October 27th, 2009

Legal ethics and academic freedom?

By Alice Woolley

Considered:

Task Force on the Canadian Common Law Degree Final Report

Last week the Federation of Law Societies issued the "Final Report" of its Task Force on the Canadian Common Law Degree. The Final Report is the third document issued by the Task Force, the first being an initial Consultation Paper in September 2008, the second being its Interim Report issued in March 2009.

The Final Report of the Task Force continues the direction of its earlier Paper and Report. Specifically, the Task Force has recommended that the provincial law societies develop a national "approved" law degree as a prerequisite for admission. The approved law degree will be one which provides students with competencies in the areas of skills, ethics and professionalism, and substantive legal knowledge. It will be taught in three years or the credit equivalents, primarily through in-person instruction, and with sufficient resources in terms of academic faculty, physical resources, technology and an electronic or physical library. The oversight of the law schools' achievement of these requirements will be determined by the filing of an annual report by each law school each year.

To some extent the Final Report has ameliorated areas that had earlier led to strong academic criticism, in particular on the basis that the Task Force's approach ossified legal education and intruded on academic freedom. The Task Force has thus made the competencies more general, and has put increased emphasis on the need for law schools to have sufficient resources. In this respect the Task Force Final Report permits academic innovation and respects the academic freedom of the law schools while orientating towards accomplishment of its regulatory initiative.

One exception to this tendency to lighten the regulatory oversight of law schools is, however, with respect to the stand-alone course in legal ethics. In the Consultation Paper the Task Force suggested that the course "should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including in areas such as conflicts, solicitor client privilege, and the lawyer's relationship with the administration of justice" (para. 48). In the Final Report, by contrast, the Task Force has set out a detailed list of what the course in ethics should cover (p. 9):

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

a. the duty to communicate with civility;
b. the ability to identify and address ethical dilemmas in a legal context;
c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,

i. circumstances that give rise to ethical problems;
ii. the fiduciary nature of the lawyer's relationship with the client;
iii. conflicts of interest;
iv. duties to the administration of justice;
v. duties relating to confidentiality and disclosure;
vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and
vii. the importance and value of serving and promoting the public interest in the administration of justice.

This new direction by the Task Force is most unfortunate. It is inconsistent with the rest of the Final Report in imposing rigidity and specific requirements on academic legal education. In addition, because it was new to the Final Report it was not the subject of consultation with stakeholders, and in particular professors teaching in the area of legal ethics. Further, some of the obligations imposed do not fit naturally into an academic curriculum. Finally, and most importantly, in elevating the duty of civility to a primary curricular content of the course the Task Force does not simply describe the nature of the ethical duties placed on Canadian lawyers by the courts and law societies, but rather takes a position on what those duties should be. It takes, in other words, an academic position which it seeks to impose on professors teaching in the area of legal ethics, without due regard to the requirements of academic freedom. This blog post addresses these points more specifically.

It also notes the other area of weakness in the Final Report, namely its failure to address the significant implications of regulating law schools in this way. The Task Force suggests that the implications of its initiative are modest – only requiring the filing of an annual report. That may be so, but it creates a two-fold risk: that its initiative is therefore nothing more than window dressing or that, in fact, far more significant regulatory oversight will be required.

The content of legal ethics

In its earlier reports the Task Force had defined with some specificity the "competencies" to be achieved by graduates of approved law schools. In its Final Report, in response to the significant criticism of this approach, the Task Force has modified its stance, emphasizing instead the current content of the curriculum of Canadian law schools, and general instructional areas to be covered. It provides no explanation in the Final Report as to why it has not taken this approach with its ethics course. Nor does it explain how it came up with the list of instructional topics that

it included in its recommendations. Indeed, the body of the Report provides no explanation at all for the selected topics – it simply notes that it will require that the course address "certain specified competencies" (p. 34).

This approach is unacceptable. It significantly intrudes on academic freedom to develop the proper content for a course in legal ethics and professional responsibility. The meaning of legal ethics is contested, and it is the legitimate role of an academic institution to give a sense of that within its curricular offerings. Some required courses in legal ethics at Canadian law schools cover the topic with a significant emphasis on the "law governing lawyers" while others touch on more philosophical or historical questions related to the basic nature of lawyers' professional obligations. Setting out a list of required topics does not respect this legitimate variation in how the course can be taught while still covering the subject matter originally identified by the Task Force in its Consultation Report: "the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers" (para. 48).

Further, the list of requirements is not self-evidently at the core of what is appropriately taught in an academic institution, and arguably includes topics that such an institution can make little claim to teach with competence. The statement, for example, that in an academic course students should be taught "the importance of professionalism in dealing with… court staff" is to incorporate into the academy matters that have no obvious place there – academics not infrequently have never practiced and/or never dealt with court staff, and would have little advice to give to students in this respect. And even if they have – as I have – it is not obvious to me that in my capacity as an academic I have any meaningful advice to give. Certainly not advice I would expect students to listen to in preference to that of their articling principal. Further – and most importantly – on what basis does the Task Force assert that a law school that fails to provide instruction on this topic is not providing students with an education that sufficiently prepares them for practice? A general principle like professionalism seems reasonably incorporated, but the instantiation of that duty in the specific context of a particular professional relationship seems like overreaching.

If the Task Force was going to define the content of the ethics course in this way it should have sought input and consultation from ethics professors, especially given the opposition it received to its specific definition of the competencies, and the submissions made by Professor Harry Arthurs in response to the initial Consultation Report. As Professor Arthurs noted (here), absent some discussion of the ethical rules that the law societies themselves see fit to expend regulatory resources enforcing, it seems odd to impose instruction in particular ethical topics on the law schools.

This absence of consultation is particularly troubling given that the topics of instruction required are by no means self-evidently justified. This is particularly the case with the duty of civility. As I have argued elsewhere, when law societies or other lawyer groups (such as the Advocate's Society) argue in favour of civility, they usually mean one of two things: fulfilling ethical obligations imposed elsewhere on lawyers, such as not misleading the court, or being polite. If the obligation of civility really means those other ethical obligations, then it is not helpful to talk

in general terms about "civility," and may be actively misleading. Those other ethical obligations should, instead, be clearly articulated so that lawyers know precisely what is required of them. And if what is at issue is politeness, then it must be remembered that lawyers are resolute advocates for their clients, and that satisfying her auditor's sense of politesse should never deter an advocate from bringing that case forward. Is the lawyer described by Lord Brougham – and so often invoked by law societies and courts – who does not hesitate to bring about civil unrest in the pursuit of her client's interests "civil"? That likely depends on the position occupied by the person assessing the behaviour, which is exactly why the concern of the lawyer must be with her ethical duties to the client and the legal system, not to how others will perceive the civility of her conduct.

Others can – and have – disagreed with this position. It is not my intention here to convince anyone that the current preoccupation with civility is misplaced (although I obviously think it is). But it *is* my intention to argue that the duty of civility is at best contentious, and an attempt to impose instruction in it as a condition of approval of a law school is a violation of academic freedom, unacceptable in any event but certainly unacceptable in the absence of some prior consultation of whether it should be there.

Regulatory implications

In its Report the Task Force suggests that the compliance mechanism for law schools will be a "standardized annual report that each law school Dean completes and submits to the Federation or the body it designates". It suggests that this mechanism is an attempt to avoid any regulatory structure that is "intrusive or onerous" (p. 43).

While the filing of an annual report is legitimately described as neither intrusive nor onerous, it is not clear that this recommendation has sufficiently explored the regulatory implications of a requirement for an approved law degree. On the one hand, it creates the significant possibility that the approval process will be little more than window dressing, providing little additional assurance beyond the existing strong reputation of the Canadian law schools that law graduates have the competencies they are said to need. On the other hand, to provide additional assurance creates the significant possibility that additional regulatory mechanisms will be required. What if an annual report creates reason to be concerned that a law school is not providing the necessary competencies? What follow up steps will be taken to ensure compliance? What if law students complain – about, for example, the failure of a law professor to teach them the importance of civility? How will the Federation address such complaints?

In addition, what other legal avenues may be opened up for a law student as a result of the approval process? Can a law student bring an action against either a law school or the Federation if she fails an element of her bar admission course on the grounds that she had not been given the sufficient competency?

My intention is not to suggest that the Task Force's initiative in this respect is necessarily a bad thing, but that some of its regulatory implications merit more rigorous evaluation.

Conclusion

Given the high pass rates in bar admission courses, law schools are arguably the most significant gatekeeper to the practice of law. Given that, it is entirely legitimate that legal regulators be engaged with what it is that law schools do, and the extent to which the law schools have sufficiently prepared their students for legal practice. In that sense the Task Force Report provides a welcome perspective on the issue. At the same time, however, the Report should be viewed as the beginning of a conversation, not as the termination of it.