

# ETHICS AND LEGAL EDUCATION

*Brian Brooks\**

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*The submission of the report by Brent Cotter QC and Christopher Roper on Education and Training in Ethics and Professional Responsibility to the New Zealand Law Society in 1994 highlighted the need for a concerted effort to inculcate ethical know-how into the profession at all stages of their education and practice. In this article Professor Brooks surveys the place of ethics in law teaching today and ponders the many problems surrounding the teaching of ethics in the university environment. He argues that the teaching of ethics needs to focus on the process and context of ethics rather than focussing on the rule based model which some commentators advocate.*

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Those of us in education must question whether, during this century, we have placed too much emphasis on data, knowledge and skills at the expense of the transfer of values, wisdom and education for life. It may be increasingly necessary for polytechnics and universities to fill the void and place greater emphasis on value systems.<sup>1</sup>

## I INTRODUCTION

At its annual meeting in Wellington on 17th October 1997 the New Zealand Council of Legal Education resolved that all law students completing their degrees after 31 July 2000 will have to pass an approved university course in Ethics and Professional Responsibility if they wish to practise law. The Council prescribes the educational requirements for admission and its resolution was the outcome of a process which had begun some years earlier. In 1992 a joint project of Education and Training in Ethics and Professional Responsibility was initiated by the Council of Legal Education and the New Zealand Law Society with funding from the New Zealand Law Society. That project resulted in a report prepared by two overseas consultants, W Brent Cotter QC, Deputy Minister of Justice/Deputy Attorney General for Saskatchewan and Christopher Roper, Director of the New South Wales Centre for Legal Education. Their report was presented in 1994<sup>2</sup> and recommended a multi-level curriculum designed to co-ordinate education in ethics and

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<sup>1</sup> New Zealand Education Review, 21, 15 October 1997.

<sup>2</sup> *Cotter and Roper Report on Education and Training in Ethics and Professional Responsibility*, prepared for the New Zealand Law Society, (1994).

professional responsibility involving the five Law Schools, the Council's professional training courses and the Law Society's continuing education programmes.

In their Report Cotter and Roper appended written submissions. Amongst the many written submissions received was one which, *inter alia*, advanced the view that "the present low standards of ethical behaviour and responsibility about which concerns have been and continue to be expressed are substantially due to the fact that the subject is an unrecognised and untreated casualty of the development of the full-time course of University study which is now the normal path to the law degree."<sup>3</sup> That writer went further to argue that in his time as a student when law was studied predominantly as a part-time process universities nevertheless "saw it as no part of their function as teachers of the academic discipline of law to train students in the basic behavioural norms of the practice of a profession, albeit the learned profession which the study of law would qualify those students to enter. [The universities] regarded and continue to regard matters of professional as opposed to academic training or learning as being the province of and responsibility of the profession."<sup>4</sup>

## II THE TEACHING OF ETHICS TODAY

This observation raises a range of issues many outside the purview of this article but picked-up at various places in this volume. For the immediate purposes of this chapter the Cotter/Roper Report, and New Zealand Council for Legal Education resolution, invite a response to the broad issue of the relationship between ethics, professionalism and legal education and the starting point must be a description of what is being done presently in New Zealand Law Schools.<sup>5</sup>

The first observation is that neither ethics nor jurisprudence is compulsory in the curriculum of the five law schools. The programme of study in the law schools presently consists of four years study leading to an LLB degree. The core of the programmes, common to all of the schools, is the compulsory study in first year of an introduction to law followed by the five substantive subjects. Four of the of substantive subjects are usually studied in the second year of a full-time degree course with Property falling into

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<sup>3</sup> Paper prepared by Mr C Withnall QC for submission to Messrs Cotter and Roper, annexed as an Appendix A to their report, above n 2.

<sup>4</sup> Above n 3.

<sup>5</sup> The New Zealand Council of Legal Education also sets the prescription for the Professional Legal Studies course which is the post-graduate, pre-admission course conducted by the Institute of Professional Legal Studies at a range of locations in New Zealand. In addition the Council prescribes the content of the New Zealand Law and Practice Examination which the Council conducts itself. This programme is intended primarily for overseas lawyers seeking admission to practice in New Zealand.

the third year. Property apart, the third and fourth year offerings are described compendiously as the "electives" to distinguish them from the identified compulsory subjects. The electives on offer differ from law school to law school and vary from year to year.

Two Faculties teach Ethics as a stand-alone subject: The University of Auckland and Victoria University of Wellington. Auckland offers two courses in ethics. One is a regular two points (48 hours) elective called Legal Ethics. This is not taught by a member of the Law Faculty but by a member of the Philosophy Department. In addition a student at Auckland may choose between two courses which have a practical focus. One course is the Community Placement programme. The other, which is not a formal paper for credit, has the weighty title of Regulation 4 Certificate Legal Ethics. It is co-ordinated by a full-time Law Professor.

In the Law Faculty at Victoria University of Wellington a full-time member of the academic staff of the Law Faculty has offered Ethics as an Honours Paper and, more recently, a member of another Faculty at Victoria University of Wellington has co-taught Ethics as a full elective. In some years at Victoria's Law Faculty Ethics has alternated with Jurisprudence as an elective. At Waikato University the School of Law offers a fourth year elective entitled Professional Responsibility. This course is not available in every academic year and was not offered in 1997. However in 1997, and for the first time, Waikato's Law School included a module of six weeks on Ethics in the introductory, and compulsory, Legal Systems course. The Law Faculty at Otago University does not offer a legal ethics paper but law students are able to take a professional ethics paper offered by the Department of Philosophy. Ethics is not taught in the School of Law at Canterbury University but the Philosophy Department at Canterbury offers a course in moral philosophy (which Law students can attend) and Canterbury's LLB Jurisprudence programme deals with this and other issues such as Natural Law theories.

Space precludes a detailed description of the content of the Ethics programmes offered in four of the five law schools. As a sample we can look at the University of Auckland and Victoria University of Wellington. As noted earlier Auckland's Law School offers two Ethics programmes. In the major elective the lecturer is a member of the staff of the Department of Philosophy and he treats the subject as a topic in normative philosophy and seeks to give his students an account of the role of law and of the people who are members of the institutions of the law. He believes that views of ethics which emphasise character and conscience have it wrong. His position is that the role of law is to settle disputes between opposed views. It follows from this perspective that lawyers who appeal to their own conscience or their personal moral views undercut the law. While it is possible to argue that such an approach makes law a technical discipline it also allows the argument that ethics can be taught. Part of the view of the Auckland lecturer is that ethics is a certain

kind of reasoning and deliberation and that this can be taught as can an understanding of the values and principles which most plausibly underpin social institutions such as law.

In the alternative ethics programme at Auckland, which is co-ordinated and largely taught by a Professor of Law, the emphasis is on ethical theories and moral traditions and students are invited to consider a range of ethical issues associated with conflict of interest, professional privilege and duties to courts and clients. Classes are conducted by a range of visitors each discussing matters on which they are especially experienced. Significantly, students are required to purchase a copy of Rules of Professional Conduct of Barristers and Solicitors as well as a collection of materials prepared by the Law School. This course is similar to the Institute of Professional Legal Studies compulsory programme on legal ethics for aspiring practitioners.<sup>6</sup>

At Victoria University of Wellington the undergraduate law degree programme contains an optional subject entitled Ethics and the Law which is a comparatively new offering and is being developed. In 1997 the course was taught by two full-time academic staff of the university, one from within the Law Faculty and one from outside Law. The course is broad based. The first part discusses the various traditional ethical analyses such as Natural Law theory and compares and contrasts the arguments. The course then proceeds to examine a number of areas of substantive law and legal issues such as abortion, legal pluralism and collective rights and obligations and critiques them against the framework of the theories discussed earlier. The second part of the course seeks to locate the legal profession in an ethical perspective and analyses the place, role and duties of the professional in ethical terms. It then focuses on particular instances of breaches of the Code of Professional Conduct and critiques the rules and the identified conduct against the ethical framework established at the start of the course.

### III WHAT IS LEGAL EDUCATION

The foregoing, and brief, survey raises a number of questions. The first question concerns the broad framework of legal education and asks: what is legal education? One widely cited answer is that of Professor W Twining who argued that legal education is a "life-long process which concerns not only undergraduates and intending practitioners,

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<sup>6</sup> In New Zealand the IPLS course is a compulsory part of a law practitioner's education and the Cotter/Roper Report identified three objectives for the IPLS programme. It is expected that at the conclusion of the programme those participating will: have been introduced to the responsibilities of lawyers in various professional roles and contexts; be able to identify these responsibilities when they arise in specific professional contexts; have developed their attitudes and values with respect to the legal profession and professional responsibility. IPLS has an extensive prescription which gives detailed attention to the objectives. Above n 2, 21.

but also the recently qualified, leaders of the bar, and senior judges. It applies to lawyers in the public sector and industry as well as the private practitioners.”<sup>7</sup>

There are four immediate observations germane to this article. First, if legal education is a “life-long process” then students need skills to equip them for independent learning. Second these skills will come not from *what* students learn at law school but from *how* they learn. Third, placing the focus on how to learn makes learning a process for which the student is responsible. Fourth a didactic, formalised, rote-learning of rules is not the way to encourage and equip people to learn for life.

The Twining observation raises further inter-related issues. What assumptions underlie legal education?<sup>8</sup> What are the expectations, aims and objectives of legal education? What competencies should an effective lawyer have and how do we measure competence? What education is needed to ensure those competencies are up-to-date? How effective are current educative programmes? What kind of ongoing education and training is required for lawyers? What will it mean to be a “lawyer” in the 21st century? What will be the relationship between law schools and the profession and between Law Schools and the wider university community?

Clearly each of the many issues warrants a chapter of its own. For present purposes we can inject one further question: is any one of the foregoing issues free from ethics? Put another way we can ask: is there any part of the law which ethical considerations do not touch? The answer, it is suggested, is that there is no part of the legal landscape which is not illuminated by ethics. That being so it follows that ethics ought to be taught. If ethics can be taught what is the desired outcome? The latter question can be put another way: what effect, if any, does formal education and training have on the ethical values and professional conduct of lawyers?

A troubling answer to that question is found in the Cotter/Roper Report. In the course of compiling the report the co-authors conducted a number of consultations in June and

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<sup>7</sup> W Twining “Developments in Legal Education: Beyond the Primary School Model” (1990) 2 Legal Education Review, 35, 35.

<sup>8</sup> Is a legal education the right of every citizen? Does every citizen have the right to practice law? Does legal education exist only for lawyers or is it also for the community which the legal profession serves? Are traditional “categories” of law inviolable? Is there a “legal” solution to all problems? Is the adversarial system for conflict resolution the most effective? Are all law students intending to become private law practitioners? What is the impact of technology and globalisation?

October 1995. The relevant portion of the Report was cited in Law Talk<sup>9</sup> in the following passage:<sup>10</sup>

The consultations held in June and October 1995 revealed that the general problem of lawyers' ethics is more specifically that:

- lawyers do not *know* the rules of professional responsibility; and/or
- lawyers know the rules but when confronted with a situation they are unable to *recognise* the ethical issues involved: and/or
- lawyers know the rules and can recognise issues but they do not have the ability to *analyse* the issues and come up with a satisfactory solution: and/or
- lawyers can do all these things but they *choose* not to follow the ethical rules, because of external or internal pressures.

Not only does the cited extract raise as many questions as it answers it also reveals a confusion between the rules of professional conduct and ethical dilemmas. The two are not synonymous. The formal rules of professional conduct can be learnt by rote but that is not true of the capacity to be sensitive to ethical dilemmas. To achieve this capacity requires training in ethics to have a broader focus beyond the formal rules covering a lawyer's professional duties. In other words we expect that a lawyer will be able to identify and select, and operate within, a framework of professional, ethical and socially responsible behaviour and practice. What is not agreed is how lawyers, or those who aspire to be lawyers, are best encouraged to be ethical. The various approaches to teaching ethics in the New Zealand Law Schools presently demonstrates that there is no common agreement on the content of "legal" ethics, let alone a consensus on whether "legal" ethics differ from other professional ethics in fields such as medicine, accountancy or journalism. And, at the level of first principles, there is a longstanding debate amongst philosophers about the meaning of "ethics". Linked with this is the question whether it is possible to isolate "legal", "business" and "medical" ethics or is there simply "ethics"?<sup>11</sup>

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<sup>9</sup> Law Talk 472, 2 March 1997, 14.

<sup>10</sup> Above n 2, 7.

<sup>11</sup> Accelerating developments in bio-engineering are exposing complex ethical dilemmas which are beginning to be addressed in the popular media. Apart from debates about cloning, an instructive example is the coverage given to the action of fertility clinics in the United Kingdom which, in 1996, began the process of destroying 3,300 frozen human embryos. A summary of the reactions is found in Time Magazine, August 12, 1996, 30-31.

#### IV ETHICS: TAUGHT OR CAUGHT

Against this background a recent legal text deliberately eschews the use of the term "ethics" in favour of the description "professional responsibility" when examining the rights and duties of lawyers.<sup>12</sup>

In that excellent text the author expresses the clear and strong view "that professional responsibility should be taught *commencing at undergraduate level*"<sup>13</sup> and adds the rider that this view is not advanced simply in the hope of book sales. Oddly, the author fails to explain how his book should be presented to students and his emphatic view that ethics should commence at the undergraduate level side-steps the question of where exactly in the undergraduate degree ethics should be located. Clearly it would be silly to attempt to introduce first year law students to the professional responsibilities involved in disclosure and recovery of costs or the problems faced by lawyers employed by non-lawyers or the obligations owed by a barrister to the court in which she or he appears. Each of those matters, amongst many others, forms a chapter in the text. Indeed, any of the problematic issues described in the book will be incomprehensible to the novice law student. I say that to make the point that law schools and law teachers continue to struggle with the complex issue of inculcating ethics and we argue whether ethics is taught or is caught, whether or not education can be a substitute for experience, and whether or not exposure to thinking about legal ethics should be compulsory.<sup>14</sup>

Apart from the elevated debates about the content of "ethics" there are very real problems in introducing ethics into university level legal education. One powerful argument against a compulsory programme is that any prescribed course would be a form of social indoctrination and that it is impermissible to impose one particular approach to ethical dilemmas. Opponents of a compulsory programme warn of the "Thought Police" imposing "right thinking" on both staff and students. The response is that such views are proper but are unfounded. Universities, it is argued, should be free to develop in their own way. Universities are the very places where free-thinking and wide ranging debate exists and where no one prescription ought be imposed. The prescriptions discussed earlier reveal that different law schools approach ethics differently and, it is suggested, the

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<sup>12</sup> G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (Law Book Company, Sydney, 1996).

<sup>13</sup> Above n 12 Preface, vi (original italics).

<sup>14</sup> There is an argument that if a new compulsory subject is to be introduced into the undergraduate curriculum then rather than ethics it should be a substantive area of law to which all lawyers will be exposed. Equally, of course, the argument can be advanced that all lawyers will be confronted with ethical dilemmas and will be required to make difficult decisions and thus should be required to study ethics.

prescription which finally emerges from the Council For Legal Education resolution must be open-ended and flexible. The aim should be to provide a reasonable grounding in the principles of ethical professional practice, professional responsibility and etiquette. What is to be encouraged is a capacity to recognise when an ethical issue exists. As Gold observed:<sup>15</sup>

[T]he role and function of a lawyer in a modern law practice is fraught with difficult decisions presented by distressing dilemmas. The conventions, practices and ethics of the legal profession are founded on a base of commitment to public service and the protection and preservation of individual, community and social interests. But decision-making is often far from easy.

This points to the truth that the most difficult ethical dilemmas are those where the actors are damned if they do and damned if they do not.<sup>16</sup>

Another problem in introducing ethics into law school programmes is found in the truth that such programmes are necessarily inter-disciplinary. As we noted earlier, those New Zealand Law Schools which presently teach ethics do so in an inter-disciplinary manner. But inter-disciplinary programmes are resource intensive and are likely to be the most at risk when resources become scarce. Moreover, inter-disciplinary programmes are vulnerable to academics becoming anxious to protect their own patch. Inter-disciplinary co-operation is quickly withdrawn when academics perceive, rightly or wrongly, that their own specialist areas are at risk. Behind these issues lies the fact that there is a lack of teachers competent to present a programme on ethics. It is revealing that in the New Zealand Law Schools which presently offer ethics as a subject the teaching is done either by an interdisciplinary team, including a legal academic, or by a member of the university's Department of Philosophy.

Further, it is frequently asserted by legal academics that they teach ethics interstitially in each of the substantive law subjects, that they impart ethics by example, that ethics is all-pervasive in the curriculum and that, therefore, there is no need for a stand-alone programme on ethics. Even if the argument is conceded that a stand-alone programme is desirable the further objections are: the absence of research and information; the problems

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<sup>15</sup> N. Gold, *Report on the Reform of Professional Legal Training in New Zealand* for the New Zealand Law Society and The Council For Legal Education, January 15, 1987, 18-19.

<sup>16</sup> Consider the dilemmas respectively of a priest, a lawyer, a Human Resource Manager and a doctor each of whom learn, in total confidence from the husband of a woman they know well, that he has full-blown terminal AIDS and will die within the next twelve months. Amongst other things he has told them that he continues to have unprotected sex with his wife. May any of the four professional advisers convey the information about the husband to the wife or is each bound by the duty to maintain professional confidences?

of designing a curriculum; the lack of materials, the need to train teachers, the resource burdens thereby imposed on the Law Schools and the need for other providers of legal education to carry their share of responsibility in ensuring that lawyers are sensitive to ethical issues.

## V CONCLUSION

The law schools have a role in equipping their students to meet these objectives. To study law is to study change. Therefore the primary objective of legal education is to habituate students to the phenomenon of legal change. It follows that teaching should focus not on what the law is but on the process of the law. The Gold Report prepared for the New Zealand Law Society and The Council For Legal Education in 1987 on the reform of professional legal training, observed that the law degree programme must not be over-encumbered with legal requirements and that law students needed:<sup>17</sup>

to know the relationship between theory and practice [and] between law and business, human and industrial relations, politics, social policy and so on. The study of laws alone is an insufficient preparation for a complex social milieu in a dynamic nation.

In a complex social milieu ethical dilemmas are a constant.

Law schools are one provider of legal education in New Zealand. Together with other providers they have a role to play in producing people trained in the law who have the capacity to be able to recognise ethical problems when they arise, the practical know-how to resolve the problems and to avoid practising unprofessionally, and an attitude to their work which makes ethical practice a daily habit in approaching and resolving dilemmas.

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<sup>17</sup> Gold Report, above n 15, 18-19.