A proof-oriented model of evidence teaching

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13 *Legal Educ Rev* 2, 2002, pp 109–132

The 'new evidence scholarship' which has revitalised evidence research and teaching in North America in the last thirty years still seems to have had very little impact in Australia. The key feature of this new scholarship is a transformation of evidence from a field concerned with the articulation of rules to a field concerned with the process of proof; a shift away from the rules of evidence towards the process of proof and the way inferences should be drawn from a mass of evidence.

Evidence in the LLB program at the University of Melbourne, Australia, is generally taken as a final year subject, taught over one semester in two or three streams. Prior to its redesign, it might more accurately have been called 'The Law of Evidence' than 'Evidence', because its focus was almost exclusively on the rules of evidence.

A better environment for experimentation with the introduction of a proof-oriented teaching model was provided by a new law program, the Juris Doctor, or JD. This is a fee-paying graduate law degree where the intake is limited to 24 students. The introduction of the JD at the University of Melbourne was used as an opportunity to trial the proof-oriented model of teaching evidence, before introducing it into the LLB.

The JD is taught over two years, in six trimesters, in each of which the students are required to take four subjects. Evidence is taught in the first trimester, along with Legal Research and Method, Criminal Law, and Procedure. This placement is in direct contrast with the majority of LLB courses, where Evidence (or Litigation) is typically taken in the final or penultimate year. An obvious consequence of its placement in the JD is that students do not bring much experience or knowledge of the law, or bodies of legal rules, to Evidence.

There are twelve classes in the course, each of three hours duration; typically these take place once a week. The course is divided into 12 units, corresponding to these classes. Students are provided with course materials, which together with the text *Principles of Evidence*, constitute the primary teaching resources for the subject. There is, however, no attempt to systematically cover the material contained in each unit through lectures. Rather, 'mini-lectures' on selected topics within the unit are interspersed with the discussion of problems designed to highlight some aspect of the material under discussion or to provide an opportunity to apply a rule which has just been expounded.

It is the skills of factual analysis which the first three units of the course aim to teach students. The reason for introducing factual analysis before admissibility is to prevent the exclusionary rules dominating student thinking. In the author's experience, if the exclusionary rules are introduced first, students can tend to be blinkered by the question of admissibility in a way which prevents them from thinking creatively about the ways in which they might attempt to use a particular item of evidence, and thinking critically about whether the rules help or hinder the trial process. Indeed, once students know the exclusionary rules, they can too quickly rule evidence out of their consideration by assuming that it will be inadmissible.

Even in the admissibility units, the focus on proof is maintained, with the problems consistently requiring students both to construct case theories and to see items of evidence in the context of an overall case. The reading of appellate decisions is generally avoided because in such cases the 'facts' have already been 'found'; approaching cases on the basis that the 'facts' themselves are not neutral, and are actually the main point of controversy between the parties, sometimes appears to be a startling concept for students who take Evidence near the end of their degree, as the LLB students do. For the JD students, having this awareness from the start will hopefully inoculate them against the fallacy that 'the facts' are indeed 'facts'.

Assessment always defines the actual curriculum. It was essential therefore that the new assessment actually set out to assess whether students had acquired the skills in factual analyses specified in the objectives. In the legal context, this is often referred to as a 'clinical' approach to legal education. It was fairly clear that the traditional law school final examination did not have any of these characteristics, not least because of the time limitations inherent in the format, which make it almost impossible to present problem situations which are 'concrete', 'complex' and 'unrefined'.

What kind of realistic task might the students be set? It is suggested that the main evidential tasks required of a lawyer fall into the following categories: fact investigation and the gathering of evidence; organisation and analysis of the evidence in preparation for trial; making arguments about the admissibility of evidence; and the adducing of evidence at the trial itself. Hence, students are required to write an Advice on Evidence, which is essentially a counsel's analysis of the evidence in a case, and therefore a realistic task of the kind with which lawyers will be confronted in practice. Such a form of assessment places a premium on factual analysis.

Transferring the proof model to the mass-enrolment environment of the LLB proved far less difficult than had been anticipated. The course content for the JD was, with some simplification and reduction of reading material, replicated in the LLB. The same general teaching approach was also taken so that the classes comprised a similar mixture of mini-lectures and problems. The problems were also approached in the same way as on the JD; that is, the problem would first be expounded to students, who would then be given the opportunity to discuss it with whomsoever they happened to be sitting near, before being invited to contribute to the public discussion of the problem by the class as a whole.

One objection to a proof-oriented model of teaching evidence is that factual analysis is already dealt with in specialist subject such as advocacy, trial practice, or other clinical courses: that being so, there is no need to include factual analysis in Evidence. Reasons that factual analysis might well be sufficiently important to warrant a place in the compulsory and quasi-compulsory core of subjects include: any list of the skills required of lawyers is bound to include skills in factual analysis; factual analysis is not only central to litigation but also is an important component of any career which requires the marshalling and evaluation of the evidence and arguments for competing claims; if a course in 'Evidence' is to live up its label, then it should include a consideration of evidence as evidence, and not just an analysis of that evidence from the point of view of admissibility; it can be difficult for students to understand the purpose and operation of the rules of evidence when they are divorced from the process of proof; there are a number of exclusionary rules whose scope and operation depend on the purpose for or manner in which the evidence is being used; and finally, just as an emphasis on factual analysis can enhance students' ability to apply the rules of evidence, so can it open the door to the introduction of critical insights.

The shift towards a more proof-oriented model of teaching Evidence is now well entrenched. Its fundamental aim has been to increase students' skills in factual analysis, such skills being important to the practice of law, transferable, and essential to a proper application of many of the exclusionary rules of evidence. The change in approach has gone hand in hand with a change to the assessment, so that students are now presented with a task much more akin to that which they are likely to encounter in practice, namely the analysis of a brief of evidence in a criminal proceeding and the completion of an advice on evidence based on that analysis. Anecdotally, students have reported that the focus on factual analysis has improved their general thinking and arguing skills and more formal evaluation has confirmed that students are satisfied that the new assessment provides a better measure of their abilities than the assessment it replaced.

LEGAL EDUCATION GENERALLY

The structure of legal education and the legal profession, multidisciplinary practice, competition, and globalisation

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52 *J Legal Educ* 4, 2002, pp 480–490

In a world in which the forces of change are intensifying and accelerating, the legal profession must respond to new challenges that it is ill equipped to meet. The value that the marketplace for legal services assigns to an entrant's degree directly reflects the status of the degree-conferring institution as a national, regional or local law school.

The differences according to which law schools are sorted into these three categories have become more pronounced over time, contributing to an increasingly stratified legal profession. The identity of the institution from which a graduate receives the JD degree may be the single most important factor in the graduate's career path. Legal education and the legal profession are inextricably intertwined. For at least the last seventy-five years, the national law schools have graduated students whose career paths have led to employment in prestigious and powerful institutions in both the public and the private sector. In sharp contrast, these career paths have been available for the most part to only a handful of the graduates of regional law schools, generally the students at the top of their class who were law journal editors.

Over the course of time, both the national law schools and their graduates have increasingly disassociated themselves from their regional and local counterparts and this disassociation is accelerating. Growing competition and the relatively fixed ranking of law schools, graduates, and jobs means increasingly that graduates from different law schools will have very little in common.

Careers in legal education are a prime example of the collision between stratification and marketplace. Except for those on the clinical side of the curriculum, academic careers are open generally only to the graduates of a handful of national law schools. A related question is whether the regional and local law schools will continue to attract the same number of applicants if it