

ASSESSMENT & PORTFOLIO PEDAGOGY IN LAW SCHOOLS

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1. CONTEXT

The adoption of outcomes based learning that re-orient legal education to substantiation of what law graduates can do as entry level members of the legal profession as opposed to what they might know about the law, of necessity, also requires a substantial re-orientation of curriculum and pedagogy, and in particular of assessment practice. After all it is only by means of assessment that Law Schools can demonstrate that their graduates have the ability to work collaboratively, behave ethically, advocate effectively, exercise professional judgment and so on.

Take, for example, the art of negotiation. No matter what the field of legal practice a law graduate chooses to enter, that law graduate is likely to be called upon to negotiate either in their client's or their employer's interests. While understanding of the theory and practice of negotiation is important, the client's/employer's interests will be best served by a law graduate who can actually conduct an effective negotiation rather than by a law graduate who can write an appropriately referenced, logically constructed essay about negotiation. Consistent with the view that learning is enhanced by observation, experience and reflection¹ and with the theory of constructive alignment of learning objectives, activities and assessment,² it therefore follows that insofar as an outcome like the 'ability to conduct a negotiation' is concerned, proxy methods of assessment like research essays or examination should be abandoned in favour of learning activities and assessments that comprise active engagement in negotiation. It also follows that assessment criteria should be formulated to reflect the development of negotiation capacity including practical skills such as active listening and reframing, and also higher order cognitive skills such as creativity and problem solving.³ There is absolutely no place for norm referenced assessment in the outcomes based learning framework.

The acquisition of professional attributes such as the ability to undertake a negotiation or the capacity to apply professional judgment is a developmental process that will occur across a law student's program of study. No one expects high level advocacy or mature professional judgment from a law student when they first embark upon their law degree. Consequently, program design and unit design ought to be cognizant of the incremental nature of learning, including the elaboration of developmental milestones across the law degree.⁴ The next page illustrates with an example from the Law School, University of South Australia.

¹ David A Kolb *Experiential Learning: Experience as the Source of Learning and Development* (Englewood Cliffs, New Jersey: Prentice Hall, 1984)

² John Biggs & Catherine Tang, *Teaching for Quality Learning at University* 3rd (Buckingham: Open University Press/McGraw Hill, 2007)

³ Carrie Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education' (2001) 6 *Harvard Negotiation Law Review* 97.

⁴ Wendy Green, Sarah Hammer & Cassandra Star 'Facing up to the Challenge: Why is it so Hard to Develop Graduate Attributes?' (2009) 28 (1) *Higher Education Research & Development* 17, 22.

ETHICAL ACTION & SOCIAL RESPONSIBILITY

Level 1

- Upon completion of Level 1, law students should be able to:
- Critically examine aspects of social justice relevant to the operation of the legal system and the application of the law to particular issues and disputes
- Consider the impact of the law on indigenous groups
- Identify and apply principles of academic integrity
- Consider the role of the legal profession in society

Level 2

- Upon completion of Level 2, law students should be able to:
- Identify and apply principles of professional conduct relevant to the legal profession
- Evaluate the efficacy of the principles of professional conduct relevant to the legal profession
- Critically evaluate the role of the legal profession in society
- Consider and evaluate the way in which the law governing enterprise and state based activities impacts upon individuals and particular social groups
- Conduct basic legal procedures in a manner which demonstrates sensitivity to ethical responsibility citizenship

Level 3

- Upon completion of Level 3, law students should be able to:
- Critically reflect upon their professional development
- Develop a plan for their future professional development
- Effectively resolve ethical dilemmas, including conflicts between their various professional duties
- Evaluate the extent to which the law delivers individual and social justice
- Evaluate the extent to which the law facilitates sustainable development
- Effectively undertake community legal service

Once the relevant milestones have been identified, learning activities and assessments can be designed and implemented within units of study. Ideally the links between learning in various units of study, and especially, the way in which learning activities and assessments reinforce, augment and substantiate learning should be made transparent to law students, who should be actively encouraged to take responsibility for the self management of their learning. The capacity to reflect upon learning, the ability to seek and make use of feedback and the ability to self regulate learning behaviours are now regarded as essential outcomes for law in Australia⁵ and the United Kingdom.⁶

2. EPORTFOLIOS

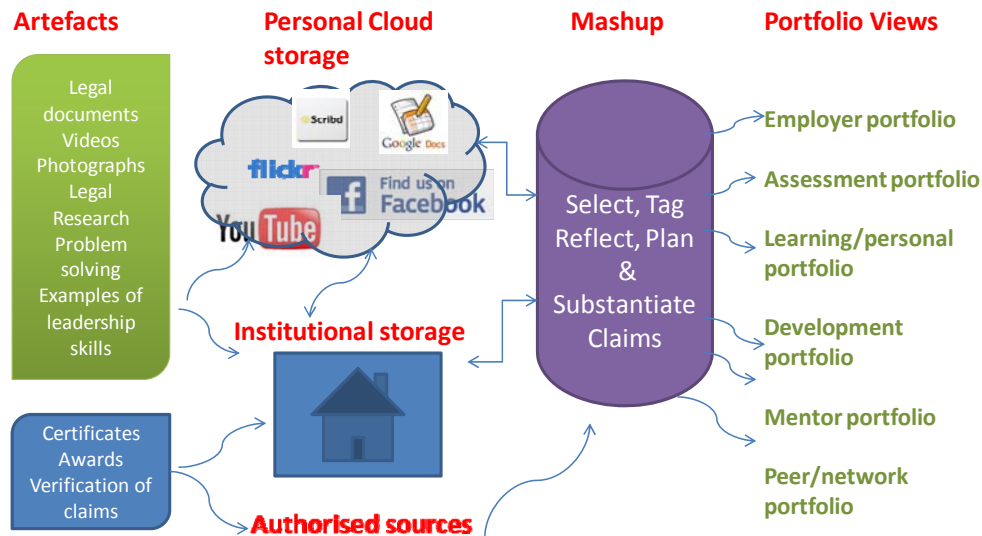
Eportfolios provide one means by which the gradual development of learning outcomes can be substantiated simultaneous with the facilitation of student centred learning and reflective practice. Essentially an eportfolio is a digital repository which marries elements of social networking, personal cloud storage and institutional learning space. The model on the next page illustrates. Eportfolios enable artefacts demonstrating attainment of learning outcomes from both inside and outside Law School to be stored over the course of a student's program of study, and also facilitate a wide variety of connections to be made between the artefacts and various claims of achievement. Artefacts may include: audio-visual records of engagement in advocacy and dispute resolution; examples of legal drafting; critical incident reports involving clinical legal education experiences; examples of research project management; awards recognising achievements; and references from clerkship experiences. As eportfolios are maintained over time and are not limited to assessment in any one unit of study they direct student attention to their incremental development and provide students, their assessors and potential employers with a holistic picture of knowledge, critical faculty and competency.⁷

⁵ Australian Learning and Teaching Council, *Threshold Learning Outcomes for Law Draft 6* (2010), Threshold Learning Outcome 6, provides: "Graduates of the Bachelor of Laws will be able to:
(a) learn and work independently, and
(b) reflect on and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development."
available at <http://www.altc.edu.au/standards/disciplines/law>

⁶ "Ability to reflect critically: A student should be able not only to learn something, but to reflect critically on the extent of her or his learning. At a minimum, a student should have some sense of whether s/he knows something well enough or whether s/he needs to learn more in order to understand a particular aspect of the law." United Kingdom, Quality Assurance Agency, Subject Benchmark Statements, Law available at <http://www.qaa.ac.uk/academicinfrastructure/benchmark/honours/law.asp>.

⁷ Tina L Cockburn, Tracey L Carver & Melinda J Shirley 'Using E-Portfolios to Enable Equity Students to Reflect On and Document their Skill Development' (2007) 15 *Waikato Law Review* 64 at 68; Abigail Garthwait & Jim Verrill 'E-portfolios: documenting student progress' (2003) 40 (8) *Science and Children* 22 at 23.

An E-portfolio Model



3. EPORTFOLIO PEDAGOGY

The student lies at the centre of eportfolio pedagogy. Eportfolio thinking requires students to act as the self authors and the self managers of their learning. They do so by learning how to: select material that substantiates their learning; evaluate and reflect upon their advance toward learning goals; and articulate claims about the achievement of professional standards.⁸

Reflection which is at the heart of eportfolio pedagogy also assists bridge the gap between understanding of legal doctrine and the context in which it operates.⁹ This is particularly important in a discipline like law, which is integral to the manner in which social relations are constructed, and which governs the distribution of social resources. Traditional legal education has tended to present the law as self-contained, self-referencing, rational, rules based system. Critical reflection that compels students to view their legally related experiences from multiple perspectives is an essential hermeneutic to becoming a fully rounded legal professional.

However - beware - the shift from traditional forms of assessment focused upon the recitation and application of legal knowledge to this form of reflective, transformative learning will be difficult and is likely to meet with both student and faculty resistance. Connecting law students with the process of their learning requires considerable structured support. Substantial investment needs to be made

⁸ Lorraine Stefani, Robin Mason & Chris Pegler *The educational potential of eportfolios*, (Oxon: Routledge, 2007), 19; Helen L Chen & Tracy Penn Light, *Electronic Portfolios and Student Success: Effectiveness, Efficiency, and Learning*, Washington, Association of American Colleges and Universities, 2010 at 3.

⁹ Anthony V Alfieri 'Against Practice' (2009) 107 *Mich. L. Rev* 1073, 1085.

in explaining the purpose and advantages of e-portfolios. Eportfolios are hard work to create and maintain and the extra work involved will be perceived as a burden unless students are persuaded of their benefits. Likewise, embedding e-portfolio pedagogy thoroughly across the law curriculum, and adopting an experiential, constructivist framework for learning also requires high levels of faculty dedication.

4. ESSENTIAL STEPS

4.1 EPORTFOLIO PURPOSE

Eportfolios can fulfil various functions including substantiation of learning from an institutional perspective as well as substantiation and reflection upon learning from a student's personal perspective, a showcasing function, a career management function, as well as a tool to support mentoring and or collaborative learning. The primary purpose of the eportfolio will play a substantial role in its implementation into the curriculum. A constructivist eportfolio, for example, will look and operate completely differently to an institutional, portfolio the primary purpose of which is to demonstrate the institution's efficacy within the higher education system. Of course it is possible to combine purposes and most modern eportfolio systems do so, but at the coal face of curriculum design within programs of study the dominant purpose of the eportfolio will be definitive.¹⁰

4.2 TOOL

There are a variety of tools available which support eportfolio pedagogy. Some of these are proprietary (eg Blackboard, Pebblepad and Desire2Learn) and some of these are open source (eg Mahara, SAKAI). The comparative features of some of these tools have been evaluated by a number of authors including: Klaus Himpsl-Guterman and Peter Baumgartner.¹¹

4.3 POLICY QUESTIONS

There are a number of important policy issues that must be addressed prior to implementation of any eportfolio framework. These include:

1. Ownership of the portfolio
2. Liability for content
3. Authentication of content
4. Interoperability and transfer of material
5. Storage capacity
6. The link between the eportfolio and the Law School's other student management systems

4.4 PRACTICAL CONSIDERATIONS

1. Assessment of individualized learning – how can individualised learning and personal reflection be assessed consistently and reliably

¹⁰ April Chatham-Carpenter, Lori Seawel & John Raschig 'Avoiding the Pitfalls: Current Practices and Recommendations for ePortfolios in Higher Education' (2009) 39 (4) *Journal of Educational Technology Systems* 437

¹¹ 'Evaluation of Eportfolio Software' in Nicole A Buzzetto-More *The E-Portfolio Paradigm: Informing, Educating, Assessing, and Managing With E-Portfolios* (Santa Rosa, Calif., Informing Science Press, 2010).

2. Scalability
3. Cost
4. User interface
5. User documentation and help features
6. Existing communities of practice
7. Combination of social networking and assessment features
8. Ease of deployment
9. Which competencies/learning outcomes
10. Which courses?
11. Which learning activities and assessments?
12. Development of law specific scaffolding.

5. CONCLUSION

Eportfolio implementation is a long term project that dovetails with the challenge of moving to an outcomes based curriculum. A whole of program approach is required commencing from the start of a student's study to their transition to professional practice. Once adopted, eportfolios have the potential not only to capture evidence of learning but also to facilitate greater awareness of incremental development and what is required for ongoing development, to cultivate deeper understanding of what it means to be a member of the legal profession and to substantiate claims of professional competency. Law students who do engage will benefit by being placed in a position to articulate their own individual narratives of their professional development. Staff who engage will also be rewarded by being able to share those individual journeys.