiki is probably familiar to most through Wikipedia, the online, and far from reliable

¹⁹ Paul Maharg, *Transforming Legal Education* (Ashgate, 2007).

²⁰ William Twining, 'The Benson Report and Legal Education: A Personal View' in PA Thomas (ed), *Law in the Balance: Legal Services in the 1980s* (Robertson, 1982) 274.

²¹ Maharg (n 19) 272.

encyclopaedia. It is defined there as follows:

A wiki is a page or collection of Web pages designed to enable anyone who accesses it to contribute or modify content, using a simplified markup language. Wikis are often used to create collaborative websites and to power community websites.²²

Using this technique it would be possible to place my material on the Transforming Legal Education wiki and develop it as my thoughts developed. More significantly, others in the legal education community could add their own ideas or examples of methods or materials. They could edit my work and that of others, to correct errors or develop ideas. It is worth noting that a history of all edits is retained and is freely accessible to readers, so that there is little advantage in using the editing facility as a weapon. Moreover, the wiki's editors are able to ensure that the editing facility is not abused.

A further point about using this interactive technology is that it lent itself readily to the use of hyperlinks so that I could readily cross-refer in a much more effective way than would have been possible with a conventional piece of text. This led me to re-think the structure of what I proposed to write and I came up with the mind-map in Figure 3 (which itself will undergo amendment).

Figure 3: Mind map: website content

The box containing the question mark indicates how others might add suggestions, which can then form the basis of further sections of this resource.

Open access and authorial security—a balance

The early piloting of this wiki, working with invited colleagues, quickly identified a core problem which raised questions about the appropriateness of the wiki as a medium for academic writing. While the ability of others to post comments on one's work and to post up other material was generally welcomed, colleagues felt uncomfortable about the possibility of their own work being edited. Contributors to a conventional wiki do not generally build their careers on their contributions. By contrast, published work is key to academic careers and identification with one's expressed ideas is important. For these reasons, academic colleagues expressed uncertainty at the prospect of exposing their work to the editing (even well-intentioned) of others. Moreover, the facility to explore the history of any edits did not resolve matters. For that reason, a decision was taken that a differently-organised site was necessary to achieve the various functions desired, and this has now been prepared and is in its pilot stage.

²² <http://en.wikipedia.org/wiki/Wiki> (accessed 19 May 2010).

I gained financial support from the UK Centre for Legal Education, and through the good offices of Clark Cunningham, the US National Institute for the Teaching of Ethics and Professionalism. This provided the pump-priming to establish a pilot website, which [can](#) be accessed at www.teachinglegalethics.org. The home page (Figure 4) provides a series of tabs through which registered users may access a variety of resources and links and a forum for debate about issues of mutual concern.

Figure 4: Website home page²³

Most of the tabs are self-explanatory. The Resource Library contains the different categories shown in the drop-down menu below it. A number of resources are featured within the site itself. Others are made accessible through two means. Where they are in the public domain direct links are provided. Otherwise full citations are given so that they can be accessed through other means. 'Teaching Materials' similarly provides access to a variety of materials, which may be used in class or by professionals for CPD activities, including video as well as text sources. There are also suggestions as to how learning activities might be undertaken. 'Conferences' provides details of (and links to) conferences relevant to those interested in the teaching of legal ethics, within this section we will develop an archive of past relevant conferences. Each tab has its own drop-down menu. Thus under 'Community' you will find a Discussion Forum, a User List and User Blogs. During the piloting of the site these categories may change if practice shows that they can be improved.

An unusual characteristic of the website is that registered users may add to these resource stores. Specific forms enable users to add new entries to any of these categories or to upload their own learning materials and exercises. Thus it is hoped that the website will become a truly interactive resource for the law teaching community and, as it develops, practitioners and others who share an interest. We also anticipate that participants will use the ideas and learning resources provided on the website and adapt them to the needs of their own students and their own circumstances. They will then be able to post copies of their own adaptations of those materials and to add reports of how well the adapted materials work.

The website will act as an effective international forum in further ways. There is a facility to comment upon articles, resources or other materials posted on the site. The Discussion Forum enables users to start their own discussion strings on issues of concern or to participate in existing discussions. Members may also set up their own blogs or contribute to those of others.

Users can navigate the site using the tabs already identified and their drop-down menus; through a conventional search engine; or through the tags, which can be seen on the home page in Figure 4. These represent keywords which contributors are asked to identify in respect of materials they add.

²³ The information below relates to the design of the website in early June 2010. There may be changes made in the light of our experience of using the site.

Clicking on a particular tag brings up a list of all the resources which relate to that subject. We are currently developing the list of keywords available so that they represent an inclusive, but manageable set of relevant subjects and issues. Users contributing a new resource who find that the existing list of tags does not include all the keywords they need may request the introduction of a new tag, but this function will remain subject to editorial control.

The goal is for the website to become the primary resource bank and forum for all those interested in the ethics project in legal education, whether academics, practitioners, judges or professional regulators. We hope that readers of Legal Ethics will find this an interesting and valuable project, both as participants and as contributors. In this way we can collaborate in an international community of practice, which will make a real contribution to the legal ethics project in legal education.