

The Teaching and Learning of Legal Writing Skills: Observations from Emalus

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The University of the South Pacific has long been conscious that English is a second language for many of its students, and that this creates special challenges for teaching and learning. In law, where language is often technical and needs to be used with great precision, these challenges are particularly apparent. This article, which is based on the author's experiences in teaching at the University of the South Pacific, discusses different approaches to the teaching of legal writing, and identifies some strategies for improving teaching and learning in this area. These strategies have the advantage of being easy to implement, and apply equally to disciplines other than law.

Introduction

The year 2006 is an important year as it marks the 10th anniversary of Emalus Campus achieving the 'campus' status within the University of the South Pacific (USP). Even though the USP LLB programme began several years before that, the culmination of this ten-year period is an opportune time to reflect on what has been achieved and undertaken in the LLB programme. It is an ideal time to review and reflect on certain academic strategies which have been undertaken in the School of Law programmes and courses with the objective of understanding and critiquing the rationale of such strategies, as well as the pedagogical challenges and the future directions to be taken. In addition, as the pressure increases for schools and departments within USP to be efficient and accountable in their teaching and administration, and to submit to a new quality standards regime, academics need to re-think some of the teaching and learning strategies that have been adopted in lecture theatres and classrooms throughout the university.

This article describes my perspective with regard to approaches to the teaching and learning of legal writing, and is based on reflections and observations which I have made over the last five years arising from the courses which I have coordinated and taught.

The Importance of Skills-based Learning

In terms of the Bachelor of Laws programme (LLB), a student enrolling in a law course, whether compulsory or elective, will be led by the teacher through the various units in the form of lectures, assignments and tutorials and will usually sit a final examination. From a law student's perspective, a great part of this process is an exploration exercise and the only indicator of whether they have learned and retained any knowledge and information rests in that artificial and abstract final course grade.

Certainly, an exploration process is exciting in the context of learning. However, it cannot always ensure the learning of the skills necessary for the profession and for life after university. The criticism has been made that skills taught in law schools are far removed from everyday problems that lawyers encounter (Henderson 2003). Law schools often deliver learning that is more conceptual than contextual, leaving students with idealistic or unrealistic notions of the subject matter. Also, there is ongoing criticism that the law schools deliver high theoretical content and not enough fieldwork. This follows another criticism of law school; that there is too much emphasis on research, and not enough application of researched knowledge in terms of litigation of cases. In order to ensure that the curriculum aligns more closely with the reality of working subsequent to graduation, skills-based learning in any tertiary course should be emphasised. This is especially so for law students where there is an increasing demand for practical legal skills by the legal profession.

I have noted the growing importance of skills-based teaching at tertiary level, especially for law schools. The skills that may be taught at tertiary level include generic skills, which can be applied across subjects, such as reading, writing and planning skills. They may also be subject specific skills, such as legal research. Promoting the teaching and learning of skills can create a medium for the: (i) provision of skills necessary and relevant for the legal profession and the community to which graduates return; and (ii) provision of skills as a set of interchangeable tools applicable to any context or task required by a law graduate. These two propositions stem from an appreciation that the teaching of skills has to be for a purpose. They have been inspired by the whole movement on *Re-thinking Pacific*

Education which propounds as one of its key objectives achieving relevant and appropriate curriculum in Pacific education systems. (IOE 2002).

It is clear that as universities begin to focus on skills-based learning, the role of universities will slowly transform from one which houses an elite group of academics and indoctrinated graduates to one that produces modern and adaptable graduates suited for the real world. Thornton realises this notion of adapting and modernising learning when he states that “the role of universities is to serve the state through the market” (Thornton 2005: 14). I believe that, in addition to providing students with substantive subject knowledge, skills-based learning should now be considered as a critical learning objective at tertiary institutions, including the University of the South Pacific. This is particularly the case for the teaching of law students, as the legal profession tends to expect graduates to have acquired particular skills. This article focuses on approaches to the teaching of one of these skills, that of legal writing, which has been described “as one of the most important tools that a student can acquire during law school” (Morris, Cook, Creyke, Geddes & Holloway 1996: 319). This article discusses the current emphasis on and methods of teaching legal writing skills in USP’s LLB courses and the pros and cons of three approaches to the teaching and learning these skills.

What is Legal Writing

The term ‘legal writing’ has some unfortunate connotations, such as legalese, jargon, and even gobbledegook and gibberish. Meehan and Tulloch (2001:77) describe legal writing as having an “overwhelming emphasis on precise and comprehensive legal content.” I like David Melinkoff’s term: “language of the law” (Melinkoff 1982). Legal writing is merely the language of the law, whereby the working language of the law, English in the context of this paper, is used as a medium to communicate, transmit, record and inform readers and audiences of the law. One’s ability and competence to use the language of the law, in other words, to produce legal writing, is a skill. Thus, the constant challenge for law schools and law teachers alike should be to retain the emphasis on legal writing and impart the necessary skills for legal writing to students. This is indeed a challenge, for reasons discussed below.

Challenges of Teaching Writing Skills for Pacific Students

My observations have been drawn from my experiences between 2001 and 2006 teaching courses such as Criminal Law & Procedure I and II (LA205 and LA206), Law of Contracts I and II (LA201 and LA202), Law of Succession (LA303), Law Clinic (a course in Clinical Legal Education – LA331) and Legal Research Project (LA326). In teaching legal writing skills to law students I have encountered several challenges, which I now discuss in order to give a perception of the realities facing the teaching and learning of legal writing skills at USP.

One of the most immediate and apparent challenges is the use of English as the language of instruction. The teaching of the law in most English speaking law schools operates on the assumption that a student is fully capable of reading well, writing correct grammar and speaking competently in English. A student's ability to understand and use English for legal writing is very much dictated by his/her competence to read, speak and write English in the first place. However, most students that enrol in the courses that I have taught are speakers of English as a second language. They are, therefore, at a disadvantage, and the teaching and learning of legal language is made correspondingly more difficult.

A second challenge is that, while law teachers are qualified and capable of teaching about the law in all its various subjects and fields and display much talent in this role, they usually have no or very little specialised training in the pedagogical techniques of teaching legal writing skills. Law teachers, for the most part, have not had the opportunity to be instructed in some of the basic pedagogical techniques required, and have not been able to observe what other law and non-law institutions are doing in the area of legal writing skills. While some may argue that specialised training or instruction is not entirely necessary and it is better to develop one's own methods and techniques to suit one's situation, the advantage of undergoing specialised training is the opportunity to become exposed to tried and proven techniques of teaching legal writing skills.

A third challenge relates to the way legal writing skills are currently integrated into the curriculum. In general terms, like most law schools,

USP offers the traditional, compulsory 'black-letter law' courses. These courses cover areas such as contracts, torts, criminal law and property law. Students also select several optional courses. Legal writing skills instruction is integrated into each of those courses as determined by the course coordinator who is responsible for designing and delivering them. The marking criteria for assessment exercises (research essays, law reform proposals, drafts of wills and contracts, problem analyses, case-notes and drafts of pleadings for moot exercises) include a component on legal writing skills. For instance, students studying Contract Law may be required to write a legal opinion advising an imaginary client about his/her rights and duties under a contract. In that task, the student is required to produce a piece of written work that, amongst other things, must conform to the norms of good legal writing. Students are also given the opportunity to practise legal writing skills in hypothetical situations during tutorials or seminars. These settings provide opportunities for students to work with each other under the observation and guidance of a lecturer. This method of integrating legal writing into most law courses ensures that students are taught these skills early in the degree programme and revisit them in subsequent courses.

The challenge lies in the fact that the practical reality with this approach is that a teacher has limited time and space in which to teach such skills. A teacher introduces the exercise with the added hope that students will pick up the 'hints' and do well, which is often far from the reality, as many students require a high level of motivation in order to learn well. Furthermore, this approach does not provide for the coordination of teaching legal writing skills across courses and there may be inconsistencies across courses. Nor does this approach allow any opportunity for teaching advanced or specialised legal writing skills unless individual lecturers choose to incorporate them into their courses.

Smith's observations of the disadvantages of this *integrative approach* are noted here:

First, teachers who integrate writing instruction with other topics must spend significant class time on subjects other than writing. Second, because the pedagogical goals of an integrated course are broader than those of a pure legal

writing course, the teacher of an integrated course may have more difficulty designing problems and exercises. Finally, no textbooks are available at present for the integrative approach. While there are some helpful articles, many teachers may feel the need for a truly comprehensive textbook (Smith 2004: 17).

The integrative approach does, however, have some merit and should continue to be used in the teaching of legal writing skills in law courses. Integrating legal writing assessments into courses demands only a relatively low level of design and planning. For example, a law teacher setting a problem-solving exercise will establish as one of the marking criteria the ability to write concisely and express a legal analysis of the problem by outlining the issues, the facts, the relevant law and application of the law to the facts in resolving the problem. If a student is able to do this and it is evidenced in the final product, then marks are awarded for good legal writing as well as ability in legal analysis. Another advantage of this approach is that it enables legal writing skills to be taught in a context, and it also creates flexibility for any teacher to adopt into their course a skills component.

In summary, competence in legal writing is a necessity for law students and the integration of teaching legal writing skills in a number of courses is a common strategy adopted within law schools. However, difficulties arise because the exact methodologies for the teaching of those skills and standards that students are required to attain vary from teacher to teacher.

Horizontal and vertical integration in teaching legal writing skills

In his article, Smith suggests that there are two approaches to teaching and learning legal writing skills that may be useful in overcoming difficulties associated with the integrative approach. The first is the horizontal advancement approach, which is aimed at teaching several legal writing styles within one tier of the law degree. The second is the vertical advancement approach, which operates on the idea that legal writing skills are taught in the first year courses and students will become exposed to increasingly sophisticated aspects of legal writing as they progress (Smith 2004).

Whilst the USP School of Law expects both horizontal and vertical advancement approaches to the teaching of various skills, including legal writing, in practice this is difficult to implement. It requires a great deal of coordination, curricular planning and monitoring. It also requires all law teachers to commit to a particular approach to the teaching of legal writing.

Some teaching proposals

Given that incorporating horizontal and vertical advancement of skills is not without problems, I am suggesting some alternative strategies to the teaching of legal writing which are complements to the currently used integrative approach. They are not to be considered as authoritative and refined, but as practical options to be applied as appropriate.

Specialised writing seminars

Competence in legal writing cannot be achieved overnight or through a single major assignment, given that there are several genres of legal writing, each with its own characteristics. Given the almost scientific nature of legal writing, it is possible to offer students a specialised course or seminar on legal writing skills. This would allow students to undertake intensive instruction on legal writing and to receive specific teaching on all aspects of legal writing as applicable to the practice of law. An added advantage is that qualified experts would be contracted to offer the seminars on behalf of the institution. Such seminars would be for a short period and would run possibly between semesters. The choice can be left to the school on whether to accredit the seminar towards the degree. A positive aspect of this approach is that, from a cost-benefit analysis, it maximises the opportunity for students to acquire writing skills. An intensive seminar or course on legal writing skills allows students to focus solely on acquiring these skills which they cannot do in the integrative approach. The integration of legal writing into a number of courses would, however, complement a specialised writing seminar, as the subsequent written assignments in other law courses would serve to reinforce the writing skills that have already been learned.

It must, however, be noted that specialised seminars need a lot of planning and management. Seminar materials have to be written in an appropriate style and the person responsible for delivering the seminar has to be qualified and carry relevant experience in the field. These practical and administrative factors can be discouraging to a law school in maintaining a commitment to offer specialised seminars. Often, the fear is that a generic set of materials can easily become obsolete if new and better approaches are designed and marketed elsewhere.

An Early Intervention Approach (EIA)

A more proactive approach to imparting legal writing skills to law students is what I call the Early Intervention Approach (EIA). Under this approach, students who have difficulty in legal writing should be identified as soon as possible and be directed to undertake special classes or workshops in legal writing skills. The level of instruction can be aimed at nurturing the minimum of skills that they already possess and raising them to a level where they can start handling the basic requirements of legal writing.

USP has already implemented an EIA approach in the form of administering the English Language Skills Assessment (ELSA) test to all new degree students, and requiring students who do not meet the minimum criteria in this test to undertake a remedial English course. However, some law students who have passed the ELSA tests or failed and then passed the remedial English course, continue to struggle with legal language. This is at least in part because 'the language of law' is at times technical and does require students to be very precise in their understanding and use of grammar and vocabulary. Identifying law students who are weak in legal writing through the monitoring of assignments and referring them to remedial assistance on legal writing would complement the more general early intervention that is already conducted at USP through the ELSA testing process.

While this approach guarantees a 'starting' step towards tackling the problem, it should not be treated as the final step. Teachers would need to continue to monitor the progress of law students who had earlier been identified as having problems with English. In addition, several different

types of remedial instruction may be needed for different aspects of legal writing. For instance, a student may be competent in writing essays, but may have difficulty in drafting a contract. The identification of students who are having difficulties would therefore be ongoing, and would need to be repeated each time students were introduced to a new form of legal writing.

The cost of having an EIA is that it requires an added amount of administration, coordination and planning. It also requires teachers with special skills to implement it. These teachers, who would need some background both in law and in teaching English language skills, may not be easy to find.

Incorporating context and culture within skills-based learning

It is important to take into consideration the actual context in which the teaching and learning of law operates when designing skills-based law courses and assignments.

The community in which a person lives and the cultural practices to which they adhere have considerable impact on how they learn, both formally and informally. Redfield spoke truthfully when stating that “the classroom is important only as it is understood in its relation to the society and culture of the children who occupy it, and teaching will be effective only as it is related to society and culture” (Nabobo 2002: 36).

Thus, a student’s cultural background should be taken into account when designing courses in legal writing skills. By exploring the ways in which Pacific peoples communicate with others and express ideas—the role of the orator and public speaking for instance—one can automatically discover the “valued sources of knowledge and insights” (Thaman 2000: 2) existing amongst Pacific societies. The recent movement in the Pacific to incorporate Pacific cultures into courses at tertiary level has been spurred on by the realisation by some Pacific academics that there is a “cultural gap” which has been described as “the distance between the expectations of the school curriculum and those of the cultures in which students are socialised” (Thaman 2002: 25).

Pacific students could be assisted in their learning of legal writing skills by being required to write on topics with which they are culturally and socially familiar. Often the subject of course assignments and exercises are foreign and distant. For example, I have observed how most students in my courses are unfamiliar with a hypothetical problem concerning insider trading in a company, but will quickly express themselves on a hypothetical problem concerning a land dispute in a village community.

Incorporating culture goes beyond just using examples and problems which will be familiar to students. Students who are thinking in one language and expressing themselves in another may write poorly in the language they are expressing themselves in if the grammar rules for each of the languages are different. It may be onerous to expect law teachers to have some understanding of linguistic principles, but having an understanding of how Pacific languages and dialects work would certainly help in identifying the source of difficulties, and could usefully feed into legal writing seminars or remedial classes that are implemented under an EIA.

Another way that culture and the language of law could possibly be brought together is to get students to use their local languages more. Whilst the principle language of the legal systems in all USP member countries is English, at subordinate court level local languages are used. There is a dearth of legal dictionaries and legal literacy material in local languages, and activities for students based around developing such material could be useful to help them consciously realise how English and their local language differ. (Of course, law teachers are unlikely to have experience in local languages and therefore will only be able to assess English language versions or translations.) Students could also be required to do reflective activities which require them to think about the differences in expression and style that exist between a document written in their local language and a document written in English.

Whilst incorporating local examples and creating hypothetical situations that students can relate to is a simple strategy that is easy to implement and is already widely used by the School of Law, once there is any attempt to look at how local languages affect legal writing in English we again run into difficulties relating to the need for special skills, training or knowledge.

Having an expert design some activities that law teachers could implement would be a possible way to overcome this barrier.

Summary

Overcoming the challenges of teaching and learning legal writing skills is a constant, but realising that there are some fairly simple strategies which can be used to overcome those challenges raises the hope that teaching and learning writing skills can be done more effectively in the context of a Law School in the University of the South Pacific. However, implementing any or all of the strategies mentioned first requires the School of Law to approve a collective commitment to bring legal writing skills to the fore. A law school that agrees that legal writing competence is a critical learning objective must match that commitment with adequate funding to bring in specialists, where needed, to strengthen the teaching of legal writing skills.

There also needs to be recognition that, whilst law staff know about law, they may know little about teaching, and that teaching a skill such as legal writing requires specialised knowledge. Finally, in order to move away from a traditional style of teaching towards one that incorporates modern notions of skills building and equipping students with knowledge that would be relevant for the real world, there needs to be increased coordination across courses. It is hoped that the ideas and strategies in this paper will help to generate a discussion that will lead to this happening.

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