

LAW SCHOOLS: EVOLUTION AND LAW'S ROLE

CHERYL GREEN*

I INTRODUCTION

What is required to produce a good lawyer capable of entering the realm of private or other types of law practice in today's world? Law is a profession and a business, and the community it serves expects high quality service within a fast-paced environment where rapid technology advances are the norm. Today's challenge is to incorporate into the law degree curriculum, the opportunity for law students to develop the requisite skills while teaching them to research, analyse and apply law.

II LEGAL QUALIFICATIONS – HISTORICAL AND CURRENT

Traditionally, law degrees have focussed on teaching the theory of law and its application. The current legal admission requirements in New Zealand are: a four year law degree followed by a postgraduate requirement of completing the Professional Legal Studies Course ('Professionals Course') before admission to the bar. These legal admission requirements evolved from a report in 1987 to the New Zealand Law Society at the request of the Society and the Council of Legal Education (the 'Gold Report'), which was written by Professor Neil Gold who is a Canadian legal academic.¹

As with some professional degrees, the distance between academic theory learning and its clinical practice application, is not always without tension in the institutions that teach theory and its application. The tension between adequate development of professional legal skills in law students (whether they be undergraduate or postgraduate law professionals) or on the job as a practising law clerk, has a long history. New Zealand has undertaken both paths with law clerking being the initial approach, and the Professionals Course being introduced after the Gold Report which said that 'the academic and practising branches of the profession have not been able to develop an agreement about the nature, structure and objectives for the effective preparation of lawyers.'² The Gold Report also clarified that the prior New Zealand legal admission training requirements were untenable, referring to it as:

a poor sibling of both the academic and practising worlds. When the salutary decision to make law study a full-time activity was made, little was done to bridge the gap between academic grounding and the development of practical and professional skills, knowledge and the attitudes which are the requisites of competent practice... Reiterated, almost *ad nauseam*, is the need for client relation skills, fact marshalling and analysis skills, general problem solving capability and the arts of persuasion applicable to those who negotiate and advocate.³

The Gold Report resulted in the current requirement that all law graduates complete the professional practice course before seeking legal admission to the bar and obtaining a practising certificate. The course develops law problem solving skills listed in the New Zealand Council of Legal Education's *Professional Legal Studies Course and Assessment Standards Regulations* 2002 (NZ), and include:

* LLB Director of Clinical Legal Education, University of Waikato – paper presentation at ALTA Conference, Wellington, New Zealand 7-9 July 2016.

1 Neil Gold, 'Report on the Reform of Professional Legal Training in New Zealand' (Submission to the New Zealand Law Society, 1987) (the Gold Report).

2 Ibid 3.

3 Ibid 4-7.

1. Interviewing.
2. Advising.
3. Fact investigation and analysis.
4. Writing.
5. Drafting.
6. Negotiation.
7. Mediation.
8. Advocacy.
9. Problem solving.
10. Practical legal research and analysis.
11. Office and personal management.

This practical problem solving focus contrasts with the traditional law degree focus of teaching the theory of law and its theoretical application.

III ON THE JOB LEARNING

In New Zealand we have the post-admission three year rule requirement during which time new lawyer professionals must not practice on their own account and must also receive practical training experience under the supervision of a senior practising ‘mentor’ whether they be a barrister and solicitor or a barrister sole. Those who wish to practice on their own must also pass the Stepping Up course set by the New Zealand Law Society. The Stepping Up course assists candidates to:

- Run the business of a law practice.
- Be responsible for the obligations of the practice.
- Understand and apply the relevant rules of conduct and client care.
- Understand the principles and rules of trust accounting noting that it is important for candidates to have an understanding whether or not they intend to operate a trust account.

The Right Honourable Sir Andrew Tipping reviewed the Professionals Course in 2013 and said unequivocally that it ‘can never give trainees anything like that sort of experience and supervision that the three year rule is designed to provide post admission. That is where the primary focus of on the job experience and training should fall.’⁴ Sir Tipping went on to say: ‘[t]he fact that in some cases the anticipated post admission supervision and training does not occur, or at least does not satisfactorily occur, should not skew the appropriate role of the Profs Course.’⁵

Clearly, most lawyers would consider the three year mentorship as the more preferred method of professional development for inexperienced lawyers, with which it is hard to disagree. But even Sir Tipping acknowledged that the system is far from perfect. The Gold Report similarly said that there ‘was no evidence that law firms can be relied upon to provide all new lawyers with supervised, guided and directed opportunities for on-the-job learning through experience.’⁶

The events surrounding the ten year passage of the *Lawyers and Conveyancers Act 2006* (NZ) are an interesting case study of the struggle between traditional notions of professionalism and the new managerial practices that are now required in all law firms. Many law practices in the current environment clearly take their supervisory roles very seriously and commit, as part of their practice, to producing high quality well trained solicitors. What is also clear is that some practices struggle with this and there are others who, even worse, think the ‘deep end’ is the best place for a new lawyer to start. However to train and supervise newly admitted lawyers properly

4 Sir Andrew Tipping, *Review of the Professional Legal Studies Course: Report to the New Zealand Council of Legal Education* (PLSC Review, 2013) 3.

5 Ibid.

6 Neil Gold, above n 1 at 8.

requires time and cost. An inexperienced lawyer is an uneconomic unit and quite possibly a liability for the first one to two years.

In a 2016 report by New Zealand law graduate Josh Pemberton, called 'First Steps: The experiences and retention of New Zealand's Junior Lawyers'⁷ ('First Steps'), some junior lawyers who were interviewed expressed the view that on-the-job learning required to become a useful lawyer in practice was such that the early stages of practice felt akin to 'an apprenticeship'.⁸ Law is both a profession and a business – a very competitive business at that. It is easy to understand why in the current climate, advertised lawyer positions in law firms often require candidates with at least two or more years of experience. Few positions are available for newly admitted lawyers.

IV EXPERIENCES OF JUNIOR LAWYERS

The First Steps report looks at how students cope with the transition from university to legal practice and provides both statistical data and commentary from interviews with junior lawyers about various aspects of their life in law. While the vast majority of the respondents surveyed agreed that law school had given them a good grounding in theory and analytical skills (92.7%), almost seven out of every eight respondents (86.7%) also agreed that their law school training should have been more practical.

Almost three quarters (74%) of respondents agreed that '[t]he professional legal studies course was a useful bridge between law school and legal practice'⁹ but many of those who found their course useful overall, still expressed strong reservations about its timing and content. A number of respondents also felt that completing the Professionals Course after university while (often) working full-time in legal practice, meant the course was merely something that had to be endured, rather than something with which to properly engage. The phrase 'box-ticking' came up time and time again.

V WHAT DOES A LAW STUDENT NEED TO LEARN?

Knowing what law students learn in law school and in the Professionals Course is simple. But the traits required for many lawyer positions are extensive, and feedback from the legal profession indicates that the following abilities are required for an employable law graduate:

- Intellectual horse-power sufficient to excel in his or her role as a lawyer.
- Quality of work output – the ability to produce high quality work with attention to detail.
- Achievement of targets in day-to-day work – the setting of realistic objectives and priorities and the initiation of prompt corrective action if required.
- Meeting deadlines – the ability to complete work and to manage time effectively.
- Cost effectiveness – making optimum use of financial and other resources.
- Decision-making – an ability to make sound decisions based on fact and to take initiative; to accept responsibility for decisions. It is also about the ability to follow through and avoid procrastination.
- Problem-solving – analytical skill and the ability to develop effective solutions.
- Job knowledge – knowing and understanding his or her brief.
- Innovation/creativity – an ability to think creatively within the context of his or her own specialisation and to find original solutions to problems.
- Leadership – effective management of, and planning with, team members, including the delegation of jobs at an appropriate level.

⁷ Josh Pemberton, *First Steps: The experiences and retention of New Zealand's junior lawyers* (The Law Foundation of New Zealand, 2016).

⁸ Ibid 14.

⁹ Ibid 13-14.

- Team building – an understanding of group processes and the coaching and development of all team members.
- Relationships – an ability to generate and sustain appropriate professional relationships.
- Communication skills – oral – an ability to communicate logically, clearly and with conviction.
- Communication skills – written – an ability to present documents in a clear, concise manner.
- Technological expertise; and
- Cultural awareness.

VI BI-CULTURALISM IN LEGAL EDUCATION

One of the Gold Report's recommendations in 1987 was that the Professionals Course should have a special section on Māori language and culture. Gold stated that as with all cultures, the knowledge of local customs and laws is fundamental.¹⁰ In 1988, Justice Richardson J (as Chairman of the Council of Legal Education), included in his list of crucial issues for modern New Zealand education: 'valuing cultural diversity and recognising the unique character of New Zealand founded on the Treaty of Waitangi.'¹¹

Chapter Four of the latest edition of *Burrows & Carter Statute Law in New Zealand*¹² looks at Māori concepts and language in legislation, stating that '[i]ncreasingly, legislation drafted and enacted in English also contains terms or provisions in Māori'¹³. One such example is the *Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 Te Ture mō Mokomoko (Hei Whakahoki I te Ihi, te Mana, me te Rangatiratanga) 2013* (NZ). Chapter Four also incorporates Tai Ahu Te Teo Māori as a language of New Zealand law, stating that 'the Interpretation Act 1999 should be amended to insert a provision to the effect that provisions incorporating the Māori language, if enacted, are presumed to be interpreted according to tikanga Māori.'¹⁴

Chapter Four also cites the dissenting judgment of F B Adams in *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) who said at page 444: '[l]egislation may well need to pin down the intended meaning of a Māori term, especially if the term has many different meanings, or there are tribal differences in usage.'¹⁵ The evolving legislative developments regarding Māori concepts and language are so significant that law educators in New Zealand need to ensure that they are incorporated into the teaching of law undergraduates and postgraduates, just as Gold and Justice Richardson J recommended almost 30 years ago.

VII WHAT LEARNING IS BEST FOR PROFESSIONAL LEGAL PRACTICE?

The type of learning that law students undertake to prepare for professional life in legal practice is important because they need an engagement level that encourages 'accretion' by gradual accumulation of layers of practice experience. This type of learning is becoming more difficult to achieve due to the current focus on technology and instant communication.

10 Neil Gold, above n 1, 25.

11 Peter Spiller, 'The History of New Zealand Legal Education: A Study in Ambivalence' (1993) 4 (2) *Legal Education Review* 223, 125.

12 Ross Carter, *Burrows and Carter on Statute Law in New Zealand 5th Edition* (LexisNexis New Zealand, 2015).

13 Ibid 148.

14 Ibid 153.

15 Ibid 153.

Levy¹⁶ has addressed educators' assumption that students' ability to 'multitask' is a new learning style resulting from their constant exposure to technology, as a study has showed that this assumption is wrong.

We were absolutely shocked ... multitaskers are terrible at every aspect of multitasking. They're terrible at ignoring irrelevant information; they're terrible at keeping information in their head nicely and neatly organised; and they're terrible at switching from one task to another.¹⁷

To dispel any notion that constant technology exposure confers multi-tasking superpowers, learning science suggests there are physiological and neurobiological constraints that make it impossible. Lecturing is a very useful technique for delivering information that is uncomplicated, straightforward and of a reasonably general nature. Lecturing is also a cost-effective way to convey information to a large number of students. But studies show that long periods of lecturing are ineffective for most learners whose attention spans rarely exceed (if we are lucky) 20 to 25 minutes. Putting information into practice is where we need to focus our attention if we wish to produce work ready law graduates; this is what all New Zealand university law schools are reviewing currently.

VIII 'WORK READY GRADUATES' – WHAT DOES THIS MEAN?

On page 10 of a report titled Tertiary Education Strategy 2014-2019 produced in March 2014 by the Ministry of Business Innovation and Employment and the Ministry of Education in New Zealand, the stated priority is to ensure that tertiary education supports development of transferable skills including the ability to communicate well, process information effectively, think logically and critically, and to adapt to future changes. This priority is one of the most crucial outcomes of tertiary study, including for those degrees with vocation-specific qualifications. This report's reasoning is that a greater focus on attaining these transferable skills in tertiary education, will benefit graduates and employers, and improve graduates' employment outcomes.

IX WHAT 'WORK READY GRADUATES' DOES NOT MEAN

Section VII earlier in this article refers to learning by 'accretion' which must occur at the beginning of a degree to be successful. The Professionals Course provides an extremely useful and competent course, but given that students have approximately 11 assessments to undertake in 13 weeks, it can become a matter of 'ticking the boxes.' For example, no matter how high quality the teaching, a student who has never undertaken a negotiation or looked, even briefly, at negotiation theory, will usually struggle to understand what they are doing and focus inevitably, on what they need to do to pass their assessment, rather than on what they are doing and why. Although if a law student is lucky enough to land a job in a law firm with a high quality mentoring system, this may not be a problem at this stage (as discussed earlier above).

X THE WAY FORWARD?

Focusing on delivering a professional legal education that will qualify students for the practice of law should be undertaken from the first year of the law degree. This raises the obvious issues of cost and time in a structure that is already bursting at the seams with work commitments. Working more closely with the legal profession is an option, with the introduction of the *Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013*, and continuing professional development now being compulsory for all practising lawyers in New Zealand.

16 James B Levy, 'Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School' (2015) 19 *Chapman Law Review* 241, 21.

17 *Ibid.*

Eligible continuing professional development activities may include teaching and preparing for law courses at a tertiary level. One example would be where a law lecture includes references to clinical education taught by legal practitioners who bring their current practice insight with them. The law and the legal process can be examined, analysed and critiqued with client concerns and best interests in mind.

A more specific example is a Tort's course where, with support from the academic colleague teaching the course, a legal practitioner would teach a class on negligence using an anonymised current client matter with the client's written permission. This raises issues regarding client privacy and confidentiality but these are not insurmountable. The client's claim preparation could be explained to the class by referring to relevant legislation and case law. Law students may be subsequently briefed on the outcome of the client's claim where that occurs before the end of the course.

XI CONCLUSION

A barrier to change in complex organisations like law schools and professional societies, can be institutional inertia. Traditions can die hard even when they are clearly out of step with best practice. Law schools need to keep building a system of legal education that, while respecting appropriate traditions, embraces sound educational and cultural practices to ensure that law students have sufficient opportunities to acquire and develop the skills and values they need as future practising lawyers.