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Sally Kift

*Queensland University of Technology*

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## LAWYERING SKILLS: FINDING THEIR PLACE IN LEGAL EDUCATION

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SALLY KIFT\*

### SKILLS TEACHING IN LEGAL EDUCATION — A BACKGROUND

In “Pericles and the Plumber”, Twining observed that any working theory of legal education had to contend with the fact that certain functional distinctions had evolved into rigid dichotomies: that education should be separated from training, that academic be isolated from practical, that theory be divorced from practice, that liberal education be distinct from vocational training, and that law be sequestered from other disciplines.<sup>1</sup> More recently, it has become apparent that conceptions of legal education have also been inhibited by its segregation into three distinct stages: the academic, the vocational and continuing legal education. In light of such divisions, it is not surprising that the traditional objectives of legal education have been subjected to rigorous scrutiny in recent years and that reviews such as the 1987 Pearce Report on Australian Law schools<sup>2</sup> concluded that legal education was both insufficiently practical and insufficiently theoretical.<sup>3</sup>

Subject to institutional commitment, theoretical approaches are always susceptible to accommodation within traditional teaching and learning models. However, the incorporation of practical training is more difficult: even if it is accepted that there is a place for skills teaching within law schools,<sup>4</sup> how is this to be done?

McInnis and Marginson, *Australian Law Schools After the 1987 PearceReport*<sup>5</sup> identified a “lack of conceptual clarity” in Pearce and noted that:

nowhere in the four volumes does the Committee spell out systemically what it means by good teaching. Nor does the Report establish clear taxonomies of types of legal education.<sup>6</sup>

The Pearce Report indicated that skills teaching in law schools required more attention and suggested that the aims of undergraduate courses should include a mix of intellectual skills as well as vocational skills. In particular, the Report nominated three aspects of skills teaching that required greater attention: oral expression and legal advocacy; drafting skills; and negotiation and interpersonal skills.<sup>7</sup> However, in the absence of any blueprint for the place of skills training in law schools and with no indicators against which quality teaching in the delivery of that training might be assessed, it cannot be that surprising that the integration of skills development, skills theory and practice, into a holistic and effective educative process has proceeded slowly

But proceed it must. Stuesser makes a compelling case for the enrichment of legal education by the incorporation of skills learning. He argues that the integration of theory and practice enhances the understanding of law and legal process and humanises lawyering as a “people profession” which requires, amongst other things, basic interpersonal skills.<sup>8</sup> Studies assessing lawyer competency, such as that recently undertaken by de Groot in Queensland,<sup>9</sup> not surprisingly include indicia of both skills and knowledge as the yard-sticks by which lawyer competency is judged.<sup>10</sup> Though his research focuses on the respective merits of articles and legal practice courses as approaches to producing a competent lawyer, de Groot makes the following relevant observation:

Considering that a subject’s LLB studies constitute such a major prerequisite for admission as a solicitor, it might have been expected to figure more prominently as a contributing factor to the acquisition of the [particular] competency characteristic.<sup>11</sup>

Almost two decades after “Pericles and the Plumber”, Twining again observed that

what is involved in teaching, learning and assessing individual professional skills is under-theorized and under-researched.<sup>12</sup>

Twining’s challenge provides the focus for this article.

While there has been much debate about the role and value of setting objectives in educational practice, Mackie holds that there is, nevertheless, benefit in going through the process of attempting

to set precise objectives.<sup>13</sup> The first task of this article is to find a place for skills learning in an appropriate taxonomy of *learning* objectives for legal education. Once the learning objectives have been satisfactorily identified, the *subject* matter objectives of skills teaching, the question of *what* skills should be taught, will be addressed. As becomes almost immediately evident, skills teaching and learning compels additional and special teaching approaches. The final part of this article will therefore address the question of models for skills teaching in legal education.

## A TAXONOMY OF LEARNING OBJECTIVES IN LAW SCHOOL

Traditionally the learning objectives identified by Bloom et al,<sup>14</sup> which fall into three domains — the cognitive (thinking) domain, the affective (feeling) domain, and the psychomotor (doing) domain — have been used as the defining objectives in higher education. The question for present purposes is whether the teaching of legal skills has a place within that taxonomy or whether a different and more appropriate classification of learning objectives should be embraced for legal education.

Bloom's taxonomy has been justifiably criticised as being too broad, as having no place for certain of the objectives of professional education, and as failing to distinguish between knowledge and skills — the difference between knowing how to do something and being able to do it.<sup>15</sup> In particular, once the validity of this latter distinction is acknowledged, three different types of learning may be identified: cognitive learning, skill learning and affective learning.<sup>16</sup>

This classification has almost immediate appeal: though it has been argued by Bloom and others that the third of their learning objectives, the psychomotor domain, has little relevance to the academic aspects of university education,<sup>17</sup> intuitively that domain seems to bear close resemblance to skill learning, which could be considered a variant of “doing” in the professional context.

The case for the assimilation of skills as an explicit learning objective is further strengthened on an analysis of the six hierarchical categories of cognitive learning Bloom has identified: those of knowledge, comprehension, application, analysis, synthesis and evaluation. While the attainment of the first of these

(ie, knowledge), may be satisfied by the simple acquisition of factual information, the remainder of the categories require, to varying extents, the cultivation and application of intellectual *skills* to achieve their cognitive objectives. Again there is a distinction between attaining the inert factual knowledge and the ability to use it at the higher cognitive level.<sup>18</sup>

In an interesting discussion of Bloom's cognitive and affective learning objectives in a legal context, Petter suggests that:

The only way to teach a student to organize and process ideas is through interaction with and feedback to the student in an ongoing process of supervised trial and error. In order to teach comprehension, for example, the professor must start by ascertaining what the student believes he or she comprehends; then, if there is some deficiency in the student's comprehension the professor must take additional steps of discovering where in the student's intellectual process the mistake is being made, of identifying the mistake for the student, and of giving the student an opportunity to try again until he or she masters the skill. And a similar methodology must be adopted for each of the five levels of learning objectives above knowledge in the cognitive ladder.<sup>19</sup>

It will shortly be seen that this process bears close resemblance to the experiential learning model advocated for the teaching and learning of skills.

In the search for a more appropriate taxonomy of objectives for professional education, Carter identifies three major categories of educational objectives:

- (1) knowledge (what the student knows)
- (2) skill (what s/he can do)
- (3) personal qualities (what s/he is).<sup>20</sup>

The taxonomy he has developed is reproduced at Figure 1. Carter crystallises the difference between knowledge and skill when he discusses the development of skill:

The development of a skill may not require a very great deal of knowledge, and may in some cases proceed in the absence of much knowledge at the higher levels at all. Whilst the acquisition of a skill may be made much easier by a greater theoretical grasp of the subject, proficiency can only be attained through diligent practice, evaluation and feedback.<sup>21</sup>

Figure 1: Carter’s Summary of a Taxonomy of Objectives for Professional Education

Personal Qualities	<b>Mental Characteristics</b> Openness Agility Imagination Creativity	<b>Attitudes and Values</b> Things Self People Groups Ideas	<b>Personal Characteristics</b> Integrity Initiative Industry Emotional resilience	<b>Spiritual Qualities</b> Appreciation Response	Being
Skills	<b>Mental Skills</b> Organisation Analysis Evaluation Synthesis	<b>Information Skills</b> Acquisition Recording Remembering Communication	<b>Action Skills</b> Manual Organising Decision-making Problem-solving	<b>Social Skills</b> Co-operation Leadership Negotiation and persuasion Interviewing	Doing
Knowledge	<b>Factual Knowledge</b> Facts Structures Procedures Concepts Principles		<b>Experiential Knowledge</b> Experience Internalisation Generalisation Abstraction		Knowing
Cognitive			Affective		

Against Carter's taxonomy the learning objectives for law are capable of explicit and relevant classification in a way that more accurately reflects many of the perceived goals of professional legal education: particularly, the acquisition of actual cognitive knowledge; the ability to use that knowledge in a legal context; and the cultivation of affective and other social and interpersonal characteristics and qualities. With these goals firmly in place when designing courses (and with a sympathetic approach to the inculcation of skills training), it should be possible to address the current imbalance that exists in legal education between the three domains — cognitive, skills and affective. For example, it would be entirely possible for students to use skilled behaviour and interpersonal qualities to ascertain the relevant facts for seminar hypotheticals through a process of legal interviewing, rather than rely on the standard written problem sheet.

The distinct advantage of Carter's taxonomy is that its very relevance in all respects (not just in respect of two out of three domains as per Bloom et al) makes it difficult to ignore the placement of skilled, and related affective, learning objectives within law curricula. If, as seems clear, affective and cognitive learning do not exist independently and often do occur together,<sup>22</sup> it would seem desirable that a command of affective skills (social, personal and interpersonal) be actively cultivated and inculcated into the culture of expert professional practice, only the cognitive learning aspects of which have concerned traditional law curricula to date. For example, how could the novice law professional ever hope to discern the facts relevant to a client's case through the interview process or, more importantly, ever hope to be in a position to counsel the client as to an outcome that might best accommodate that client's needs and circumstances, if the professional is unable to draw on relevant desirable personal attributes and skills which have at least been identified, if not encouraged and developed, at law school. As Carter also points out, this holistic approach is closer to "the ideals of a good University education as a liberal education of the whole person".<sup>23</sup>

Finally, the application of a relevant taxonomy will focus attention on the ways in which the particular skills objectives might be achieved (the learning experiences) and will also highlight the need for appropriate methods of assessment to test the attainment of the skilled (and affective) behaviour.<sup>24</sup> These matters will be

addressed further below.

## THE SUBJECT MATTER OBJECTIVES — WHAT SKILLS?

It is useful when discussing “lawyering skills”, to utilise the term “skills” in the sense explained by Mackie, namely as representing a

convenient linguistic tool which implies a need to grapple with a *continuum* of ‘*practical expertise*’ from fairly simple lawyer tasks which may be susceptible to certain ritualised techniques or procedures (eg some aspects of office systems management or ability to complete standard court forms) to more complex operations with less readily identifiable underlying techniques (eg judicial creativity) ...Between the extremes come various lawyering acts — drafting, interviewing and counselling, negotiation, advocacy<sup>25</sup>

Much has been written concerning the lawyering skills that should constitute the “subject matter objectives”<sup>26</sup> in law curricula. Recently, Wade has examined the “awesome goals of law school” all of which he says, in one sense, involve the teaching of skills. Wade has described these skills objectives as evolving in three historical “waves”: the first being the “traditional” skills associated with abilities to critique and manipulate legal rules in thought, word and writing; the second, in the 1970s, associated with the clinical legal education movement; which was expanded upon later in the same decade in a third wave, primarily in the form of postgraduate Continuing Legal Education and Professional Legal Training courses, but also taken up later by some of the newer law schools. This last surge encompassed skills such as interviewing, negotiating, advocacy, drafting, oral and written communication skills in a legal context, identification of ethical issues and practice management skills.<sup>27</sup>

It is not the purpose of this article to attempt to analyse the vigorous debate as to the specific constitution of the lawyering skills that ought to be taught at law school. Rather, this article will focus on the arguably generic vocational and lifelong nature of many of the lawyering skills the commentators have identified.

By way of example, in the Figure 1 taxonomy, Carter classifies skills under four headings:<sup>28</sup>

- (1) *information skills* which deal with the handling of factual knowledge; subdividing into acquisition, storage and

communication skills;<sup>29</sup>

- (2) *mental skills* which include the higher levels of the cognitive domain of Bloom's taxonomy; subdividing into organisation, analysis, evaluation and synthesis skills;<sup>30</sup>
- (3) *action skills* which include psychomotor skills but are not limited to manual skills and will depend on the profession; subdividing therefore into manual, organising, decision making and problem solving skills;<sup>31</sup>
- (4) *social skills* or people/interpersonal skills; subdividing into co-operation, leadership, negotiation and persuasion and interviewing and counselling skills.<sup>32</sup>

The relevance of these types of skills to legal education is self evident, though they may not be specific lawyering skills.

Cognitive research suggests that specific subject matter knowledge, particularly if it is neither embedded in the context of its discipline nor supported by appropriate skills is becoming less valuable:<sup>33</sup> little of the detail is remembered even a short time later and the pace of change is such that detail is likely to be quickly superseded in the rapidly changing legal domain.<sup>34</sup> An obvious example of this in the legal context is specific subject matter knowledge of substantive law which requires the support of research skills to remain relevant and useful. It is more valuable today for students to acquire the flexibility to be effective in different situations and, on graduation, for them to display some generalisable skills over and above their content matter expertise.<sup>35</sup> Persuasively, potential employers and business leaders across a range of disciplines, including law, have

repeatedly emphasised that professional knowledge was considered less important than the development of skills in communication, decision making, problem solving, the application of knowledge to workplace, working under minimum supervision and the ability to learn new skills and procedures.<sup>36</sup>

Gibbs et al suggest that what "different situations" have in common is not their knowledge content but their skills content. Consequently, education in preparation for these situations should focus on common transferable or generic skills that are of use to students in a variety of applications in the world outside academia.<sup>37</sup> Though the form that a specific skill may take, and its relative value, may differ from one situation to another, a sample list of transferable skills was recently identified by the Oxford

Centre for Staff Development, as set out in Figure 2.<sup>38</sup>

*Figure 2: Gibbs et al Checklist of Transferable Skills*

Transferable Skills	Examples
Communication	Writing reports, giving presentations, using media (eg video, posters).
Group work	Leadership, sharing, co-operation, teamwork.
Personal	Independence, autonomy, self-assessment, self-confidence.
Interpersonal	Influencing, counselling, listening, interviewing, assertiveness, negotiation.
Organisational	The management, project management, objective-setting, project evaluation.
Teaching and training	Identifying learning needs, designing and running workshops, coaching, peer tutoring.
Learning	Reading flexibly and with purpose, note-taking flexibly and with purpose, literature search and review.
Information gathering	Locating information sources, evaluating sources and data, extracting relevant information, interpretation of data, presentation of data.
Problem solving	Problem analysis, creative problem solving, decision making.
Language	Oral skills, use of a foreign language.
Information technology	Using word processing, databases, spreadsheets, graphics, DTP.
Entrepreneurship	Taking initiatives, seizing opportunities, creativity.

While it is not suggested that all of these transferable skills should be taught at law school, the argument for validly incorporating at least some of them in modern law curricula is

bolstered when the obvious correlation between the lawyering skills (such as those described by Wade in the educational “waves”) and many of the transferable skills (as set out in Figure 2) is acknowledged. As referred to above, employer surveys suggest that graduates who possess these transferable or generic skills have great appeal. Moreover, it should not be forgotten that law graduates seek to apply their legal education to an increasingly wide range of occupations and careers. The importance of these skills is thought to be so great in some institutions that formal policies are in place to “profile” students’ transferable skills on graduation, in addition to the usual certification of academic achievement.<sup>39</sup> To a large extent this provides an emphatic solution to Gold’s challenge as to the acceptability of licensing a legal practitioner who has not had skills training.<sup>40</sup>

But how to teach for transfer? Nathanson<sup>41</sup> defines transfer of learning as

the carry-over or generalisation of learned responses from one type of situation to another. Two types of transfer of learning exist: vertical and lateral. Vertical transfer refers to skills of a lower order being transferred to a higher or more complex level. Lateral transfer is the application of learned skills to new situations which differ from those in which the learning has occurred.<sup>42</sup>

The issue of skills transferability is not simple and the process is by no means an automatic one.<sup>43</sup> As Gibbs et al point out:

It can be hard to find convincing evidence that some “transferable skills”, such as problem solving, transfer to new situations at all, where transfer takes place its extent seems to depend largely on the similarity between the context in which the skill was learnt and the context in which the skill is subsequently used...

The practical implication of this transfer problem is that it is not sufficient to tack transferable skills on to conventional academic curricula — the skills simply won’t transfer effectively to non-academic contexts. It is necessary to bring elements of the world of work into the classroom, to confront students with situations and problems which resemble those they will eventually have to tackle, and to allow them to learn the necessary skills in work-like contexts, tackling the problems in the way they will eventually have to tackle them outside academia.<sup>44</sup>

It may be possible for the simultaneous cultivation of both transferable and lawyering skills to occur within existing course design — communication and language skills may be introduced in a systematic and integrated fashion whereby students are required to give oral presentations in seminars, to undertake vivas and to

submit assignments. Assessment may be conducted on the basis that students will demonstrate higher level skill acquisition (Nathanson's vertical transfer) as the years go by. However, it will be necessary, in certain instances, that specific instruction in the skill be given so that the requisite convergence between, or lateral transfer from, the generic to the lawyering skill may occur. For example, with respect to the generic communication skills, the lawyering skill of effective interviewing practice may be modelled and taught by bringing "elements of the world of work into the classroom" as suggested by Gibbs et al and simulating this particular lawyering task, with its interplay of both communication and interpersonal skills. To assist law teachers in this process, specific texts are now being written providing structured instruction and guidance on the effective incorporation of such work-like contexts into law curricula.<sup>45</sup> Similarly the generic skill of effective writing, as currently developed throughout law courses by the routine submission of assignments, may be specifically plotted for transfer as a lawyering skill in the variety of its specialised lawyer applications; by building in instruction, opportunities for doing and feedback on profession-like activities such as the preparation of pleadings, opinion letters, briefs, contracts, wills and legislation.

A key factor in designing for transfer is that students be provided with a theory of the relevant skill, one of the purposes of which is to provide a framework for promoting transfer: as Twining has put it, to "provide coherence — to map connections and to develop a systematic, internally consistent overview."<sup>46</sup> The necessity for theoretical frameworks in skills education has been recognised by many legal educators over time and is crucial to the implementation of effective skills instruction in many ways. Recently Wade has again emphasised the need to produce models and theories for skills training/learning:

Without theory, skills are shallow and ephemeral. (Without reflection on skills, [a skill in itself], theory is marginalised).<sup>47</sup>

Additional to the requirement for theorising, and without purporting to be exhaustive, another vital precondition for transfer is "effective sequencing".<sup>48</sup> Collins, Brown and Newman in their model of "cognitive apprenticeship"<sup>49</sup> provide assistance in this regard by focussing on three aspects of the order in which tasks are introduced to students. They advocate that effective sequencing

may be accomplished by increasing complexity, increasing diversity — so as to facilitate transfer by freeing the skills from their dependency on similarity of contexts and making them more readily available for use in new applications — and by introducing “global” before “local” skills, in the sense of making explicit how the specific skills fit into the global activity of lawyering.

The teaching approaches that are most likely to achieve this skills development and which incorporate the prerequisites of skills theorising and effective sequencing, will now be considered.

### APPROACHES TO TEACHING SKILLS

As has probably become obvious, the teaching of lawyering skills is challenging work and will require additional teaching skills and commitment. Gold emphasises:

teaching skills is not the same as teaching law ... teaching about skills requires an approach to the learning-teaching process which recognises the multi-disciplinary nature of skills study and practice ... In teaching people to perform skills one is forced beyond didactic modes of instruction. Experiential forms of learning are necessary if new abilities to perform are to be acquired. To begin with, to talk about skills will rarely help someone to perform them. The centre of attention in skills teaching shifts from teacher to learner. It is the latter's experiences and abilities which ultimately must be tested.<sup>50</sup>

As Gold continues,<sup>51</sup> it is true to say that there are many approaches to facilitating the acquisition of new skills and no particular approach is mandated. However, when designing any course, as the Biggs presage-process-product (3P) model of classroom learning makes explicit,<sup>52</sup> it is useful to acknowledge that prior to students' engagement in learning, presage factors exist which will directly affect students' approaches to the particular tasks they are set. Biggs refers to this as the metacognitive activity of determining how, as a strategy, the students will engage in the process of learning.<sup>53</sup>

An important key to calling out desired approaches is through motivation.<sup>54</sup>

In teaching lawyering skills, the student presage factors have every potential to correlate positively with desirable learning processes and outcomes: arguably the optimal motivational context exists because this is exactly the skilled work that many students hope to perform in their chosen profession on completion of their

studies. However, it is not sufficient to rely simply on the active involvement of students as motivation. Real purpose and relevance must be made explicit to students to demonstrate the place and importance of the learning in the overall context of lawyering activity, otherwise students will become quickly uninterested.

Biggs states that “strategy is embedded in motive”,<sup>55</sup> students who are intrinsically motivated to embrace the learning will adopt an approach to learning that will produce the desired outcome. He promotes an “expectancy-value” model as a framework for motivating students that provides useful guidance in initial skills course design. The “expectancy” is of success, in the sense that there is some purpose to going on: students will become quickly discouraged if they are required to utilise skills they have not been trained in and/ or simply do not have. As Mackie suggests, tasks should be set from which students will obtain an “early sense of achievement” to give them the confidence to tackle more difficult tasks in the sequence,<sup>56</sup> simply, the tasks should be doable. Biggs refers to this as the “*cognitive* dynamic of task engagement”; the “optimal mismatch” between current competence in the lawyering skill (which may well be non-existent) and that required by the task set.<sup>57</sup> As regards motivation in this context, anecdotal student evidence and recently conducted research<sup>58</sup> suggests that the *affective* dynamic of embracing skills learning may be well satisfied in the legal context due to identification of the task with a career-related step.<sup>59</sup> Perhaps what legal educators should remember in all this is to make the vocational link explicit and not to assume that recognition of the task’s value, and consequent motivation, will be automatic.

When one endeavours to assimilate the varying considerations that have been identified so far into a theory of teaching lawyering skills, it is possible to make the following observations as to the essential features of such skills instruction. In no particular order of importance, the skills instruction should:

- provide a legitimate means for incorporating skills knowledge (obviously) into the law curriculum, but also contribute to affective domain learning, to date largely ignored (Carter and Petter);
- promote learning as a lifelong process (Crebert’s transferability);
- relate to the learner’s conception of future practice, particularly in the sense of linking the classroom to the real world (Biggs and

Crebert's transferability);

- seek to engage/motivate the learner: eg, by appeal to the learner's prior experience, *cognitively* by optimal task engagement or *affectively* by identification with a career related step (Mackie and Biggs);
- adopt a student centred (rather than teacher focussed) approach to learning (Gold);<sup>60</sup>
- provide a framework for theorising in the teaching of skills (Nathanson, Wade and Twining); —
- embrace an experiential form of learning to facilitate the testing of that learning (Gold);
- situate the skills so that they may be transferable (Crebert);
- provide the opportunity for reflection and feedback on the skill practiced (Wade and Gold);
- provide the means for appropriate sequencing of the skills instruction (Nathanson and Collins, Brown and Newman);
- provide some scope for the accommodation of different learning styles, including and in particular adult learning, as a general tenet of good teaching.

It should be possible to accommodate these features using appropriate strategies and teaching approaches. How this might be done will now be examined.

## TEACHING SKILLS — A CONSTRUCTIVIST /EXPERIENTIAL MODEL

Candy states that recent research on learning has witnessed the ascent of new dominating factors:

[recent research] first views learning as a qualitative transformation of understanding rather than a quantitative accretion; second, it sees learners as active construers and “makers of meaning”; third, it concentrates on portraying the experience of learning from the learner's perspective; and fourth, it seeks to examine the phenomenon of learning in all its complexity, as it occurs in “natural” or “real-life” settings.<sup>61</sup>

Candy labels this shift in perspective from the view that knowledge is something external that is transferred to a passive learner who appropriates and masters the learning, to the view that knowledge is something that must be internally constructed by an active learner, as a move to the “constructivist paradigm”.<sup>62</sup> Central to constructivism is the premise that learners will try to give meaning to, to “construe”, their environment and experiences in a

continuing process.<sup>63</sup> Constructivism in education focuses on the learner (rather than the teacher) and is concerned with two matters: how it is that learners construe knowledge — the events, ideas and experiences presented — and how they will construct personal meaning from that knowledge into systems, structures or schemata, using both cognitive and affective processes.<sup>64</sup>

In a skills context it is clear that students will not learn a skill by being told about it, nor even by discussing it and thinking about it: students must be provided with opportunities to practise the skill. Learners construct personal meaning and cognitive strategies in a skills context when they have been provided with an event, the experience of skilled behaviour, to construe. However, just as activity-based learning of itself is not sufficient to motivate student approaches to learning<sup>65</sup> so also active participation is not sufficient to enhance knowledge and understanding. What may be required of teachers in this teaching and learning process is guided instruction, otherwise learners “may become ‘trapped’ in their own constructions, without having access to alternative ways of viewing events and ideas”.<sup>66</sup> Therefore, not only will students need access to the theory of the skill and an opportunity to practise it, they should also be given opportunities for reflection and feedback on their performances of the skill so that they are able to reconstrue or mode their previous constructs. Then they may apply new, clearer understandings to the next experience of skilled behaviour. It has been suggested, therefore, that experiential learning is the best (and possibly the only effective) way to prepare students for the “tasks and skills of practice”.<sup>67</sup>

### *Experiential Learning Theory*

Constructivism underpins many teaching and learning approaches. In experiential learning, it is the *experience* from which learners construe meaning. As explained by Andresen et al, experiential learning

supports a more participative, learner-centred approach, which places an emphasis on personal experience, rich learning events and the construction of meaning by learners.<sup>68</sup>

Experiential learning theory, relating theory to practice in “learning by doing”<sup>70</sup> as refined by Kolb, emphasises the pivotal role that experience plays in the learning process.<sup>70</sup> Kolb states it is

this emphasis on experience that

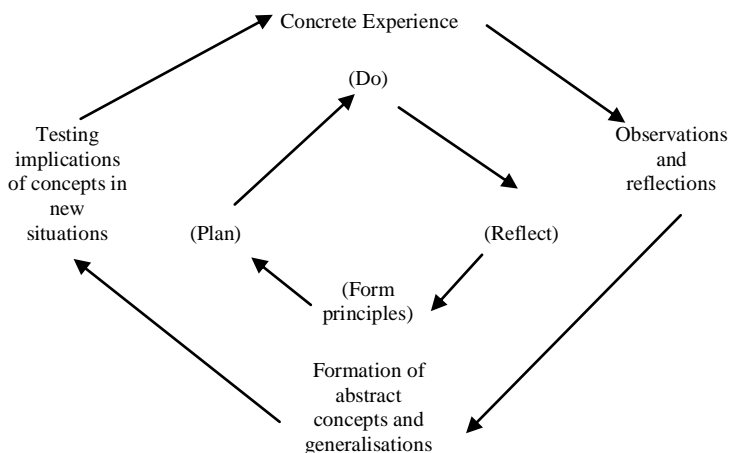
differentiates experiential learning theory from rationalist and other cognitive theories of learning that tend to give primary emphasis to acquisition, manipulation, and recall of abstract symbols, and from behavioural learning theories that deny any role for consciousness and subjective experience in the learning process ... experiential learning theory [is] a holistic integrative perspective on learning that combines experience, perception, cognition, and behaviour.<sup>71</sup>

Experiential learning may be implemented in a variety of ways and in almost any learning situation: as a year long independent project, as a ten minute role play or as a five minute reflection exercise at the conclusion of the lecture.<sup>72</sup> Further, it may be possible to draw on actual experience, including the abundant prior experience possessed by many (particularly adult) learners, and it may also be possible to construct experiences in the learning environment. It is clear however that experience alone is not sufficient for learning.

It is not enough just to do, and neither is it enough just to think. Nor is it enough simply to do and think. Learning from experience must involve links between the doing and the thinking.<sup>73</sup>

The Kolb model, which has its theoretical origins in the work of Dewey Lewin and Piaget,<sup>74</sup> describes the learning cycle in four stages as represented in Figure 3:<sup>75</sup>

Figure 3: Kolb's Experiential Learning Model (Modified)



The cycle may be entered by the learner at any stage, but the

process must be followed sequentially. The learner moves through the cycle by actively reflecting on experience, translating that reflective observation into a “theory from which new implications for action can be deduced”,<sup>76</sup> and by then testing those theories as a guide to creating new experiences.

Gibbs et al have usefully illustrated each stage of the experiential cycle by reference to associated teaching and learning processes as depicted in Figure 4.<sup>77</sup>

Figure 4: Gibbs et al: Teaching and Learning Processes associated with each Stage of Kolb’s Experiential Learning Cycle

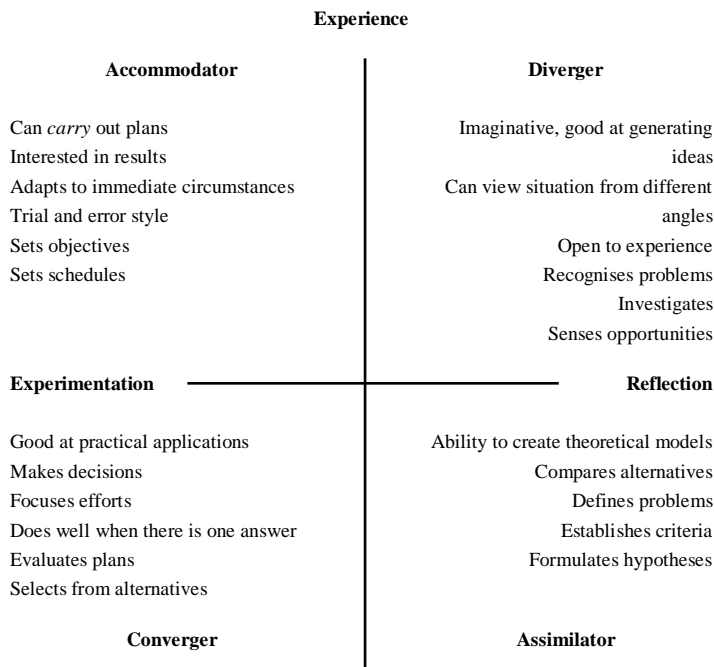
Stage	Illustrative Learning Activity
Do	Experiential exercises, actually using the skills, work placements
Reflect	Watching a video of yourself, discussing what happened, using a checklist to assess the use of a skill, keeping a reflective log or diary, profiling skills.
Form	Listening to a lecture about a skill, reading, summarising general principles from a discussion.
Plan	Preparing for a presentation or for teamwork, setting actions plans, identifying priorities for skills development using a profile.

It has been observed that an aspect of good teaching is the adoption of teaching and learning processes that accommodate a variety of learning strategies.<sup>78</sup> In this regard, Kolb has identified that distinct learning styles are associated with each stage of the experiential cycle: students will have different strengths, will consequently tend to favour different stages and may well become stuck at one stage in the cycle while moving through it (similar to the way in which learners may become trapped in their own constructions as discussed above in relation to the constructivist paradigm). Detailed examination of Kolb’s learning styles inventory is beyond the scope of this article.<sup>79</sup> Further, it is not this writer’s intention to debate with constructivists and others the usefulness or otherwise of learning styles inventories. Nevertheless, it is suggested that the relevance of particular learning styles to the

present discussion is twofold: first, that experiential learning as a teaching approach will clearly accommodate different learning styles; and secondly, that awareness of the learner's place on the two dimensional learning styles axis represented in Figure 5 below — constituted by the abstract/concrete dimension and the active/reflective dimension — may be used by learners to discover their own learning strengths and weaknesses. With suitable motivation, a learner's self-identification as a practical converger, an observing diverger, a conceptualising assimilator or a hands-on accommodator, should lead and assist the learner to develop the necessary skills to enable them to operate within the full range of learning styles, furthering their ability to learn lifelong.

Therefore, before embarking on experiential learning, it may be useful for students to recognise the nature of their own styles and the characteristics of other learning styles, and to appreciate that skilled behaviour at each stage of the cycle can also be learned. Gibbs has set out the abilities associated with effective learning at each stage of the learning cycle as follows:<sup>80</sup>

Figure 5: Modified from Gibbs: Abilities associated with each stage of the learning cycle



### Conceptualisation

It is suggested that teachers utilising experiential learning exercises might wish to consider designing the learning activity carefully to provide a structure to each stage of the cycle so that learners are taken through the appropriate sequence.<sup>81</sup> At a practical level, it will not be possible for learners always to have actual learning experiences relevant to the particular learning outcome. It is often necessary therefore to provide for “substitute experiences” such as simulations, case studies, role plays and games.<sup>82</sup> For example, a video of a client interview could be shown to a class. The teacher could ask specific questions focussing on the “micro-skill”<sup>83</sup> of questioning, such as “What sequence of questioning was used by the lawyer in the questioning stage of the interview? Was it effective? (At a particular point) what types of questions were used — leading, reflective, open or closed?” The class could then be asked to record their experience of the video, reflect upon it in light of their knowledge of effective questioning skills and propose a strategy for improvement. The video might then be viewed a second time, having regard to the reflection prompted by the first viewing and the ensuing class discussion. In this way learners could be taken through the experiential cycle twice within the session.<sup>84</sup>

Of course, as mentioned earlier, the cycle may be entered at any stage. In the client interviewing context, note taking in a lecture that deals with effective questioning sequences would see learners enter the cycle at the abstract conceptualisation stage (as would reading or summarising general principles from discussion). Learners could then be asked to prepare for a role play of an interview in its questioning stage to test the efficacy of questioning sequences — the planning stage of the cycle. The role play is conducted and students may experience what happens in response to certain forms of questioning — the skills are actually used. The role play is videoed so that the learners have access to a behavioural record of the experience and can reflect on it. They could also discuss with other learners their experiences of the questioning styles or utilise a checklist to assess their use of the skill. Learners could then be invited to return to the conceptualisation stage and encouraged to reformulate their understandings. Perhaps learners could then be given the opportunity to embark on the experiential cycle for a second time

by preparing for a further role play and experiencing what happens on that occasion and so on round the cycle until an adequate understanding of the questioning skills has been constructed.<sup>85</sup>

The importance of planning learning activities that incorporate each stage of the learning cycle cannot be overstated: ineffective learning processes in skills training often emphasise one aspect of the experiential cycle at the expense of the others.<sup>86</sup> It may be, for example, that students are provided with opportunities to experience the use of the skills but little or no regard is had to structuring time for reflection (nor indeed might there be any training in reflective practices). As Wade and others have identified, it may be even less common that students engage in the abstract conceptualisation stage of the cycle: there may be no theory of the relevant skill presented or no occasion for learners to derive a personal construct/strategy from their own experience.<sup>87</sup> Thus, while it is apparent that effective experiential learning requires that all stages of the cycle must be accommodated, it is also apparent that, for the reflection and conceptualisation stages, a theoretical framework of the skill must underpin the learning process. The conceptualisation stage of the cycle bears on the ability of learners to generate solutions or strategies, which in turn leads to the provision of new experiences. A theoretical framework within which the skill is taught is also critical to the efficacy of assessment and evaluation in the experiential learning: teachers will be unable to assess the utilisation of the relevant skill in the absence of clear criteria and students will be unable to evaluate or analyse their own mastery of the skill in the absence of a model of expert practice.<sup>88</sup> In all respects practice must be linked to theory. Alternatively, at a more pragmatic level for course design, it has also been suggested that three stages are apparent in experiential learning exercises:<sup>89</sup> *the input or preparation stage* where an overview of the activity is outlined and students begin to reflect on what is required of them; *the actual engagement in the experience* which may be somewhat overwhelming for the learner; and the third stage where *the processing of what has occurred* takes place and the learning is abstracted and internalised. It may be easier for teachers to conceptualise their planning for experiential learning if they have in mind these three stages and the underlying necessity for a theoretical framework of the skill being taught.

## AN ASPECT OF EXPERIENTIAL LEARNING — REFLECTION

What may also be exposed in this last construction of experiential learning is the pervasive role played by reflective activity throughout the cycle: during the preparation stage in anticipation of the activity; as a “coping” mechanism while the activity is being engaged in and at the observation and reflection stage following the activity.<sup>90</sup>

It is also appropriate to isolate and examine this reflective stage of the cycle due to the importance that reflection in professional practice, “reflection in action”, has been accorded in more recent times.<sup>91</sup> It is arguable that reflection and evaluation are skills in themselves.<sup>92</sup> Boud et al state that it is the ability to reflect that characterises those who learn effectively from experience: only learners can learn and only they can reflect on their own experiences.<sup>93</sup> It is critical therefore for learners to be aware of the role of reflection and how the processes involved in it may be facilitated. The reflective process is a complex one. In a way in which many learners in law will not have had great experience of, both affective and cognitive dimensions must be engaged to undertake reflective activities.

Boud et al have devised a model for promoting reflection in learning. They define reflection, which occurs in a “processing phase” after the experience, in the following terms:

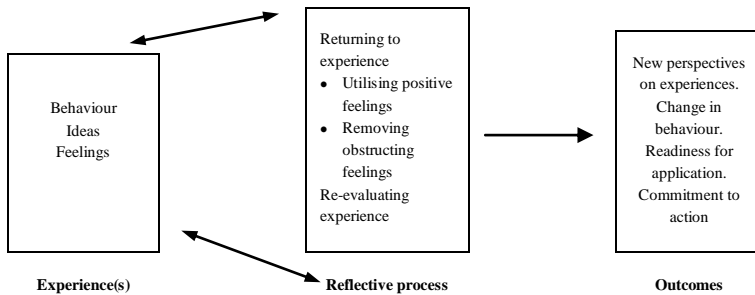
reflection in the context of learning is a generic term for those intellectual and affective activities in which individuals engage to explore their experiences in order to lead to new understandings and appreciations.<sup>94</sup>

In essence, reflection is a metacognitive skill in which greater awareness of and control over the student’s learning process is generated. In defining “metacognition” Walker has said:

The regulation of cognition refers to the activities and strategies that we use to control, regulate and direct our cognitive processes. When faced with a particular cognitive task, many adults and some children are able to draw upon a variety of strategies and activities to focus their mental faculties onto [sic] the task ... Metacognitive regulation, then, refers to a wide range of self-directed skills and strategies which may be employed prior to, during, and after the performance of a cognitive task. Metacognitive regulation includes such activities as planning and organising for a task, monitoring understanding and progress at a task, questioning ones [sic] knowledge, predicting possible outcomes, testing

and evaluating one's level of accomplishment and revising ones [sic] task strategies. Metacognitive regulation also refers to the allocation and deployment of attention or effort considered necessary to meet the demands of a particular cognitive task.<sup>95</sup> The model for reflective practice advocated, set out in Figure 6, is similar structurally to the Biggs 3P model referred to earlier. Boud et al recognise that presage factors of learner characteristics and intents can dramatically affect the metacognitive activity of self monitoring that Biggs describes as "metalearning",<sup>96</sup> and which is one aspect of process in the 3P model. As discussed also by Walker, this is the metacognitive regulation of deciding how the task of reflection is to be handled in the context. In a similar way, Kemmis refers to reflection as "meta-thinking", in the sense of thinking about the relationship between thought and action in a particular context.<sup>97</sup>

*Figure 6: Boud, Keogh and Walker's reflective process in context*



The metacognitive activities embedded in reflection become explicit in the process stage of the Figure 6 model. Here are ways in which reflection may be promoted. Additional to the obvious but important step of linking the reflection in a temporal sense to the learning activity<sup>98</sup> (either actually, by specific scheduling of a follow-up debrief or artificially, by video replay), Boud et al also identify three stages in the reflective process. In particular, they suggest the purposeful imposition of two steps between the experience and the reevaluation: first, the step of returning to the experience, the recollection; and, secondly the step of attending to the feelings generated so that impediments to learning in the form of negative feelings may be neutralised and so that positive feelings may be utilised.<sup>99</sup> These two steps are considered necessary to minimise the potential for distortion of the reflection process that might arise out of any contemporaneous evaluation that occurred during the experience (and that has now become indistinguishable from it in the learner's mind).<sup>100</sup>

Once the determinative stage of re-evaluation is reached, the underpinning necessity for a “theory of skills” is again manifest: vital to success in the teacher’s role as reflection facilitator will be access to competency models and criteria for expert performance. Boud et al have also identified further factors that may contribute to reflection and enhance its outcomes so that learners may construct personal meaning and cognitive strategies from the experience:

Re-evaluation involves re-examining experience in the light of the learner’s intent, *associating* new knowledge with that which is already possessed, and *integrating* this new knowledge into the learner’s conceptual framework. It leads to an *appropriation* of this knowledge into the learner’s repertoire of behaviour. This can involve a rehearsal in which the new learning is applied mentally to *[validate]* its authenticity and the planning of subsequent activity in which this learning is applied in one’s life.<sup>101</sup> Finally the outcomes of the reflective process, the products, can be many and varied. They may include the emergence of a new cognitive map, the development of a skill, changes in behaviour, the solution to a problem or clarification of an issue.<sup>102</sup>

Specific attention has been devoted to drawing out the reflective activities Boud et al have identified because, in analysing the literature on experiential methods in law school teaching, little regard is generally had to the mechanics of such a process. It has also been the writer’s experience that even though time might be allocated to reflection and self evaluation, learners are not expert in conducting this task. It is highly desirable that the objectives of reflection be made both explicit and relevant (in the motivational sense discussed above) at the outset. Ideally, as suggested by Gibbs, the reflection should be modelled:<sup>103</sup> teachers could provide an example of a productive and effective reflective discussion. “Modelling is simply providing a clear model or example and shaping learners’ behaviour towards this model.”<sup>104</sup>

## ASSESSMENT

Probably more than anything else it is the question of assessment that causes some of the greatest difficulties in skills learning, primarily because the assessment must be linked to the learning objectives.<sup>105</sup> Assessing the skills learning often calls for further innovative practices and usually demands great commitment in terms of time and energy on the part of teachers.

For students to be motivated to take skills instruction seriously the skills must be appropriately valued in the assessment scheme.<sup>106</sup>

As has also been suggested, there is a strong argument that students' academic transcripts should include some certification as to skills acquired, in addition to other cognitive achievements.<sup>107</sup> While the cornerstones of assessment are validity and reliability (and it may be these factors that cause skills teachers concern), as Mackie has identified, while assessment of skilled or competent performance will inevitably involve impressionistic systems, there is some evidence that the use of agreed checklists or rating criteria to list what is being assessed will improve validity and reliability.<sup>108</sup> The necessity for an articulated theory of the skill being taught has earlier been identified as crucial to the reflective and conceptualisation stages of experiential learning; it is again crucial for valid and reliable assessment practices.

Additional to the obvious methods of assessing students — by observing performance in role plays and by the setting of self-reflective exercises — two other fruitful mechanisms suggested for assessing skills are those of self assessment and peer assessment.<sup>109</sup> Crebert has also suggested that, in the context of lifelong learning skills, valid forms of assessment might include negotiated learning contracts, clinical case studies and learning documents, in all of which students analyse and articulate the learning processes associated with the successful completion of the learning activity.<sup>110</sup>

## CONCLUSION

Boud et al in their work on reflection warn that it may not always be possible to turn experience into learning or, at least, that it may not always be possible to put into practice what has been reflected upon and learnt.<sup>111</sup> What Boud et al take from this is that teachers and researchers should not underestimate the complexity of the learning process in real situations.<sup>112</sup> This is probably not a revelation to those who have already attempted the difficult task of incorporating lawyering skills into core law curricula. However, arduous as this task might be, it must also be true that as teachers in a professional discipline we should strive to inculcate both generic and professional skills into our teaching and learning programs: if future lawyers are to develop such skills at some stage in their professional lives, it is important that they be encouraged to do so in their initial undergraduate training, with appropriate theoretical

underpinnings to assist them in that professional maturation.

To assist in this worthy endeavour, this article has sought to articulate and explore a number of pre-conditions for the successful incorporation of skills teaching into legal education. Various ways of conceptualising skills and organising teaching in order to convey skills meaningfully to students have been considered. In order to prepare our students for the “people profession” of lawyering, the inclusion of skills learning objectives is also significant for the contribution it makes to affective domain learning; it usefully highlights that learning’s validity and importance to legal education.

It is hoped that these various observations and insights might assist busy law teachers who desire to meet the challenge of teaching a greater range of skills than those presently traversed in traditional law courses. As law teachers we should all, at times, be prompted to reflect on and re-construe our own teaching practices and experiences and seek to evaluate their effectiveness. Perhaps in so doing, some may be motivated to incorporate further aspects of skills teaching and learning into course design so that existing skills components, such as oral and written communication skills for example, might be built upon and the transferability of those skills promoted.

Skills education has a legitimate place in legal education. Now that the inhibiting distinctions of the past which Twining identified in 1967 have been stripped away it has finally been understood that students can learn by doing and, quite conceivably may learn to greater effect, utilising both cognitive and affective processes. The linking of theory with practice through the inculcation of structured skills instruction will prove for the benefit of future law graduates, and their employers, and ultimately it will be this that finally entrenches skills teaching in legal education.

\* Lecturer in Law, Queensland University of Technology.

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<sup>1</sup> W Twining, *Pericles and the Plumber* (1967) 83 *LQ Rev* 396, at 421–422; also N Gold, *A Postscript — Themes, Trends and Prospects in Professional Legal Education and Training: A Global View* (1985) 3 *J Prof Legal Educ* 171, at 173; cf Great Britain, *Report of the Committee on Legal Education* (Ormond Report) (London: HMSO, 1971) Cmnd 4595, esp para 100.

<sup>2</sup> DE Pearce, E Campbell, & D Harding, *Australian LAW Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary and Volumes I-IV* (Canberra: AGPS, 1987).

<sup>3</sup> HJ Schlegel, *Legal Education: More Theory, More Practice* (1988) 13 *Legal*

- Service Bull 71, at 71; LD Solomon, Perspectives on Curriculum Reform in Law Schools: A Critical Assessment (1992) 24 *U Tol L Rev* 1.
- 4 For six compelling reasons to teach skills in law school see L Stuesser, Skills for the Masses: Bringing Clinical Skills to More Students at Less Cost (1992) 10 *J Prof Legal Educ* 119, at 119–125.
- 5 C McInnis, & S Marginson, *Australian Law Schools after the 1987 Pearce Report* (Canberra: AGPS, 1994).
- 6 *Id* at 258.
- 7 *Id* at 168.
- 8 Stuesser, *supra* note 4, at 119–125.
- 9 JK de Groot, *Producing a Competent Lawyer: Alternatives Available* (Sydney: Centre for Legal Education, 1995). Also JK de Groot, *Acquiring Basic Legal Skills and Knowledge: What and Where?* (1994) 12 *J of Prof Legal Educ* 1.
- 10 See *id* at 135–136 for the identification of the eight core competency characteristics.
- 11 *Id* at 5. See also K Mackie, Lawyers' Skills : Educational Skills, in N Gold, K Mackie, & W Twining eds, *Learning Lawyers' Skills* (London: Butterworths, 1989) 9 — that lawyer surveys attribute skills learning to experience in most cases rather than law school education.
- 12 W Twining, Taking Skills Seriously (1986) 4 *J of Prof Legal Educ* 1, at 1.
- 13 Mackie, *supra* note 11, at 14.
- 14 BS Bloom, MD Engelhart, EJ Furst, WH Hill, & DR Krathwohl, *Taxonomy of Educational Objectives* (New York: McCay, 1956).
- 15 See for example, R Carter, A Taxonomy of Objectives for Professional Education (1985) 10 *Stud Higher Educ* 135, at 137.
- 16 *Id*.
- 17 A Petter, A Closet Within the House: Learning Objectives and the Law School Curriculum, in N Gold ed, *Essays on Legal Education* (Toronto: Butterworths, 1982) 78.
- 18 Cf Carter, *supra* note 15, at 139–140.
- 19 Petter, *supra* note 17, at 86.
- 20 Carter, *supra* note 15, at 137 (modified). The taxonomy appears *id* at 146.
- 21 *Id* at 140.
- 22 J Biggs, What do Inventories of Students' Learning Processes Really Measure? A Theoretical Review and Clarification (1993) 63 *Brit J In 'tl Educ Psychol* 3, at 7, 9, 15.
- 23 Carter, *supra* note 15, at 147.
- 24 *Id*.
- 25 Mackie, *supra* note 11, at 10–11.
- 26 Petter, *supra* note 17, at 5, to be compared with the learning objectives identified in the taxonomy.
- 27 JH Wade, Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges (1994) 5 *Legal Educ Rev* 173, at 175–181. See also, for example, N Gold, Are Skills Really Frills? (1993) 11 *J Prof Educ* 1, at esp 6–7; R Johnstone, Rethinking the Teaching of Law (1992) 3 *Legal Educ Rev* 17, at 22–26; KJ Mackie, Professional Legal Skills: Report of a Workshop (1987) 5 *J Prof Legal Educ* 117; Stuesser, *supra* note 4. See further Solomon, *supra* note 3, at 15 referring to the Cramton and MacCrate Reports in the US which provide guidance in identifying the fundamental skills which are drawn on by a practitioner. In addition, the Cramton Report identified various mechanisms for developing the requisite skills. The question as to what constitute fundamental lawyering skills is soon to be revisited in Australia: see CD Steytler, Practical Prerequisites for Legal Training (1997) 71 *Austl LJ* 95 also referring to the MacCrate Report.

- 28 Carter, *supra* note 15, at 141.
- 29 *Id.*
- 30 *Id* at 142.
- 31 *Id.*
- 32 *Id* at 143.
- 33 See further discussion of these matters, for example, within the framework of “cognitive apprenticeship” in A Collins, JS Brown, & SE Newman, Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing and Mathematics, in LB Resnick ed, *Knowing, Learning and Instruction: Essays in Honour of Robert Glaser* (New Jersey: Lawrence Erlbaum, 1989).
- 34 P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) ch 3; P Candy, G Crebert, & J O’Leary, *Developing Lifelong Learners Through Undergraduate Education*, Commissioned Report No. 28 NBEET (Canberra: AGPS, 1994) at 34–37.
- 35 R Crebert, *HEC/AVCC Project on the Enabling Characteristics of Undergraduate Education: Discussion Paper* (Brisbane: QUT Academic Staff Development Unit, 1994) 7.
- 36 *Id.*
- 37 G Gibbs, C Rust, A Jenkins, & D Jaques, *Developing Students’ Transferable Skills* (Oxford: Oxford Centre for Staff Development, 1994) 4.
- 38 *Id* at 9.
- 39 *Id* at 6. In a specifically legal context, the QUT Law School now issues students with a “Skills Certificate” on the completion of their law degree.
- 40 Gold, *supra* note 27, at 7.
- 41 S Nathanson, Putting Skills and Transactions Together in Professional Legal Training (1987) 5 *J Prof Legal Educ* 187; see also R Duncan, Teaching Legal Skills for Transfer of Learning: Is Simulation the Answer? (1984) 2 *J Prof Legal Educ* 67.
- 42 Nathanson, *supra* note 41, at 191.
- 43 *Id.* See also Mackie, *supra* note 27, at 119–120.
- 44 Gibbs et al, *supra* note 37, at 4.
- 45 For example, K Lauchland, & M Le Brun, *Legal Interviewing: Theory, Tactics and Techniques* (Sydney: Butterworths, 1996), specifically designed for independent student learning.
- 46 W Twining, Taking Facts Seriously, in N Gold ed, *Essays on Legal Education* (Toronto: Butterworths, 1982) 75. It is interesting to note that Twining says this in the context of arguing for the teaching of the “skill of fact finding”. As to what might constitute the “fact skills” see 65–66.
- 47 Wade, *supra* note 27, at 191.
- 48 See Nathanson, *supra* note 41, at 194; also Collins, Brown, & Newman, *supra* note 33, at 483–486.
- 49 Collins, Brown, & Newman, *supra* note 33, at 483–486. See also JS Brown, A Collins, & P Dugid, Situated Cognition and the Culture of Learning (1989) 18 *Educ Researcher* 32. For a discussion of this framework in a particular skills learning environment see S Kift, & G Airo-Farulla, Throwing Students in the Deep End, or Teaching Them How to Swim? Developing “Offices” as a Technique of Law Teaching (1995) 6 *Legal Educ Rev* 1.
- 50 N Gold, *supra* note 27, at 9–10.
- 51 *Id* at 10.
- 52 J Biggs, Teaching for Better Learning (1991) 2 *Legal Educ Rev* 133, at 136; see also Biggs, *supra* note 22, at 9.
- 53 Biggs, *supra* note 22, at 9.
- 54 Biggs, *supra* note 52, at 136.

- <sup>55</sup> *Id* at 140.
- <sup>56</sup> Mackie, *supra* note 11, at 16; this is similar to the “effective sequencing” desirable for transferability of the skills training which has been discussed earlier.
- <sup>57</sup> Biggs, *supra* note 52, at 142.
- <sup>58</sup> For example, see A Lynch, Why Do We Moot? Exploring the Role of Mooting in Legal Education (1996) 7 *Legal Educ Rev* 67, at esp 84–93.
- <sup>59</sup> Biggs, *supra* note 52, at 143.
- <sup>60</sup> See also M Le Brun, & R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: LBC, 1994) 77–80. Le Brun and Johnstone promote the most developed and recent argument for student-centredness in legal education.
- <sup>61</sup> PC Candy, *Self-Direction for Lifelong Learning: A Comprehensive Guide to Theory and Practice* (San Francisco: Jossey-Bass, 1991) 249–250. See also L Resnick, Introduction, in L Resnick ed, *Knowing, Learning and Instruction: Essays in Honor of Robert Glaser* (New Jersey: Lawrence Erlbaum Associates, 1989) 1. Candy’s work draws on the earlier arguments for a constructivist approach developed by Säljö and Marton et al at the University of Gothenberg. (For example, see R Säljö, Learning in the Learner’s Perspective — Some Common Sense Conceptions (1993) 19 *Int’l Educ Rev* 277.) For examples of the use of this theory in legal education see C Bond, & M Le Brun, Promoting Learning in Law (1996) 7 *Legal Educ Rev* 1 and also M Keyes, & G Orr, Giving Theory a Life: First Year Student Conceptions of Legal Theory (1996) 7 *Legal Educ Rev* 31.
- <sup>62</sup> Candy, *supra* note 61, at 251.
- <sup>63</sup> *Id* at 254.
- <sup>64</sup> *Id* at 272.
- <sup>65</sup> See discussion *supra* in relation to the Biggs presage factors.
- <sup>66</sup> Candy, *supra* note 61, at 274 and generally 272–274.
- <sup>67</sup> R Downs, Experiential Learning in a Practical Legal Training Course (1989) 7 *J Prof Legal Educ* 141, at 145.
- <sup>68</sup> L Andresen, D Boud, & R Cohen, Experience-Based Learning, in G Foley ed, *Understanding Adult Education and Training* (Sydney: Allen and Unwin, 1995) 207. For a consideration of constructivism as exemplified by experiential learning in the context of mooting see Lynch, *supra* note 58, at 76–81.
- <sup>69</sup> See, for example, G Gibbs, *Learning By Doing* (London: Further Education Curriculum and Development Unit (FEU), 1988). This guide cannot be recommended highly enough for the ideas it contains for implementing experiential learning and for the furnishing of practical teaching and learning methods, many of which are categorised according to the phase of the experiential learning cycle with which they are concerned.
- <sup>70</sup> D Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (New Jersey: Prentice Hall, 1984) 20.
- <sup>71</sup> *Id* at 20–21. See also P Bergman, A Sherr, & R Burrigde, Learning from Experience: Non-Legally Specific Roleplays (1987) 26 *J Legal Educ* 535, at 538: “What distinguishes experiential learning from traditional methods is that the largely intellectual aspects of the second and third stages are based on concrete experiences rather than intellectual constructs”.
- <sup>72</sup> Gibbs, *supra* note 69, at 113.
- <sup>73</sup> *Id* at 9.
- <sup>74</sup> Kolb, *supra* note 70, at 20.
- <sup>75</sup> *Id* at 21 representing the Lewinian Experiential Learning Model, modified by the inclusion of Gibbs et al identifiers for each stage: Gibbs et al, *supra* note 37, at 13.

- 76 Kolb, *supra* note 70, at 21.
- 77 Gibbs et al, *supra* note 37, at 13.
- 78 Le Brun, & Johnstone, *supra* note 60, at 77–80.
- 79 For useful discussions see Kolb, *supra* note 70, ch 4; Johnstone, *supra* note 27, at 30–32; Le Brun, & Johnstone, *supra* note 60, at 77–82.
- 80 Adapted from Gibbs, *supra* note 69, at 20.
- 81 *Id* at 15.
- 82 *Id* at 54–63. These various teaching methods have been described in detail in many of the works on teaching and law teaching: for example Le Brun, & Johnstone, *supra* note 60, at 304–311; Johnstone, *supra* note 27, at 50–52. For a selection of writings which discuss attempts to incorporate educational theory into skills instruction see H Astor, & C Chinkin, Teaching Dispute Resolution: A Reflection and Analysis (1990) 2 *Legal Educ Rev* 1; Bergman, Sherr, & Burrige, *supra* note 71; RP Davidlow, Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing (1984) 34 *J Legal Educ* 527; Duncan, *supra* note 41; K Mack, Bringing Clinical Learning into a Conventional Classroom (1993) 4 *Legal Educ Rev* 89, esp at 107; D Peters, Using Simulation Approaches in Large Enrolment Law Classes (1988) 6 *J Prof Legal Educ* 36; R Park, Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses (1990) 8 *J Prof Legal Educ* 161; MR Power, Educating Mediators Metacognitively (1992) 3 *Alternative Disp Resol J* 214; R Stewart, Making Simulating Stimulating (1985) 3 *J Prof Legal Educ* 51; G Tamsitt, Interviewing and Negotiation Revisited (1987) 5 *J Prof Legal Educ* 33.
- 83 Mackie, *supra* note 11, at 11: Mackie suggests that interviewing skills can be sub-divided into the skills of attending, listening, questioning, counselling. In turn these techniques can be further sub-divided and so on. See also Gold, *supra* note 27, at 6–7; Park, *supra* note 82, at 167–168 also emphasising the desirability of teaching micro skills before full scale simulation.
- 84 Adapted from Gibbs, *supra* note 69, at 62.
- 85 See *id* at 12 for a further example in a chemistry course.
- 86 Gibbs et al, *supra* note 37, at 13.
- 87 See discussion *supra* re the necessity for theoretical frameworks — theories of the relevant skills; see also references *supra* notes 41, and 46–47.
- 88 Many of the recent texts on skills, such as those in the Butterworths Skills Series, provide checklists, summaries and evaluative criteria against which to assess and reflect on performance and from which new constructs may be generated. For an example, see Lauchland, & Le Brun, *supra* note 45, at 177–180 setting out a sample judging sheet for a client interviewing competition.
- 89 D Boud, R Keogh, & D Walker, Introduction: What is Reflection in Learning?, in D Boud, R Keogh, & D Walker eds, *Reflection: Turning Experience Into Learning* (London: Kogan Page, 1985) at 9–10; Downs, *supra* note 67, at 144 citing B Hart, The Application of Experiential Learning to Organisational Development, in Australian Consortium on Experimental Education, in *Experienced-Based Learning. How? Why?* (Sydney: Australian Consortium on Experiential Education, 1980) 45.
- 90 Boud et al, *supra* note 89, at 9–10.
- 91 See, for example, DA Schon, *Educating the Reflective Practitioner: Towards a New Design for Teaching and Learning in the Professions* (San Francisco: Jossey-Bass, 1987).
- 92 N Tarr, The Skill of Evaluation as an Explicit Goal of Clinical Training (1990) 21 *Pac LJ* 967.
- 93 Boud et al, *supra* note 89, at 11.
- 94 D Boud, R Keogh, & D Walker, Promoting Reflection in Learning: A Model in Boud, Keogh, & Walker eds, *supra* note 89, at 19.
- 95 RA Walker, Metacognition: Thinking About Thinking and Learning How to

- Learn (1993) 48 *F Educ* 119, at 121–122.
- <sup>96</sup> Biggs, *supra* note 22, at 9.
- <sup>97</sup> S Kemmis, Action Research and the Politics of Reflection, in Boud, Keogh, & Walker eds, *supra* note 89, at 147. Kemmis states that as “meta-thinking”, reflection expresses quite definite ideological commitments, taking certain aspects of social life for granted or treating them as problematic, and revealing an orientation to the social world and social order.
- <sup>98</sup> Boud et al, *supra* note 94, at 26; Mackie, above note 11, at 17.
- <sup>99</sup> Boud et al, *supra* note 94, at 26–30.
- <sup>100</sup> *Id* at 30.
- <sup>101</sup> *Id* at 27 (emphasis supplied).
- <sup>102</sup> *Id* at 34–35.
- <sup>103</sup> Gibbs, *supra* note 69, at 52–53.
- <sup>104</sup> *Id* at 53.
- <sup>105</sup> Ramsden, *supra* note 34, at 189; also Johnstone, *supra* note 27, at 57.
- <sup>106</sup> See, for example, N Rogers, Improving the Quality of Learning in Law Schools by Improving Student Assessment (1993) 3 *Legal Educ Rev*, 113, at 118–120; JW Barnes, The Functions of Assessment: A Re-Examination (1990–1991) 2 *Legal Educ Rev* 117, at 181–182.
- <sup>107</sup> Gibbs et al, *supra* note 37, at 16.
- <sup>108</sup> Mackie, *supra* note 11, at 22.
- <sup>109</sup> See generally Gibbs, *supra* note 69, for interesting cases studies using experiential learning including methods of assessment; also D Boud, *Implementing Student Self-Assessment*, HERDSA Green Guide No 5 (Campbelltown: HERDSA, 1991); Duncan, *supra* note 41, at 71; Le Brun, & Johnstone, *supra* note 60, at 190–193; Ramsden, *supra* note 34, esp at 210–212 and see ch 10 generally. For a recent collection of assessment practices in PLT courses, see de Groot, *supra* note 9, at ch 4 esp at 4.3.1.
- <sup>110</sup> Crebert, *supra* note 35, at 16–17.
- <sup>111</sup> Boud et al, *supra* note 94, at 35. The example there cited comes from Argyris who was successful in training his participants in recognising the dysfunctional aspects of their own behaviour but the learners were unable to put this into practice in role-playing situations.
- <sup>112</sup> *Id*.