

**The organic development of a legal writing and tutoring programme at the  
University of KwaZulu-Natal School of Law: Reflections on a sustainable,  
structured approach to teaching and tutoring legal writing in South  
African law schools**

**Angela Diane Crocker**

UNIVERSITY OF KWAZULU-NATAL  
FACULTY OF LAW AND MANAGEMENT STUDIES  
SCHOOL OF LAW, HOWARD COLLEGE

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**Angela Diane Crocker**

This thesis is submitted in fulfilment of the requirements for the degree of  
Doctor of Philosophy

Supervisor: Professor Ann Strode  
Co-supervisor: Professor Warren Freedman

2022

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## **ACKNOWLEDGEMENTS**

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## **ABSTRACT**

Although much advocacy work takes place in courts, a considerable amount of the background work and day-to-day tasks of lawyers is writing and clearly articulating various legal positions. Thus, the ability to write like a lawyer is very important. However, legal academics as well as the law profession have consistently made the point that there is a real issue with the quality of legal writing of law students. This is a problem that many South African Universities are grappling with, and which must be addressed urgently.

An examination of the literature, through the lens of four iterations of legal writing programmes implemented at the University of KwaZulu-Natal School of Law, Howard College, shows that the key drivers of good legal writing are critical thinking and student motivation. If these principles are incorporated into the structure of the programme, it will help students to be motivated to think critically, which will enable them to engage on a sufficiently deep level with the material being studied. This in turn should help to produce written work that is persuasive. Thus, it is submitted that the design of a legal writing programme should include four teaching principles: the constructive alignment of the programme; a commitment to learner participation; the implementation of conversations in feedback; and the transformative contextualisation of programme materials.

However, the real question is how can a sustainable, structured approach to teaching and tutoring legal writing in South African law schools be achieved with large classes of novice legal writers and legal lecturers sometimes having overwhelming teaching loads and competing academic commitments? It may seem like an impossible task, but it is not if the legal writing programme is pedagogically well-designed and administratively well-structured. This thesis submits that the answer lies in training senior law student peer tutors to assist in a legal writing programme.

Keywords: legal, peer, persuasive, tutors, writing

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# 1 INTRODUCTION

## 1.1 Introduction

Law students beginning their legal journey at the University of KwaZulu-Natal [UKZN] Howard College School of Law are often under prepared to take on the rigours of law work, naively anticipating that the standard of work at tertiary level is similar to that experienced at high school.<sup>1</sup> In particular, their writing skills are often greatly lacking. The advanced level of critical thinking and logical argumentation that they must exhibit in order to master the skill of persuasive legal writing can catch these novice learners unawares and they often struggle to meet the required standard – even after four years of study.<sup>2</sup> This is reiterated by complaints from members of the judiciary, the legal profession and the media about law students' legal writing skills and by calls from the legal profession for law lecturers to help law students to improve their basic legal writing skills before entering professional practice.<sup>3</sup>

Many explanations appear in the literature for the poor legal writing skills of students entering tertiary instruction. These include having English as a second language, exacerbated by a lack of cultural familiarity with legal discourse; inadequate primary and secondary education, which often has a focus on rote learning rather than critical thinking;<sup>4</sup> and the necessity for continuous practice of the skill, which requires intrinsic motivation.<sup>5</sup> Greenbaum, Wegner, Baker and Rideout and Ramsfield all agree that part of the reason for this deficit in good legal writing skills is that law students, whether English is their mother tongue or not, live and work in varying cultural contexts and thus may not have a cultural familiarity with the legal discourse community.<sup>6</sup> Wegner believes that not having this specific knowledge may cause these students to understand words or concepts incorrectly since these words may have one meaning in the cultural context with which the students are familiar – but another meaning entirely in a legal

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<sup>1</sup> Hill 1995:10–21, Jacklin & Robinson 2007:114–123 and Loots 2009:211–235, cited in Spark et al 'Paving the Road to Success: A Framework for Implementing the Success Tutoring Approach' (2017) 5(2) *Journal of Student Affairs in Africa* 6.

<sup>2</sup> Swanepoel in Swanepoel & Snyman-Van Deventer 'The Need for a Legal-Writing Course in the South African LLB Curriculum' (2012) *Obiter* 121, 122 expresses a similar sentiment: '... there is the sad reality, but mammoth challenge, regarding the general unpreparedness of students to study law'.

<sup>3</sup> Greenbaum 'Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives' (2004) 15(1) *Stellenbosch Law Review* 3 6; Mabuza 'Lawyers, move to Improve literacy, numeracy standards' *Business Day* 4 April 2007 at 4.

<sup>4</sup> Swanepoel & Snyman-Van Deventer op cit note 2 at 123.

<sup>5</sup> Newmann, Wehlage & Lamborn 'The Significance and Sources of Student Engagement' in *Student Engagement and Achievement in American Secondary Schools* (1992) 12.

<sup>6</sup> Rideout & Ramsfield 'Legal Writing: A Revised View' (1994) 69(1) *Washington Law Review* 69.

context.<sup>7</sup> Greenbaum refers to this specific knowledge of legal discourse as “insider” knowledge and that “outsiders” need to be taught the unwritten rules or conventions by an expert in the field in order to master an entirely new technical vocabulary.<sup>8</sup> Against this contextual background the teaching of legal writing is a critical issue which justifies further research.

Any attempt to address the problem of the poor legal writing skills of Bachelor of Law (LLB) students needs to start with an understanding of what writing skills are needed by lawyers entering the profession. There has been much debate in academic circles about what it is to write like a lawyer and there is no commonly accepted definition of the term legal writing. The opinions of academics on this topic differ as to whether legal writing is simply clear, concise text which flows coherently and logically, or rather a more nuanced form of prose requiring a focus on the persuasiveness of the text and the target audience.

Greenbaum, in summarising several academic writers’ descriptions of the term “legal writing”, concludes that it is a “context-based, social act, in which there are a specific set of communicative practices”.<sup>9</sup> For example, legal writing denotes the ability to use technical vocabulary appropriately within a range of legal contexts such as judgments, heads of argument and written communications to clients, with an awareness of audience, purpose, context and analytical schemata.<sup>10</sup> Bean takes this a step further and maintains that “writing is both a process of doing critical thinking and a product communicating the results of critical thinking”.<sup>11</sup> He posits that legal writing should not be viewed merely as a communication skill but as a “product of critical thought”.<sup>12</sup> This is a very significant point as it underpins the concept of persuasiveness. Legal writing cannot be truly persuasive unless it is based on a critical understanding of the issues.

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<sup>7</sup> Wegner ‘Better Writing, Better Thinking: Thinking Like a Lawyer’ (2004) 10 *The Journal of the Legal Writing Institute* 9–22.

<sup>8</sup> Greenbaum op cit note 3 at 14.

<sup>9</sup> Greenbaum op cit note 3 at 6, quoting Rideout & Ramsfield op cit note 6 at 58; Phelps ‘The New Legal Rhetoric’ (1986) 40(4) *Southwestern LJ* 1092; Mitchell ‘Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education’ (1989) *Journal of Legal Education* 277; and Swales *Genre Analysis: English in Academic and Research Settings* (1990).

<sup>10</sup> Ibid.

<sup>11</sup> Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 3.

<sup>12</sup> Ibid.

The ability to write like a lawyer is an essential skill. At the core of legal practice is advocating for the rights or interests of others. Although much advocacy work takes place in courts, a considerable amount of the background work and day-to-day tasks of lawyers are writing and clearly articulating various legal positions. Every branch of law requires lawyers to express themselves succinctly in writing, whether it be the drafting of legal opinions, contracts, legal agreements, legislation, heads of argument, judgments – the list goes on. If we accept this, it means that a good lawyer, after careful, critical analysis of legal problems, must consistently be able to present well written solutions for specific target audiences.

While good legal writing or even writing that is merely adequate might have persuasive value for an intended audience, poor legal writing might not only fail to persuade an intended audience but could also have many unintended negative consequences. Feerick gives some examples of the serious negative consequences that can arise in legal practice from bad legal writing:

Bad legal writing can result in increased legal fees for clients, detrimental reliance by citizens, thousands of hours of court resolution, loss of integrity for our legal institutions, and a disrespect for law and lawyers. Lawyers who do not write clearly also leave themselves open to malpractice or disciplinary proceedings for, among other things, misleading or failing to inform clients.<sup>13</sup>

Thus, Feerick submits that “(p)racticing lawyers have a responsibility to produce legal writing that meets professional standards”.<sup>14</sup> In light of this, one of the most essential skills for a law student to master is persuasive legal writing rather than simply being able to write according to the standard protocols of, for example, a legal letter.<sup>15</sup> Feerick takes this point even further stating that a good lawyer should understand the power that language has to persuade, facilitate, clarify and inspire, and that without the ability to produce good legal writing it is impossible to be a good lawyer.<sup>16</sup>

The critical importance of legal writing is listed as one of the specific outcomes attached to the first exit level outcome of the LLB degree required by the South African Qualifications

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<sup>13</sup> Feerick ‘Writing Like a Lawyer’ (1994) 21(2) *Fordham Urban Law Journal* 381–388.

<sup>14</sup> *Ibid* at 386.

<sup>15</sup> Greenbaum *op cit* note 3 at 8 stresses the importance of teaching law students legal writing, which she says is an ‘integral part of cognitive development’.

<sup>16</sup> Feerick *op cit* note 13.

Authority (SAQA). This mandates law teachers to ensure that law graduates possess the requisite skills with a strong focus on critical thinking attributes, including requirements that:

The learner has acquired the ability to analyse and comment upon the law critically. The learner has acquired knowledge and understanding of, and ability to critically analyse and comment upon current and controversial legal issues ... The learner has developed the ability to explain, critically analyse and comment upon the relationship between law and society.<sup>17</sup>

Importantly, a deep approach to learning, including the ability to think critically and to analyse current and controversial socio-legal issues promoting justice in society, is also clearly articulated in the outcomes and standards for the LLB which are laid down by SAQA.<sup>18</sup>

However, despite much having been written on how to teach this essential skill of legal writing, students still appear to be leaving university without having mastered these skills. Kissam laments that “Lawyers, law professors, and law students appear to have many difficulties in understanding and engaging in the critical dimension of legal writing.”<sup>19</sup> Several academic writers discuss other reasons for why it is so hard for law students to acquire the necessary legal writing skills.<sup>20</sup> It is posited that the ability to think and write critically is not an easy skill to master as: one, it requires a conscious writing process which is often difficult for students to attain; and two, it can be a very personal and often exhausting experience, with numerous written drafts regularly being subjected to constructive criticism. In addition to this, the formal conventions of legal writing are many and complex,<sup>21</sup> which law students must assimilate while simultaneously coming to terms with the substantive content of their law modules. Rideout and Ramsfield comment that law students “are learning to write within a highly conventionalized discourse, law, in which legal arguments are constructed according to certain unwritten discourse rules, or conventions”.<sup>22</sup>

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<sup>17</sup> South African Qualifications Authority (SAQA) *Bachelor of Laws* available at <http://regqs.saqa.org.za/viewQualification.php?id=22993> (accessed 2023-7-3).

<sup>18</sup> Ibid.

<sup>19</sup> Kissam ‘Thinking (By Writing) About Legal Writing’ (1987) 40(1) *Vanderbilt Law Review* 135–174.

<sup>20</sup> See discussion on novice legal writers – Greenbaum op cit note 3 at 14; Crocker ‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’ 2018 *Potchefstroom Electronic Law Journal* 3. See, also, Rideout & Ramsfield op cit note 6 at 60, speaking of the unwritten rules of legal discourse; and Bean op cit note 11 at 4.

<sup>21</sup> Rideout & Ramsfield op cit note 6 at 60.

<sup>22</sup> Ibid.

The literature makes it clear though that students who appear to be struggling with legal writing might not need to be treated in remedial ways since their writing proficiency may simply be exacerbated by their lack of familiarity with the law and legal analysis. Grammar and punctuation instruction may thus not be what they require, but rather instruction on the “methods of inquiry and internal dialogues available to someone who is 'situated' within the law”.<sup>23</sup> Candlin, Bhatia and Jensen take this point further by stating that writing legal discourse requires participation in the legal community itself and therefore a “mix of generic and disciplinary knowledge” is needed to be able to write like a lawyer and also an awareness of why such a genre is written the way that it is.<sup>24</sup> Thus, introducing students to legal discourse and the legal community is essential because in order to acquire a deep understanding of how to think and write critically, they need to learn not only how to write like a lawyer, but to understand why lawyers write in this way.<sup>25</sup>

Accepting that legal writing is a specific skill that will require *inter alia* a specific skills-based course that includes teaching students to think critically like lawyers, poses the complex and practical question of how should this skill best be taught? Traditionally, legal writing was not taught as a separate skill; it was often assumed that students would inevitably assimilate the skills associated with writing like a lawyer during the course of their degree. However, legal academics now generally accept that there must be formal legal writing instruction for all law students – and diverse views of the methodologies that ought to underpin programmes dedicated to teaching legal writing abound.

In this regard the literature shows that there have been fundamental shifts in thinking about how legal writing should be taught: from teaching grammar and punctuation to teaching critical thinking, critical reading and critical writing;<sup>26</sup> from a core focus on teaching legal writing that merely requires the application of legal precedent to an additional focus on teaching persuasive legal writing;<sup>27</sup> from expecting students to assimilate legal writing skills on their own

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<sup>23</sup> Rideout & Ramsfield op cit note 6 at 69.

<sup>24</sup> Candlin, Bhatia & Jensen ‘Developing Legal Writing Materials for English Second Language Learners: Problems and Perspectives’ 2002 *English for Specific Purposes* 312.

<sup>25</sup> Ibid.

<sup>26</sup> Vinson ‘Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge’ (2005) *Touro Law Review* 510; Clarence, Albertus & Mwambene ‘Building an Evolving Method and Materials for Teaching Legal Writing in Large Classes’ (2014) 67(6) *Higher Education* 842.

<sup>27</sup> Council on Higher Education ‘Higher Education Qualifications Sub-framework: Qualification Standard for Bachelor of Laws (LLB)’ (2015) 11.

throughout their degree to formally teaching the art of persuasive legal writing;<sup>28</sup> and from a top-down sage on the stage teaching approach to a constructivist, inclusive teaching approach embracing transformative teaching methods.<sup>29</sup>

It is argued that teaching critical reading and thinking is fundamental to teaching persuasive legal writing. However, this is not an easy task. Bean posits that deep learning requires students to develop a complex view of knowledge, which can be a difficult process – both intellectually and emotionally.<sup>30</sup> Quinot says that South African students must take an even more nuanced approach when reflecting on legal issues. He suggests that in the context of a transformative constitutional democracy South African law students need to be trained to consider the “underlying normative considerations behind legal authority when justifying any particular argument”.<sup>31</sup> He believes that legal writing ought to be taught in a way that invites societal issues in by considering matters of morality, policy and politics as part of legal analysis and that in so doing it will “embody the social context within which it operates”.<sup>32</sup> This is obviously a controversial point as not all lawyers enter law school with a social conscience or even want to write in a manner that promotes social justice. Nevertheless, this ability to think critically, regardless of the purpose, and to produce logical written arguments within the context of our transformative Constitution is an essential part of what is required in learning to write like a lawyer.

So, in essence, academic writers have suggested that legal writing should be taught in a way that encompasses both the technical aspects of the writing as well as the overall persuasiveness of the piece, while adhering to certain legal conventions.<sup>33</sup> This is important as there is a distinction between teaching legal writing that requires adherence to a formal legal precedent, such as a simple letter of demand or a notice of motion, and teaching persuasive legal writing that is used in, for example, legal judgments and opinions. The former is formalistic, often requiring a simple application of facts to a set legal example and may not allow for creative,

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<sup>28</sup> Snyman-Van Deventer & Swanepoel ‘Teaching South African Law Students (Legal) Writing Skills’ (2013) 24(3) *Stellenbosch Law Review* 515; Williams ‘On the Maturing of Legal Writers: Two Models of Growth and Development’ (1991) 1(1) *The Journal of the Legal Writing Institute* 9.

<sup>29</sup> Quinot & Greenbaum ‘The Contours of a Pedagogy of Law in South Africa’ (2015) 26(1) *Stellenbosch Law Review* 36.

<sup>30</sup> Bean op cit note 11 at 19.

<sup>31</sup> Quinot ‘Transformative Legal Education’ (2012) 129 *South African Law Journal* 417.

<sup>32</sup> Ibid.

<sup>33</sup> Greenbaum op cit note 3 at 3–21, discussing the ideas of Benson in Benson ‘The End of Legalese: The Game is Over’ 1985 *Review of Law and Social Change* 518–522.

critical thinking, while the latter allows the writer more leeway to be creative in the critical application of the law to a set of facts to persuade the reader of a particular point of view. In fact, the writer often depends on this creative independence to enhance the persuasiveness of the piece.

Against this background, teaching legal writing is an important focus for law schools. However, teaching such a complex skill is not without its challenges.

Key issues arise when designing a legal writing programme. One, should legal writing be integrated into substantive law modules across the curriculum, or should this skill be taught in a dedicated legal writing module? The question of whether to use a dedicated writing course or integrate writing skills into all modules is not definitively answered in the literature. Boughey advocates for specific writing centres that are linked to tutorial programmes;<sup>34</sup> Broodryk talks of the benefits of writing-intensive courses across the law curriculum;<sup>35</sup> and Bean supports the concept of integrating writing, critical thinking and active learning.<sup>36</sup>

Two, how can law students be motivated to think critically and engage deeply with the legal material presented in a legal writing module so as to actually improve their critical thinking and writing skills? Unless students “buy in” to this shift away from the rote learning they may have undertaken at high school, they will struggle to adapt to this kind of deep engagement. The literature shows that the key to teaching legal writing skills lies in motivating students to engage critically at a deep level with the required legal materials.<sup>37</sup> The level of engagement needed to produce good quality, persuasive legal writing, however, is more rigorous than merely listening in class and working hard to achieve good marks. This stringent level of engagement needs to be intrinsically motivated so as to produce a psychological investment in learning legal writing. Although law students must be taught to remain objective in their approach to legal analysis and writing, an investment or an interest in the work that they are

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<sup>34</sup> Boughey ‘Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality’ (2012) 26(1) *South African Journal of Higher Education* 51–65.

<sup>35</sup> Broodryk ‘Writing-Intensive Courses Across the Law Curriculum: Developing Law Students’ Critical Thinking and Writing Skills’ (2014) 35(3) *Obiter* 453–456.

<sup>36</sup> Bean *op cit* note 11 at 2–3.

<sup>37</sup> Fourie ‘Beyond the Ivory Tower: Service Learning for Sustainable Community Development’ (2003) 17(1) *South African Journal of Higher Education* 123.

doing will give them the motivation to understand more complex legal materials and principles of logical argumentation in order to write creatively and persuasively.<sup>38</sup>

Three, what is the most feasible, cost-effective way to make a real improvement to the staffing resource constraints experienced at South African law schools, so that adequate support can be provided to both staff and students in the teaching and learning of persuasive legal writing? Inclusive, small-group teaching methods which are needed to motivate students and encourage critical thinking and writing must be implemented, but this is notoriously difficult with limited teaching resources. The high level of educator–student contact needed to facilitate an inclusive learning environment and to provide regular written and oral feedback is a challenge exacerbated by large class sizes and a diverse student body.<sup>39</sup>

## 1.2 *Rationale for the research*

As stated above, it is a SAQA outcome that LLB students are able to critically analyse and comment on legal issues. However, the literature shows that there is a problem with the quality of many law students' legal writing.<sup>40</sup> Two main themes can inform the development of the content and teaching methodology of any legal writing programme to ensure that expected student learning outcomes are attained. These themes are critical thinking and student motivation. Writings on these themes indicate that a shift in thinking is needed when developing a legal writing programme and that legal writing programmes must be foregrounded in teaching methods that develop critical thinking and encourage student motivation.<sup>41</sup> These are the key drivers of good writing. Thus, an important issue to explore is how these principles can be incorporated into the structure of a legal writing programme to motivate students to critically engage with the legal material being studied in order to produce persuasive written work. However, the literature does not provide a clear guide on how to implement these philosophies in a practical context when facing the particular challenges that UKZN is facing. Thus, an investigation into how this issue could be addressed was instigated and four iterations of legal writing and tutoring programmes were followed. It was established that a critical reflection on these programmes would be useful to inform research into the most

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<sup>38</sup> See Newmann, Wehlage & Lamborn op cit note 5 at 12; Voke 'Motivating Students to Learn' (2002) 2 *Student Engagement* 28.

<sup>39</sup> Quinot & Greenbaum op cit note 29 at 33–34.

<sup>40</sup> Sedutla 'LLB Summit: Legal Education in Crisis?' (2013) *De Rebus* 8; Van Niekerk 'The Four-year Undergraduate LLB: Where to From Here?' (2013) 34 *Obiter* 536.

<sup>41</sup> Bean op cit note 11 at 3–4.

contextually relevant manner in which to implement a structured and sustainable legal writing programme at UKZN.

### 1.3 *Research hypothesis and methodology*

My research hypothesis was that a critical review of four iterations of legal writing and tutoring programmes implemented at UKZN would identify a sustainable and structured approach to teaching and tutoring legal writing in South African law schools.

In exploring this hypothesis, I have adopted a reflective research methodology, which would allow me to explore my hypothesis in the context-specific, real-world setting of my own teaching. Thus, in conducting this research, I fulfilled the role of both insider as the lecturer in the legal writing programmes reviewed (EMIC perspective), and the outsider as the researcher reviewing the programmes (ETIC perspective).<sup>42</sup> The vast amount of literature reviewed generally to inform my teaching along the way and to explore the research questions in this thesis provided an ETIC perspective of other academic viewpoints on the research topic.

While undertaking this study I carried out the dual role of lecturer and researcher. Throughout the process of my reflective research, I did not reveal to the learner participants that they were the subjects of my research. Initially, this was because I had not intended for my observations to form part of a formal doctoral study and was simply reflecting on my teaching practices. However, as my study progressed, I chose not to reveal my status as observer because I wanted to observe my students in a completely natural setting without the fear that they might subconsciously perform differently in order to gain my approval. Meticulous care was also taken in the writing of this thesis, so as not to reveal the identity of any learner participants in the study.

I chose a reflective research methodology because this flows naturally from my own reflective teaching practices over the years of teaching legal writing and tutor training at UKZN. Evans interprets the concept of “reflective practice” as, “the constant striving for improvement by a process involving evaluative reflection to identify areas for improvement and creative

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<sup>42</sup> Markee describes the origin of the emic/etic distinction in linguistics: ‘As originally formulated, *phonemic* accounts [of the sounds of language] are member-relevant rules about the sound contrasts of language that native speakers have inside their heads, while *phonetic* accounts are researcher-relevant distinctions about how these sounds are observably realized by native speakers.’ Markee ‘Emic and Etic in Qualitative Research’ in *The Encyclopedia of Applied Linguistics* (2012).

reflection to identify remedial practice.”<sup>43</sup> Evans then relates this practice to educational research, saying:

[T]his is achieved by a cycle whereby researchers analyse what they do, evaluate their output, seek a better way of doing things where they feel one is needed, and then apply to their research practice as much of that better way of doing things as circumstances permit.<sup>44</sup>

Morley speaks of the reflective research process as “critically reflective knowing”, which of necessity incorporates the researcher into the inquiry. She posits that within this research paradigm “researchers avoid masquerading as “shamans’ of objectivity”.<sup>45</sup> Thus, throughout the reflective process I attempted to assess each legal writing programme as honestly and as objectively as possible because this would be the most authentic way to improve my teaching – which was my ultimate goal. However, my analysis of these legal writing programmes remains subjective since I taught on all four iterations and had a vested interest in their success or failure because these programmes formed part of the UKZN Key Performance Areas of the School of Law performance evaluations.

#### 1.4 Research questions

The challenge of teaching law students at UKZN how to write persuasively has required ongoing pedagogical attention. UKZN staff are tasked with imparting these essential skills to second year law students.<sup>46</sup> There are many challenges facing law lecturers at UKZN regarding how to coherently and systematically develop the legal writing skills of students during their studies. This doctoral thesis includes a collection of six published journal articles, accompanied by an introduction, literature review and conclusion. Collectively, they critically explore the development of a legal writing programme for law students at UKZN. The process spanned ten years and four iterations of legal writing programmes. It culminated in a number of findings and recommendation for a best practice legal writing programme for large classes of first- and second-year students at UKZN.

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<sup>43</sup> Evans *Reflective Practice in Educational Research* (2002).

<sup>44</sup> Ibid.

<sup>45</sup> Morley ‘Critical Reflection as a Research Methodology: Situating the Knower: The Writing Story’ Chapt 14 in Liamputtong & Rumbold (eds) *Knowing Differently: Art-based and Collaborative Research* (2005) 265–280, quoting Ruby 1980: 154 cited in Smyth & Shacklock ‘Behind the Cleansing of Socially Critical Research Accounts’ in Smyth & Shacklock (Eds) *Being Reflexive in Critical Educational and Social Research* (1998) 1–12.

<sup>46</sup> Swanepoel & Snyman-Van Deventer op cit note 2 at 122.

In critically reviewing the UKZN programme this thesis examined four research questions:

1. What ought to be the core elements underpinning the teaching of a legal writing programme?
2. How can law lecturers motivate law students participating in a large-class, legal writing programme to read deeply and think critically about the topics they are addressing?
3. What are some of the strengths, weaknesses and lessons learned from the implementation of various iterations of legal writing programmes at the UKZN Howard College School of Law that can be used by other law schools to address the need to ensure that law graduates can meet the legal writing requirements of the legal profession?
4. Is there a structured way in which peer tutors can be used to create a sustainable legal writing programme in resource-constrained environments?

### *1.5 Scope and overview of the thesis*

This thesis is the culmination of a long process of trying to improve my own teaching of legal writing and is thus both an academic work and a deep personal reflection. This is shown in the manner in which the thesis is written – which is not totally impartial. My reading, writing and teaching experience have all fed into the evolving nature of my approach to teaching legal skills and the articles I have submitted as part of this thesis reflect much of my own personal journey of discovery.

I am an admitted attorney of the High Court of South Africa and an honorary research fellow at UKZN, having joined the university as a law lecturer about 20 years ago. I developed a particular interest in legal writing when I began teaching on a final-year elective LLB module that trains final-year law students to tutor first-year law students. So, in 2009 when the UKZN School of Law began the process of exploring pedagogical theories relating to teaching law students the complex, painstaking process of persuasive legal writing, I offered to coordinate a legal writing programme for first year law students. I found that my practical experience in legal writing as an attorney was a valuable backdrop to my academic knowledge on the matter, allowing me to put the insights gained in the profession relating to the required standard of legal writing to good use. Thus began a series of legal writing programmes that I took a keen interest in, and which evolved organically over a period of about ten years.

As part of my reflective teaching process, I documented the implementation of the four iterations of legal writing programmes using a desk review of the available literature on teaching legal writing to critique the effectiveness of my teaching practices. As this thesis developed in consultation with my PhD supervisors and as peer-reviewed journal articles were published along the way, valuable insight was gained through the comments, academic opinions and recommendations of the supervisors and peer reviewers. These ideas helped shape my subjective analysis of completed programmes and, where appropriate, were incorporated into the legal writing programmes that followed. Relevant literature was consulted, both to inform the teaching practices used in the legal writing programmes and to critically appraise the programmes after each was completed. Thus, through this process of trial and error the programmes were continually adjusted to account for challenges encountered along the way, such as increasingly large class sizes and diminishing teaching resources.

Four main iterations of legal writing and tutoring programmes have evolved at UKZN. The process began with the Concise Writing Programme, which concentrated on teaching English grammar to first-year law students and culminated in a legal writing and tutoring programme using a constructivist, values-based, small-group teaching paradigm offered to second-year law students participating in the LLB module. As each programme evolved, two prominent themes began to emerge – student motivation and critical thinking. It became apparent that both motivation and the ability to think critically are key to enabling students to produce quality, persuasive legal writing.

The first iteration – the Concise Writing Programme – focused on language intervention. Observations showed a general lack of student motivation which led to the introduction of the second iteration, the Integrated Skills in Context (ISC) programme.<sup>47</sup> The ISC programme required significant funding and teaching resources, which at the time were available in the form of an external funding opportunity. This need for external funding resources ultimately made this programme unsustainable; however, important lessons were learnt during its implementation.

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<sup>47</sup> See Crocker 'Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School' (2018) 21 *Potchefstroom Electronic Law Journal* 1–27, for a detailed discussion and analysis of these first two iterations of legal writing programmes.

During this time, the third iteration – a peer-tutoring module, Teaching Legal Skills – was running simultaneously.<sup>48</sup> This module, which used final-year law students to tutor first- and second-year law students both substantive law and legal writing, showed significant positive attributes which could address many of the challenges encountered in the previous two iterations of legal writing programmes.

This led to the fourth and final iteration – a legal writing programme, which formed part of a second-year LLB module: Legal Research, Writing and Reasoning.<sup>49</sup> This programme implemented teaching principles that focused on motivating students to engage with the materials used through teaching strategies such as student participation and conversations in feedback. However, this required significant teaching resources to reduce the class sizes by means of repeat teaching and to provide the intensive, individual formative feedback that the programme demanded to address the mixed competencies in writing skills. This programme therefore also proved unsustainable. The principles gleaned from this module combined with those learnt from the previous legal writing programmes implemented, however, could form the basis of a best practice legal writing programme at UKZN.

This thesis answers the four research questions through six published journal articles.

The findings begin with an article entitled “Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School” that was published in 2018 in the *Potchefstroom Electronic Law Journal (PELJ)*. [“Facing the Challenge”]

The next two articles were published in the *Obiter* law journal as a two-part article. The first part, entitled “Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1” was published in 2020 and the second part, entitled “Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2” was published in 2021. [“Motivation 1” and “Motivation 2”]

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<sup>48</sup> See Crocker ‘Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law’ (2020) 45(2) *Journal for Juridical Science* 128–153, for a detailed discussion on the third iteration of the legal writing programme.

<sup>49</sup> See Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write like a Lawyer: Part 1’ (2020) 41(4) *Obiter* 750–765, and Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write like a Lawyer: Part 2’ (2021) 42(1) *Obiter* 1–19, for a detailed discussion on the fourth iteration of the legal writing programme.

The fourth article contribution to this thesis was published in the *Obiter* law journal. It is entitled, “Motivating Law Students to Think Critically and Write Persuasively: Contextualising Learning in the ‘Write It Like a Lawyer’ Case Study”. [“Contextualising Learning”]

The fifth article, entitled “Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at the UKZN Howard College School of Law” was published in 2020 in the *Journal for Juridical Science*. [“Peer Tutoring”]

The sixth and final article, entitled “Blended Learning: A New Approach to Legal Teaching in South African Law Schools” was published in 2006 in the *Journal for Juridical Science*, and appears in the appendix to this thesis. [“Blended Learning”]

The journal articles presented in this thesis answer the four research questions as follows:

1. What ought to be the core elements underpinning the teaching of a legal writing programme?

The first research question is answered in five of the journal article contributions in this thesis, which document the successes and challenges experienced in the four iterations of legal writing and tutoring programmes implemented at UKZN. These articles are: Facing the Challenge; Motivation 1 and 2; Contextualising Learning; and Peer tutoring. In particular, the Motivation 1 article sets out the academic principles underpinning the theme of teaching critical thinking that emerges as a core element of a successful legal writing programme.

2. How can law lecturers motivate law students participating in a large-class legal writing programme to read deeply and think critically about the topics they are addressing?

The second research question is answered in three of the journal article contributions in this thesis – the Motivation 1 and Motivation 2 articles and the Contextualising Learning article. The Motivation 1 article sets out the academic principles underpinning the theme of student motivation, which leads to a discussion on three teaching principles that are essential to encourage student engagement and motivation – constructive alignment, learner participation and conversations in feedback. The Motivation 2 article then discusses the application of the

theory set out in the Motivation 1 article to the Write it Like a Lawyer legal writing programme. Finally, the Contextualising Learning article expands on the teaching principles highlighted in the Motivation 1 article, focusing on a fourth teaching principle, transformative contextualisation.

3. What are some of the strengths, weaknesses and lessons learned from the implementation of various iterations of legal writing programmes at the UKZN Howard College School of Law that can be used by law schools to address the need to ensure that law graduates are able to meet the legal writing requirements of the legal profession?

The third research question is answered by all six journal articles since each of these articles document and comment on a particular iteration or aspect of the legal writing and tutoring programmes implemented at UKZN. These articles address the particular challenges that were faced when implementing the individual legal writing programmes and recommend ways to enhance the learning experience of those programmes:

- The Facing the Challenge article documents the strengths and weaknesses of the teaching principles and methodologies employed in the first two iterations of legal writing programmes implemented at UKZN – the Concise Writing Programme and the ISC Programme.
- The Motivation 1 and Motivation 2 articles cover the theoretical and practical implications of implementing the third iteration of legal writing programme at UKZN in a second-year legal research, writing and reasoning LLB module, along with the challenges encountered in this programme.
- The Contextualising Learning article builds on the previous 2-part article published in the same journal, which further explores student motivation in the third iteration of the legal writing programme at UKZN commenting on the lessons learnt using this approach.
- The Peer Tutoring article explores the use of peer tutors in the fourth iteration of the legal writing programme as part of a final-year LLB module at UKZN to encourage students to improve their persuasive legal writing skills in small tutorial groups. Once again, the strengths and weakness of this programme are discussed at length.
- The Blended Learning article explores the use of blended learning in large-class teaching and recommends ways to overcome problems caused by limited teaching resources. Although this article was published before the advent of the current Covid-19 pandemic,

the pedagogical advantages and disadvantages of using online learning in a blended learning teaching environment remain relevant today and speak to the themes of student motivation and critical thinking.

4. Is there a structured way in which peer tutors can be used to create a sustainable legal writing programme in resource constrained environments?

The fourth research question focuses on how law school staff teaching on a legal writing programme which uses constructivist teaching methods, can be supported. This question is answered by the Peer Tutoring article, which discusses the benefits and challenges of using peer tutors to facilitate teaching and tutoring. It also makes recommendations on how to develop these tutors to provide a sustainable solution to some of the challenges presented by staffing resource constraints in legal writing programmes.

### *1.6 Limitations of the study*

The main challenge encountered when writing up this thesis and reviewing the various iterations of the legal writing programmes was that no baseline was undertaken to establish that these teaching methodologies actually improved student engagement and motivation leading to an improvement in the quality of legal writing. In this respect Crocker notes:

It is notoriously difficult to show a causal link between a specific writing intervention and improved writing skills over a short period of time [such as a single semester of teaching]. This is because in the early stages of writing development there is much more to improving writing than just improving the writing skills themselves, much of which is intangible. An improved ability to write can take many forms, such as improved motivation to write effectively in a particular discourse or gaining understanding of the context of a particular piece of writing or becoming situated in a particular discourse by acquiring insight into the writing conventions of that discourse.<sup>50</sup>

Thus, the viability of my suggested approach to improving student motivation and critical thinking is based on my own subjective anecdotal experiences as a law lecturer. I have taught

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<sup>50</sup> Crocker op cit note 47 at 21; Van Dinther, Dochy and Segers 'Factors Affecting Students' Self-Efficacy in Higher Education' 2011 *Educational Research Review* 96.

legal writing in each of the programmes discussed in this thesis for over 10 years. Over this time, I noted the changing class dynamics as each iteration of legal writing programme was completed and paid careful attention to the increase in student motivation and engagement in critical class discussions, which ensued.

The thesis also touches briefly on the use of e-learning and digital tools to enhance student learning and recognises the importance of incorporating these modes of learning into the teaching environment so as to remain up to date with changing technology.<sup>51</sup> However, one of the limitations of this study was that although the use of blended learning is discussed in some detail, the use of online communication tools, such as Zoom or Microsoft Teams, to teach online in real time is not discussed in any detail. Although online teaching techniques are an essential aspect of teaching and learning today, I chose to focus this study on the discussion and analysis of broader teaching strategies to enhance student motivation in order to develop a feasible structure for legal writing programmes. However, an exploration of student motivation and teaching persuasive legal writing using online teaching techniques would be an interesting and useful follow-up study to this thesis. The real-time technological aspect of teaching has become increasingly important in the current pandemic and the use of these technologies to teach legal writing must be explored in future studies as well as potential benefits associated with the inevitable changes in the nature of higher education.<sup>52</sup>

## 1.7 Conclusion

Legal academics and the law profession have consistently noted that there is a real issue with the quality of legal writing of law students. This is a problem which many South African universities are grappling with, and which must be addressed urgently because the ability to produce good legal writing is one of the most fundamental skills a lawyer must master. However, literature has shown that there are many unanswered questions about how best to address this issue. Teaching legal writing is a complex task. Novice learners who have yet to be inculcated into legal discourse find mastering the art of persuasive legal writing difficult. Teaching this skill therefore requires that careful attention be paid to the teaching techniques

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<sup>51</sup> Quinot & Greenbaum op cit note 29 at 54. Also, see, Crocker 'Blended Learning: A New Approach to Legal Teaching in South African Law Schools' (2006) 31 *Journal for Juridical Science* 1–25.

<sup>52</sup> Biggs 'Aligning Teaching for Constructing Learning' *The Higher Education Academy* available at [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf).

implemented in any persuasive legal writing programme, as well as to the overall structure of that programme. Staffing resource constraints common to many South African universities must also be overcome so that the inclusive teaching methodologies that are necessary to teach legal writing – which can be prohibitively resource-hungry in the face of increasingly large, diverse student bodies – become a feasible teaching option.

## 2 LITERATURE REVIEW

### 2.1 Introduction

Indeed, writing may be one of the most complex intellectual acts we undertake, teaching writing one of the most difficult.<sup>1</sup>

This insightful observation by Rideout and Ramsfield highlighting the fact that teaching such a difficult, complex skill as legal writing will inevitably be a difficult and complex task, sets the tone for this literature review.

At the outset it must be made clear that both international and South African sources have been consulted in order to situate this literature review in both a local and international context. Consulting selected international experiences in teaching legal writing is essential since many of the pedagogical principles and teaching methodologies can be successfully translated into a South African context. However, because many of the sources cited in this thesis originate from the United States, it is important to note the distinction between teaching legal writing in the United States and teaching legal writing in South African or European universities. This distinction is that legal writing instruction in the United States forms part of a postgraduate degree, the Juris Doctor (JD) degree, which students undertake only once they have completed an undergraduate degree. All legal writing instruction for South African or European law students, on the other hand, must be undertaken during the course of their undergraduate law degree, during which time they are required to acclimate to the particular culture of the law school and the formalities of legal discourse. Nevertheless, although legal writing is taught as a postgraduate offering in the United States, there are a number of useful insights that can be drawn from these international experiences to inform our South African reality. Thus, both international and South African authors have been consulted throughout this thesis and only where the context is unique to international learning institutions, and where necessary, will the distinction in this regard be made explicit.

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<sup>1</sup> Rideout & Ramsfield 'Legal Writing: A Revised View' (1994) 69(1) *Wash L Rev* 35 at 48.

Both South African and international academics agree that legal writing can and must be taught. For example, Snyman-Van Deventer and Swanepoel note that “[l]egal writing cannot only be left to develop or to be taught through practice in the profession”,<sup>2</sup> and Williams advocates that

[g]ood thinking and good writing are not the natural outcome of natural growth but rather a set of skills that can be deliberately taught and deliberately learned in a context that we can describe as a ‘community of knowledge’ or a ‘community of discourse’... [it] is a consequence of experience gathered by working with others more experienced in some particular discourse community.<sup>3</sup>

Therefore, as a starting point, the literature was consulted to determine where the onus of teaching law students the skill of legal writing lies and whether teaching this skill should include the advanced technical aspects of legal writing that will be used when entering the legal profession. Most national and international universities agree that law schools are responsible for teaching this skill. In respect of South African tertiary institutions, for example, Broodryk writes, “It would appear that the majority of law faculties in South Africa have now assumed responsibility for inculcating into law students, in addition to substantive law, critical thinking, research and writing skills.”<sup>4</sup> In respect of international educational institutions, Swanepoel and Snyman-van Deventer as well as Dednam agree that teaching legal writing is an essential addition to the law curriculum in the United States and Canada.<sup>5</sup> Hines and Reppy succinctly argue why the law faculty should be used to perform this important task:

The most obvious benefit from greater faculty participation in students' training in lawyer skills would be producing significantly more competent law graduates. If the conventional wisdom is true that law training is mainly concerned with acquiring a mental discipline (learning to think like a lawyer), mastering lawyers' moves (understanding the conventions of the branch of our culture which consists of the activity of law), developing a facility for making sound critical judgments (becoming an effective problem solver), and inculcating the traditions of the

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<sup>2</sup> Snyman-Van Deventer & Swanepoel ‘Teaching South African Law Students (Legal) Writing Skills’ (2013) 24(3) *Stellenbosch Law Review* 515.

<sup>3</sup> Williams ‘On the Maturing of Legal Writers: Two Models of Growth and Development’ (1991) 1(1) *The Journal of the Legal Writing Institute* 9.

<sup>4</sup> Louw & Broodryk ‘Teaching Legal Writing Skills in the South African LLB Curriculum: The Role of the Writing Consultant’ (2016) 27(3) *Stellenbosch Law Review* 536.

<sup>5</sup> Swanepoel & Snyman-Van Deventer ‘The Need for a Legal-Writing Course in the South African LLB Curriculum’ (2012) *Obiter* 122; Dednam ‘Knowledge, Skills and Values: Balancing Legal Education at a Transforming Law Faculty in South Africa’ (2012) 26(5) *SAJHE* 930.

profession (embracing the attitude and the standards of a professional), then our teaching resources should be allocated in a manner best calculated to achieve these objectives efficiently.<sup>6</sup>

Van Niekerk posits, however, that “the legal profession should make a commensurate contribution to the future of legal education” and that “a balance must be struck between the demands of academia and those of the profession, one that produces the best possible quality graduate”.<sup>7</sup> Van Niekerk emphasises the harsh reality that many of the graduates produced from the South African 4-year LLB degree are deficient in their reading and writing skills and that “[i]n a profession that oft-times requires advanced numeracy and literacy skills, it is unthinkable that graduates can enter into practice without them”.<sup>8</sup> Van Niekerk explains the reasoning behind reducing the 6-year South African LLB degree to 4 years:

As part of a transformative agenda, the new degree was intended to make access to a law qualification available to all and to increase the representivity of black South Africans or graduates in the legal profession. This degree was intended to place all graduates on an equal footing, where no one is either inferior or superior.<sup>9</sup>

However, this plan appears to have failed. During a 2013 summit conference – the objective of which was to discuss an ongoing crisis with the LLB degree – Justice Bosielo and Professor Greenbaum made a number of observations about the standard of graduate skills. In particular, they noted the poor quality of graduate literacy, writing and reading skills, which have arisen from the challenges of an inadequate primary and secondary education that many students have faced.<sup>10</sup>

This comment is pertinent given that there are continual complaints from the South African legal profession about the poor legal writing skills of students entering the workplace, making an already onerous task even more difficult for legal academics. For example, Judge Mojapelo, in his address to the Limpopo Law Council in 2012, laments the inadequacies of graduates produced from the 4-year LLB degree introduced in 1998:

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<sup>6</sup> Pedrick, Hines & Reppy ‘Should Permanent Faculty Teach First-Year Legal Writing Debate’ (1982) 32(3) *Journal of Legal Education* 413–423 at 419.

<sup>7</sup> Van Niekerk ‘The Four-Year Undergraduate LLB: Where to From Here?’ (2013) 34 *Obiter* 543.

<sup>8</sup> *Ibid* at 536.

<sup>9</sup> *Ibid*.

<sup>10</sup> Sedutla ‘LLB Summit: Legal Education in Crisis?’ (2013) *De Rebus* 8.

Let me be the one of those who admits openly: It has not worked and it has not produced the product we expected ... There is no prior training whatsoever other than this LLB degree and the product is unleashed on the high courts. In most cases the product can barely utter a few coherent sentences, never mind articulate the case of his or her client. Trying to assist the product from the bench is like pulling out teeth ... I have read with pain in my heart about the finding of a survey that found that many such products have problems with basic numeracy and literacy. They have problems with counting, reading and reasoning. Many of us had already made that observation.<sup>11</sup>

In 2015, the Council on Higher Education<sup>12</sup> developed an LLB Qualification Standard, which formed the basis of a national review of the LLB. This details the attributes that a graduate must exhibit before the LLB qualification can be awarded. For example, a graduate must show proficiency in reading, writing and comprehension skills, as well as critical thinking in legal discourse.<sup>13</sup> It is also worth noting that in order to attain ‘proficiency’ in the context of the LLB degree, the Council on Higher Education (CHE) recommends developing skills and abilities “by regularly exposing law students to problem-solving and research problems and by expecting them to produce well-written, coherent answers or research reports”. Language proficiency includes aspects such as style and grammar; “systematic and clearly structured treatment of the topic; and logic and persuasiveness of the arguments”.<sup>14</sup>

However, Dednam adds that “academics and practitioners ... do not agree on the approach to and type, volume and depth of skills involved”.<sup>15</sup> Thus, the types of problems and assignments that can be used in teaching legal writing are numerous and varied. For example, Cohen mentions that some law schools advocate studying legal writing from a practice perspective, i.e. focusing on the documents used in litigation from pleadings to appeal applications, while others rather recommend a more general approach in which students write on different set of facts for each new problem-solving writing exercise.<sup>16</sup> What is clear from the literature, however, is that the legal profession would prefer law graduates to enter the profession with an

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<sup>11</sup> Mojapelo ‘Address to the AGM of the Limpopo Law Council’ (2012) Polokwane 18–19.

<sup>12</sup> In terms of the National Qualifications Framework (NQF) Act 67 of 2008, the CHE is the Quality Council (QC) for Higher Education.

<sup>13</sup> Council on Higher Education ‘Higher Education Qualifications Sub-framework: Qualification Standard for Bachelor of Laws (LLB)’ (2015) 7–9.

<sup>14</sup> *Ibid* at 11.

<sup>15</sup> Dednam *op cit* note 5 at 930.

<sup>16</sup> Cohen ‘Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers’ (1978) 29(4) *Journal of Legal Education* 609–610.

advanced knowledge of legal writing and other technical legal skills. Dednam writes that “[w]hile the university would prefer to develop the student as a societal human being in a holistic way, the market prefers to receive ready-made legal technicians/practitioners”.<sup>17</sup> Thus, some literature suggests that equilibrium needs to be found between empowering students with holistic knowledge and the skills to contribute meaningfully to society, and training those students with specific technical legal knowledge.

South African academics highlight some inherently South African challenges to teaching and learning this skill, such as the fact that many of our students are second-language students.<sup>18</sup> Bangeni and Greenbaum write of the difficulties that many English second-language students have in learning the skill of legal writing. For example, the grammatical errors that they make when using the definite and indefinite articles may be because English is not their first language, as in most African languages there is no distinction between the two. This places a heavy burden on South African law students, many of whom have English as their additional language and many of whom enter the law degree with a poor educational background and are “unprepared for the demands of tertiary study”.<sup>19</sup>

The writing in this field deals with both theoretical approaches that underpin the pedagogy of such teaching as well as practical approaches and experiences which have been documented. For example, Gottlieb and Greenbaum provide an excellent synopsis of multiple theoretical approaches that inform the teaching of legal writing. Included in their synopsis are the following theories: New Literacy Studies, of which they maintain the principal idea is “that language and literacy are social and ideological constructs”, which can only be understood when embedded in a social context within relevant discourse; the Genre approach, which they posit promotes explicit teaching of the unique conventions of the legal profession, which again includes a “critical awareness of the specific social context of the text”, the teaching of which necessitates that the text is “situated in the context of its purpose, the situation that precipitated it, and its intended reader”; Multiliteracies, which they explain expand on the previous two

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<sup>17</sup> Dednam op cit note 5 at 926.

<sup>18</sup> Bangeni & Greenbaum ‘An Analysis of the Textual Practices of Undergraduate and Postgraduate Novice Writers in Law’ (2013) 29(2) *Per Linguam* 76. Also see Dednam op cit note 5 at 934.

<sup>19</sup> In 2019 Bangeni and Greenbaum noted that while students with academic literacy challenges who attended the Law School Extended Curriculum Programme at the University of Cape Town “have typically matriculated from disadvantaged schools, this is increasingly not the case in the faculty. Many ECP students have attended former ‘Model C’ schools, typically located in suburban middle-class areas.” Bangeni & Greenbaum ‘Bachelor of Laws (LLB) Students’ Views of their Literacy Practices: Implications for support in a time of change’ (2019) 10(1) *Reading & Writing* 2.

approaches by including means other than text, such as visual aids in the form of pictures and charts or aural aids such as videos, to enhance the learning process; and, finally, Academic Literacies, which they describe as including the element of active learning in the teaching and learning process in a way that encourages active student participation.<sup>20</sup>

Clarence, Albertus and Mwanbeni, as well as Bangeni and Greenbaum, reiterate the value of a genre-based pedagogy and the academic literacies approach to genre.<sup>21</sup> Bangeni and Greenbaum state that “A genre-based pedagogy calls for the explicit teaching of the form of key genres as well as the linguistic choices which are available to writers in particular contexts” and that an academic literacies approach to writing “seeks to understand the meanings which student writers attach to their acts of reading and writing as they are inducted into a specific discipline”.<sup>22</sup>

Given the complexity of teaching legal writing in South Africa, it stands to reason that varied perspectives from legal academics on the practical aspects of teaching legal writing and the core elements to be included in an effective legal writing programme. There are many contested issues in this particular discussion, but as a starting point it can be seen from the literature that there is no clear consensus on the definition of legal writing. Rideout and Ramsfield comment on why some legal readers and writers have found it difficult to define legal writing. They posit:

Traditional views of legal writing, usually taken by those who do not teach it, have crippled legal writing programs because they have ensured that the complex task of introducing novices to legal discourse cannot be reasonably undertaken. Without fully understanding the epistemic, social, and process dimensions of legal writing, law schools do not assign the proper resources to developing good legal writers. Instead, they use traditional definitions to prevent legal writing programs from developing and thus minimize the students' possibilities of becoming good legal writers.<sup>23</sup>

Thus, while some academic writers advocate a focus on only the technical nature of legal writing including the formal writing conventions of legal discourse, others believe that the

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<sup>20</sup> Gottlieb & Greenbaum ‘The Effect of Integration on Learning: An Analysis and Evaluation of a Legal Writing Project in a South African Law Faculty’ (2018) 34(1) *Per Linguam* 48–50.

<sup>21</sup> Clarence, Albertus & Mwambene ‘Building an Evolving Method and Materials for Teaching Legal Writing in Large Classes’ (2014) 67(6) *Higher Education* 840–841.

<sup>22</sup> Bangeni & Greenbaum op cit note 18 at 74.

<sup>23</sup> Rideout & Ramsfield op cit note 1 at 48.

nature of legal writing is much more nuanced. According to Rideout and Ramsfield, “[l]egal writing is the reflection of a complex series of problem-solving decisions; it is the battle among disparate ideas; it is the effort of a creative mind trying to work within the rhetorical confines of the discourse.”<sup>24</sup>

Feerick adds to this discussion on the definition of legal writing, and states that, in addition to the technical aspects of writing such as clarity, precision and factual basis, the content of the writing must also be “ethically sound”. He also believes that legal writing may take on different characteristics in order to achieve a desired outcome. Thus, writing which may appear to be bad legal writing because it is vague or ambiguous may not be as bad as it seems if it has been written this way by design in order to achieve a specific purpose. For example, a lawyer may take a strategic decision to leave some ambiguities temporarily unresolved so as to achieve consensus in a dispute that might otherwise not be resolved timeously. The client may be better served having to resolve those issues at a later stage if, indeed, they become an issue at all.<sup>25</sup>

Other writers imbue legal writing with a range of characteristics that may not always be possible to teach at a first- or second-year undergraduate level. Some of these skills may need to be developed over time, even while in the profession. For example, Calleros believes that good legal writing can even have a poetic quality and that its persuasiveness can be enhanced by infusing it with an individual writing style. He believes that although legal writing must be “clear, concrete and concise”, capturing the reader’s attention with vivid imagery will make the writer’s story that much more compelling.<sup>26</sup> Allowing students to write using their own individual style can also be very liberating and motivating, which will encourage them to engage critically with their writing. Bridge also argues that there is an art to legal writing, which can have a personal style and that, in fact, writing that has become “disembodied” will not be able to communicate effectively.<sup>27</sup> These different approaches to legal writing all affect the way in which one designs and carries out a legal writing programme.

Four themes emerged from the literature canvassed for this study, all of which explore in more depth various aspects of legal writing programmes for law students. These themes are: core

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<sup>24</sup> Ibid.

<sup>25</sup> Feerick ‘Writing Like a Lawyer’ (1994) 21(2) *Fordham Urban Law Journal* 381–388.

<sup>26</sup> Calleros *Legal Method and Writing* (2014) 5.

<sup>27</sup> Bridge ‘Legal Writing After the First Year of Law School’ (1978) 5(2) *Ohio Northern University Law Review* 411.

elements that ought to underpin the teaching of a legal writing programme; the importance of student motivation in legal writing programmes; lessons learnt from the implementation of legal writing and tutoring programmes; and using peer tutors to alleviate some of the law teaching staff resource constraints in legal writing programmes.

## 2.2 *Core elements that ought to be considered when designing a legal writing programme*

There is a significant amount of literature on the core elements that ought to underpin the teaching of a legal writing programme. Both national and international authors writing in the field of teaching legal writing, discuss these elements.

The first critical point that emerges is that in legal writing programmes there ought to be a shift away from only teaching spelling and grammar towards a strong focus on teaching critical thinking and reasoning.<sup>28</sup>

According to Rideout and Ramsfield:

Within [the unique discourse community of law], students must acculturate themselves to new uses of language, new paradigms of reasoning, new rhetorical considerations, and new conventions. If the focus is too narrow, such as on correcting sentences, students may still write poorly, resist learning, and discover too late the rich and complex role that writing plays for lawyers and legal scholars.<sup>29</sup>

It is interesting to note the observation of Clarence, Albertus and Mwambene that lecturers at the University of the Western Cape who were involved in a legal writing project called the ‘Large Class Writing Development Programme’ (LCWDP), which aimed to improve the writing skills of first-year law students, emphasised the need for students to learn correct spelling, grammar and tone when attending a legal writing programme.<sup>30</sup> Reflecting on the programme, however, the authors make it clear that it is not enough simply to teach spelling, grammar and tone, but that “... it is necessary to acknowledge that when we talk about legal

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<sup>28</sup> Vinson ‘Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge’ (2005) *Touro Law Review* 510. For example, Vinson, Candlin, Bhatia and Jensen all note that good legal writing requires more than just good technical writing skills.

<sup>29</sup> Rideout & Ramsfield op cit note 1 at 35.

<sup>30</sup> Clarence, Albertus & Mwambene op cit note 21 at 840–841.

writing, we are referring to much more than simply mastering legal English, or writing in certain formats. We are referring to training future lawyers to read, think and write in ways that are valued and recognised by their discourse community...”.<sup>31</sup>

A reading of the literature reveals a number of reasons why critical thinking is so important for lawyers and for law students, in particular. There are numerous elements to consider before beginning to draft a legal document; however, the ability to think critically is closely linked to the concept of writing like a lawyer.<sup>32</sup> There is consensus in the literature that a deep approach to learning, which involves critical reading and critical thinking, is essential for producing good, persuasive legal writing.<sup>33</sup> In essence, legal writing is not simply descriptive; it generally has a specific objective of persuading another party to adopt a particular position. Rideout and Ramsfield discuss the epistemic view of writing in which “writing is used not only to communicate knowledge, but also to generate knowledge. That is, writing plays a role in thinking.”<sup>34</sup> They believe this is especially true for law students and legal practitioners where “the act of writing is intimately involved with the act of ‘constructing’ the law – describing and synthesizing the applicable law, applying legal rules, drawing analogies and distinguishing facts, and developing legal arguments”.<sup>35</sup>

This need to teach the complex skill of critical thinking in a legal writing course raises the second point of whether it is important to use relative experts in the legal field to perform this task. For example, Rideout and Ramsfield recommend that educators who are tasked with teaching legal writing not only have the responsibility to ensure that they are well versed with current learning and writing theory, but must also have the intellectual ability to design legal writing assignments and analyse the reasons behind poor writing.<sup>36</sup>

The third core element emerging from the literature is the need to consider whether a persuasive legal writing programme should be limited to a dedicated programme, or if these skills should

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<sup>31</sup> Ibid at 842.

<sup>32</sup> Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 3–4; Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1’ (2020) 41(4) *Obiter* 750.

<sup>33</sup> Bean op cit note 32 at 3–4; Williams op cit note 3 9–10; Wegner ‘Better Writing, Better Thinking: Thinking Like a Lawyer’ (2004) 10 *The Journal of the Legal Writing Institute* 9–22.

<sup>34</sup> Rideout & Ramsfield op cit note 1 at 55.

<sup>35</sup> Ibid.

<sup>36</sup> Rideout & Ramsfield op cit note 1 at 48.

be incorporated only into substantive law courses, or a combination of both of these suggestions.

Teaching legal writing skills is a long process, requiring continual practice and acculturation into legal discourse. This is a task that is usually impossible to achieve in a single year. Curtis and Karp advocate that the teaching of legal writing should be incorporated into all modules and not saved for a dedicated module, and that critical reading and critical thinking are inextricably linked:

These two skills marry the finding of meaning with the evaluating of meaning, and indivisibly work together. Overall, critical skills should not be treated as something to be isolated – such as with specific courses or texts – but rather should be treated as a part of the atmosphere of every classroom by every teacher.<sup>37</sup>

Clarence, Albertus and Mwambene agree with the approach taken by Curtis and Karp, commenting that it would be beneficial for a legal writing programme to be embedded in substantive law courses and to span all four years of the LLB degree.<sup>38</sup> Likewise, Gottlieb and Greenbaum posit that an integrated approach is needed and that “... legal thinking, reading and writing skills can only be acquired if they are explicated and developed in the context of their use. This means embedding them in law courses by scaffolding the texts and assignments of these courses and basing the literacy exercises on them.”<sup>39</sup>

It is worth noting, however, that Swanepoel and Snyman-Van Deventer are concerned that although many scholars advocate an integrated approach, there appears to be a lacuna in discourse on integrating skills and content in the LLB curriculum. They say that because of this “opportunities are lost with regard to the teaching or inculcation of many important legal skills in subjects that traditionally convey theory of law alone”.<sup>40</sup>

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<sup>37</sup> Curtis & Karp “‘In a Case, in a Book, They Will Not Take a Second Look!’ Critical Reading in the Legal Writing Classroom’ (2005) 41 *Williamette Law Review* 293 at 295, referring to Carr ‘How Can We Teach Critical Thinking?’; Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1’ (2020) 41(4) *Obiter*.

<sup>38</sup> Clarence, Albertus & Mwambene op cit note 21 at 848.

<sup>39</sup> Gottlieb & Greenbaum op cit note 20 at 57.

<sup>40</sup> Swanepoel & Snyman-Van Deventer op cit note 5 at 126.

A related issue is when to offer such a programme. In other words, at what stage in the LLB degree should students be taught the basic aspects of persuasive legal writing and at what stage should they be taught the advanced aspects? At universities in the United States there is disagreement about what stage in the postgraduate curriculum a legal writing course should be introduced. The US academics, Rideout and Ramsfield, argue that law students should be introduced to the conventions of legal discourse in the first year of [postgraduate] study, building a strong foundation which can be further strengthened in later years of the law degree.<sup>41</sup> However, American author, Douglas Laycock, believes that making a significant improvement to legal writing in the first year is an impossible task because the new skills that law students must learn before even beginning to write like a lawyer take up most of their time. This viewpoint is concerning since South African students, of necessity, must grapple with mastering this skill during their undergraduate degree before leaving to join the legal profession. Laycock does, however, posit that the basics of legal writing should be introduced in the first year, with a “serious effort to improve our students’ writing” to begin in the second or third year.<sup>42</sup>

A number of South African legal academics propose a staggered approach to the integration of components of legal writing in the LLB curriculum. Snyman-Van Deventer and Swanepoel applied this approach in the Faculty of Law at the University of the Free State. The process saw the gradual introduction of elements of legal writing instruction, which were closely aligned to substantive law subjects, throughout the LLB degree.<sup>43</sup> Snyman-van Deventer and Van Niekerk<sup>44</sup> agree with Kok and Nienaber who comment that legal writing skills that are learnt during the first year of legal study “need continuing attention in order that they are developed and perfected in later years of study”.<sup>45</sup>

Louw and Broodryk believe that practical support should be provided when using a staggered approach to teaching legal writing. They write of their experiences in the Faculty of Law at the University of Stellenbosch:

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<sup>41</sup> Rideout & Ramsfield op cit note 1 at 77.

<sup>42</sup> Laycock ‘Why the First-Year Legal Writing Course Cannot do Much About Bad Legal Writing’ (1990) 1 *Scribes Journal of Legal Writing* 85.

<sup>43</sup> Snyman-Van Deventer & Swanepoel op cit note 2 at 527.

<sup>44</sup> Snyman-van Deventer & Van Niekerk ‘The University of the Free State Faculty of Law/Write Site Intervention – Supporting Broader Access with the Skills for Success’ (2018) 43(1) *Journal for Juridical Science* 51.

<sup>45</sup> Kok & Nienaber ‘Legal Skills for First-Year Law Students: Too Little Too Late?’ (2005) *The Law Teacher* 1–29.

... in each year of the undergraduate LLB programme at the Faculty, writing intensive modules are identified in which specific attention is paid to the development of writing skills in addition to the substantive law under discussion. In each of these modules, very specific aims are set regarding writing skills and each year builds on the skills developed in the previous year(s). These aims are taught specifically – in other words, there are express sessions in the modules during which these writing skills are addressed with the students – either in the form of main lectures, or in smaller groups such as tutorial sessions. However, such teaching is not separate from the substantive law under discussion in the module; it happens simultaneously.<sup>46</sup>

In the final analysis, it appears that among South African authors there is general consensus that a legal writing course should be offered using a staggered approach, and beginning with a course dedicated to teaching the basics of legal writing in the first year of undergraduate study but closely aligned to a substantive law module. Thereafter it should continue to be offered throughout the LLB degree as an embedded version in substantive law courses.

A fourth core element debated in the literature relates to the nature of the legal writing skills that should be taught to undergraduate students. If legal educators are to teach their students how to think like lawyers, they will need to teach them critical thinking skills and how to reason, for example by: “posing questions; developing a routine; and by reconstructing knowledge”.<sup>47</sup>

Snyman-Van Deventer posits that if students are to learn to think like lawyers, it is a core function of the law school to teach them analytical and critical thinking skills in their first year of study.<sup>48</sup> However, she makes it clear that there is no single method that ought to be applied in every situation and that students must be taught to adapt their thinking in order to

identify the issues, to see both sides of the issue or argument and to apply the law (rules and principles) to the issue ... s/he will [then] be able to critically engage with the law and be able to evaluate the law (case law, legislation, and so on) in terms of its applicability, usefulness, success, but also its limits and constraints.<sup>49</sup>

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<sup>46</sup> Louw & Broodryk op cit note 4 at 536.

<sup>47</sup> Crocker ‘Motivating Law Students to Write Like Lawyers: Contextualising Learning in the “Write it Like a Lawyer” Case Study’ (2022) 43(2) *Obiter* 588–604, quoting Wegner op cit note 33 at 9–22.

<sup>48</sup> Snyman-Van Deventer ‘Teaching South African (LLB) Law Students Legal Analysis to Ensure Critical Thinking’ (2019) 44(2) *Journal for Juridical Science* 94.

<sup>49</sup> *Ibid.*

American authors Williams and Wegner put forward an advanced, nuanced way of approaching the teaching of critical thinking and legal writing, which would be most effective when teaching senior or postgraduate law students. However, undergraduate students in the South African context will need time to develop these skills gradually before becoming the expert critical thinkers envisioned by Williams. For example, Williams believes that once one has acquired the skill of critical thinking one will not simply rely on the “concrete authority of the text” but having been exposed to and having engaged with a range of good arguments, one will be able to “imagine an alternative one that would be more convincing”.<sup>50</sup> Wegner describes an advanced notion of critical thinking or “thinking like a lawyer” as “dealing with uncertainty in a very profound way” or, in an interesting turn of phrase, “domesticating doubt”. She maintains that “uncertainty is inevitable in every profession that introduces students to situations that are abstract in the first instance, but then are shaped in reality by a host of individual circumstances”.<sup>51</sup>

A fifth core element is the importance of ensuring that legal writing programmes are based on multi-stage writing programmes in which students are supported in developing multiple versions of the same task. Rideout and Ramsfield state that “[l]egal writing is difficult, painful, progressive work that takes long, conscious reworking in stages”.<sup>52</sup> This statement is supported by Flower who posits that making it clear to students that writing is a multi-stage process will enable them to value the effort that has gone into their own writer-based writing and the value that it has as an early contribution to the writing process. Although this early stage of writing might not be able to communicate effectively with the reader in its current form, it has the potential to be transformed into an excellent piece of legal writing and, accordingly, will carry much motivational value for the students. Flower states that “[t]his legitimate recognition of the uncommunicated content of Writer-Based prose can give anyone, but especially inexperienced writers, the confidence and motivation to go on.”<sup>53</sup> Allowing students to view their writing as a multi-stage process that involves the submission of multiple draft versions, which become more and more refined with each revision, will energise and motivate them to perform the necessary editing and re-drafting tasks that are needed to transform their work into

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<sup>50</sup> Williams op cit note 3 9–10.

<sup>51</sup> Wegner op cit note 33 at 9–22.

<sup>52</sup> Rideout & Ramsfield op cit note 1 at 44.

<sup>53</sup> Flower ‘Writer-Based Prose: A Cognitive Basis for Problems’ (1979) 41(1) *Writing College English* 19–37.

reader-based writing. This idea could, however, be difficult to implement in the short time-span of a single semester.

This process approach is resource heavy, requiring many hours of marking in order to provide useful ongoing formative feedback on each written draft of student work. This, of course, has a knock-on effect on other work demands such as research commitments that law school staff must honour. Durako writes that:

A survey conducted in 1999 involving 117 law schools in the United States collected several measures of the average workload of directors and other writing teachers and found a pattern of staggeringly heavy workloads in terms of students taught, papers critiqued, and conferences held. ... The time and effort to critique and provide written feedback, while also preparing for class and developing writing and research problems, requires an extraordinary level of sustained commitment and stamina ... [t]his ... does not include the accompanying administrative work entailed in creating and shuffling ... writing assignments, meeting informally with students, plus scheduling ... several conferences for each student each term.<sup>54</sup>

While the literature provides examples of how resource constraints such as limited time and staffing can be alleviated by, for example, using student peer tutors or even peer assessment to assist with assessment and feedback,<sup>55</sup> it does not offer a cohesive, structured and sustainable plan that could be used at UKZN to develop and motivate these peer tutors and secure their involvement in a legal writing programme without having to outlay any financial resources. For example, Brown and Poor, in describing the benefits of using student peer tutors to assist students in active learning exercises during lectures, remark that “[a]lthough the tutors indicated that they participated in the ICPT program to improve their understanding of the material and their communication skills, as well as for self-fulfilment, they also agreed that some form of financial reimbursement was necessary”.<sup>56</sup> Topping remarks that using developing peer tutors “may involve increased costs in the short term, with a view to reduced costs and/or greater effectiveness in the medium and long term”.<sup>57</sup> He also notes that in certain

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<sup>54</sup> Durako ‘A Snapshot of Legal Writing Programs at the Millennium’ (2000) 6(95) *The Journal of the Legal Writing Institute* 107–109.

<sup>55</sup> Snowball & Sayigh ‘Using the Tutorial System to Improve the Quality of Feedback to Students in Large Class Teaching’ (2007) 21(2) *SAJHE* 321 at 333.

<sup>56</sup> Brown & Poor ‘AC 2009-2543: In-Class Peer Tutoring: A Cost-Effective Model for Engineering Instruction’ (2009) *American Society for Engineering Education*.

<sup>57</sup> Topping ‘The Effectiveness of Peer Tutoring in Further and Higher Education: A Typology and Review of the Literature’ (1996) 32 *Higher Education* 321–345.

institutions in the United Kingdom, tutors who are involved in supplemental instruction “receive credits in a course accreditation transfer scheme for their participation” as motivation to participate in the programme.<sup>58</sup> Greenbaum suggests developing peer tutors as part of a final-year elective module for which students receive credit.<sup>59</sup> Thus, a sustainable and structured method must be developed for training relative experts in the legal field to provide sustained feedback and tutoring support for legal writing throughout the LLB degree at no extra cost to faculty.

The final core element to emerge regarding the nature of legal writing programmes is the need to ensure that students engage deeply with the materials that they are seeking to understand. Fourie explains that adopting a deep approach to learning entails getting students to be actively interested in the material being studied, while seeking to understand the subject material.<sup>60</sup> This requires the careful selection of contextually relevant materials. Fourie also makes the important point that student motivation is required to encourage critical thinking. It is argued that teaching critical reading and thinking skills is not a simple task but it can be done – and it begins with student motivation.

### 2.3 *The importance of student motivation in legal writing programmes*

It is well documented in the literature that student motivation is necessary to encourage learners to engage deeply with the academic process so as to learn how to read and think critically which, in turn, is essential for producing persuasive legal writing. This is particularly important as students may struggle to see the value of completing multiple versions of the same task or of refining an argument which they feel is adequate. This implies that students are required to do more than simply work hard, listen to instructions or respond effectively to questions posed during class.<sup>61</sup>

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<sup>58</sup> Ibid at 321–345, quoting Topping, Simpson, Thompson & Hill ‘Evaluation of Faculty-Wide Student Supported Learning at the University of Central Lancashire’ (submitted for publication 1996).

<sup>59</sup> Greenbaum *Teaching Legal Writing in a South African Context: An Evaluation of the Work of Student Tutors in Assisting with the Development of Legal Writing Skills in First Year Law Students at one South African Law School* (Unpublished master’s thesis, University of Natal, 2001). See discussion in Crocker ‘Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law’ (2020) 45(2) *Journal for Juridical Science* 128–153.

<sup>60</sup> Fourie ‘Beyond the Ivory Tower: Service Learning for Sustainable Community Development’ (2003) 17(1) *South African Journal of Higher Education* 123, quoting Ramsden *Improving Learning: New Perspectives* (1988) 19.

<sup>61</sup> Crocker op cit note 37; Newmann, Wehlage & Lamborn ‘The Significance and Sources of Student Engagement’ in *Student Engagement and Achievement in American Secondary Schools* (1992) Teachers College Press, New York at 12.

Voke, and Newmann, Wehlage and Lamborn, believe that intrinsic motivation is essential for inspiring a deep engagement with – and psychological investment in<sup>62</sup> – the intellectually challenging and sometimes tedious creative process of legal writing. Intrinsic motivation has been described as the will to engage without the need for external motivating factors. That is, being driven simply by the desire to learn.<sup>63</sup> Thus, they state that intrinsically motivating learners will encourage them to participate in the process of learning because they want to understand and enjoy the process of learning. Voke states that motivating learners in this way has many advantages, such as increasing comprehension of complex concepts, enhancing creativity and promoting long-term memory.<sup>64</sup> Therefore, inspiring intrinsic rather than extrinsic motivation will encourage students to remain motivated for the long haul that is needed to learn the art of persuasive legal writing spanning their entire LLB degree.

This, however, is not an easy task and may require varied teaching methods to achieve. The literature provides many examples of practical teaching techniques that can be used to intrinsically motivate students to think critically and engage deeply with the learning process.

Exploring the issue of motivation further, Bangeni and Greenbaum consider student perceptions of learning techniques that improved their motivation and ability to engage meaningfully with legal concepts. Techniques that they mentioned as being helpful in this process include repeat reading of complex texts and reading widely about new ideas. They also spoke of comparing information from various sources of texts, including the use of dictionaries and internet search engines, to gain further understanding of new legal concepts. It was also interesting to note that they recognised the value of learning new legal concepts through discussion and feedback on written exercise.<sup>65</sup>

The success of these techniques still, of course, relies on the students completing the activities that they have been presented with, as instructed. For example, Bean and Feerick argue that students' natural curiosity will be piqued if they are given the opportunity to experience the simple pleasure of solving well designed, stimulating and interesting practical problems.<sup>66</sup> These exercises can be used to demonstrate a range of different problem-solving techniques,

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<sup>62</sup> Newmann, Wehlage & Lamborn 'The Significance and Sources of Student Engagement' in *Student Engagement* (1992) 12.

<sup>63</sup> Crocker op cit note 37; Voke, 'Motivating Students to Learn' (2002) 2 *Student Engagement* 28.

<sup>64</sup> Voke 'Motivating Students to Learn' (2002) 2 *Student Engagement* 28.

<sup>65</sup> Bangeni & Greenbaum op cit note 19 at 6–7.

<sup>66</sup> Bean op cit note 32 at 2–3.

such as “brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation”.<sup>67</sup> Wegner maintains that exploring legal writing through the analysis of cases is the ideal way to motivate students to develop their higher-order thinking skills.<sup>68</sup> Fink notes that learners who are held accountable for preparing and reading ahead of lectures will be intrinsically motivated to do so, which will then put them in good stead to attain the standard of excellence that is required of them.<sup>69</sup>

Another practical way to increase student motivation is for legal educators to convince their students that although legal writing must follow the conventions of legal discourse and strive to communicate clearly and effectively to a target audience, it need not be boring and lifeless.<sup>70</sup> In fact, Rideout and Ramsfield write that “[b]ecause of their unfamiliarity with those conventions, law students are unable to see the creativity afforded them within the conventions, for example in constructing legal arguments”.<sup>71</sup> Thus, legal writing can reflect an individual writing style and should address pressing societal issues.

The importance of student motivation is supported by the University of KwaZulu-Natal Policy on Assessment, which stipulates that feedback on assessments should be “formulated in such a way that the student(s) can see how to improve their learning and are motivated to do so”.<sup>72</sup>

Other aspects of motivation which are explored in the literature include the questions of whose responsibility it is to motivate students. Keller believes that the responsibility of motivating students to learn falls on the educator.<sup>73</sup> Keller advocates the use of the ARCS model of motivation, which “[is] based on a synthesis of motivational concepts and characteristics into the four categories of attention (A), relevance (R), confidence (C), and satisfaction (S). These four categories represent sets of conditions that are necessary for a person to be fully

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<sup>67</sup> Feerick op cit note 25 at 381–388.

<sup>68</sup> Wegner op cit note 33 at 9–22.

<sup>69</sup> Fink *Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 115.

<sup>70</sup> Bridge op cit note 27 at 431.

<sup>71</sup> Rideout & Ramsfield op cit note 1 at 48.

<sup>72</sup> University of KwaZulu-Natal *Policy on Assessment* CO/01/0312/2012 (last updated 3/9/2018) available at <https://soe.ukzn.ac.za/mdocs-posts/policy-on-assessment>.

<sup>73</sup> Keller & Burkman ‘Motivation Principles’ in Fleming & Levie (eds) *Instructional Message Design: Principles from the Behavioral and Cognitive Sciences* 2nd ed. (1993) 4.

motivated.”<sup>74</sup> Throughout this process, educators must apply their minds to inspiring intrinsic rather than extrinsic motivation to ensure the sustainability of the legal writing programme.

Cultivating intrinsically motivated students who are willing to engage deeply with the learning experience requires educators to choose their teaching techniques very carefully. Linked to the theme of student motivation, there is literature showing the importance of applying a constructivist, values-based teaching paradigm when designing a legal writing programme – which provides opportunities for implementing the ARCS model of motivation mentioned above. The concept of a constructivist teaching paradigm is well documented in the literature by a number of academics. Various writers argue that using this approach improves student motivation. Fosnot, Pelech and Pieper, Von Glasersfeld<sup>75</sup> and Clarence<sup>76</sup> all explain that constructivist teaching involves a focus on constructing knowledge by sharing ideas and learning by incorporating new experiences into an existing knowledge framework. In other words, knowledge is not found, but made. Thus, Quinot and Greenbaum point out that simply transferring information from the educator to the student is not sufficient to satisfy a constructivist teaching strategy. Teaching and learning “within a constructivist paradigm is a non-linear process” that requires educators to adopt participatory and inclusive teaching techniques to facilitate the construction of knowledge.<sup>77</sup>

A constructivist teaching paradigm supports a values-based teaching approach which, in turn, supports student motivation. Lovat explains that values-based teaching requires students to reflect on their own cultural upbringing and deep-seated beliefs in light of the cultural heritage and behaviours of others. Students are encouraged to challenge any preconceived ideas that they might have in order to step out of their comfort zone and to transform.<sup>78</sup> This transformational journey can be deeply satisfying for students, so leading to increased student motivation. The teaching principles incorporated into a values-based teaching strategy are often

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<sup>74</sup> Keller ‘How to Integrate Learner Motivation Planning into Lesson Planning: The ARCS Model Approach’ Paper presented at VII Seminario, Santiago, Cuba 2. See, also: Keller ‘Strategies for Stimulating the Motivation to Learn’ (1987) *Performance and Instruction* 1–7.

<sup>75</sup> Fosnot 2005, Pelech & Pieper 2010 and Von Glasersfeld 1998, cited in Quinot & Greenbaum ‘The Contours of a Pedagogy of Law in South Africa’ (2015) 26(1) *Stellenbosch Law Review*.

<sup>76</sup> Clarence ‘Towards Inclusive, Participatory Peer Tutor Development in Higher Education’ (2018) 6(1) *Critical Studies in Teaching and Learning* 58.

<sup>77</sup> Quinot & Greenbaum op cit note 75 at 36. Bangeni and Greenbaum also recommend “engaging students as active learners in the construction of knowledge” in order to address various literacy challenges exhibited by English second-language learners. Bangeni & Greenbaum op cit note 18 at 80.

<sup>78</sup> Lovat *Values Education for Australian Schooling*, Keynote address summary, Values Education Forum (May 2006) 4.

linked in the literature to an improvement in student motivation. For example, Fink and Williams and Williams talk of increasing student motivation by providing students with “significant and meaningful contexts”<sup>79</sup> or “significant learning experiences”. These are described as learning experiences which enable students to change in some way and which add value to their lives after the course is over so that they can contribute meaningfully to their communities or the workplace.<sup>80</sup>

These techniques can be very difficult to administer in a large-class format. For example, Pedrick when commenting on using faculty staff to teach on legal writing programmes, remarks that “[c]ommitment of the full-time faculty to instruction in elementary legal writing should be reduced and not enlarged”.<sup>81</sup> He justifies this remark, saying that:

If heavy demands are made on their time for the "donkey work" of reading, criticizing, and suggesting revision for the purpose of improving the elementary-level papers assigned to first-year law students, it must be recognized that the time so spent will not be spent on research and writing; nor, for that matter, can it be spent on preparation for conventional classroom teaching. In the end, a law school that invests a heavy segment of faculty time in legal writing instruction will pay a price in terms of the productive scholarship of its faculty. It risks losing ground in the recognition accorded that faculty in the world of legal education.<sup>82</sup>

Educators will thus need to apply creative methods to manage the dynamics of a large class. In this regard, the literature shows agreement among both national and international academics that assistants in the form of senior student peer tutors can be used to help the lecturer facilitate in-class interactive exercises.<sup>83</sup>

#### 2.4 *Strengths and weaknesses in legal writing programmes*

The literature highlights a number of teaching principles and methodologies that are common to good legal writing programmes – as well as weaknesses that may be found in some of these programmes.

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<sup>79</sup> Williams & Williams ‘Five Key Ingredients for Improving Student Motivation’ (2011) 11 *Research in Higher Education Journal* 1–23.

<sup>80</sup> Fink op cit note 69 at 115.

<sup>81</sup> Pedrick, Hines & Reppy op cit note 6 at 413.

<sup>82</sup> Pedrick, Hines & Reppy op cit note 6 at 414.

<sup>83</sup> Brown & Poor op cit note 56.

Constructive alignment is a key teaching design principle to enable critical thinking and to encourage student motivation. When designing a legal writing programme, it is important to ensure that the elements of the programme are constructively aligned. In other words, the programme materials, teaching techniques and assessments must be logically linked and presented to motivate students and to achieve the module's intended learning outcomes (ILOs).<sup>84</sup> Biggs believes that by setting up a module in this way, the likelihood that students will engage in the learning activities that have been designed to enhance understanding will be maximised – leading to the achievement of the ILOs. Then, through the assessment tasks that are chosen, the educator will be able to gauge accurately how well students have attained these outcomes. It is important that the assessment tasks are carefully designed to mirror the ILOs and to refer to the qualities that the educator is wanting the students to achieve. The literature shows that if legal writing programmes are not aligned in this way, with clear goals and logical linkages, it may cause student confusion, then leading to a lack in comprehension.<sup>85</sup>

An important teaching methodology to emerge from the literature is learner participation. Enabling a constructivist teaching environment, which encourages student understanding and critical thinking, requires more than just the transfer of information from educator to learner.

Academic writers agree that learner participation is essential to encourage student motivation and critical thinking, so allowing ideas to flow and the construction of knowledge. This requires both vertical learning between instructor and learner and horizontal peer learning between the learners themselves.<sup>86</sup> Quinot comments “that the richness of the knowledge community becomes a key consideration in effective teaching” and that “the role of the teacher thus changes from that of the sole and authoritative holder of knowledge that must be imprinted on the blank slates of her students to a role of facilitator that must guide students’ own efforts at construction”.<sup>87</sup> Active class participation creates opportunities for learners to think critically and motivates them to become fully engaged with the learning process. Bean argues that “[g]ood writing ... grows out of good talking – either talking with classmates or talking

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<sup>84</sup> Crocker op cit note 37; Biggs “Aligning Teaching for Constructing Learning”, The Higher Education Academy, [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf) (accessed 2023-7-3).

<sup>85</sup> Biggs op cit note 84 .

<sup>86</sup> Quinot & Greenbaum op cit note 75 at 36; Crocker op cit note 37.

<sup>87</sup> Quinot ‘Transformative Legal Education’ (2012) *The South African Law Journal* 421.

dialogically with oneself through exploratory writing”.<sup>88</sup> Learner participation enables learners to engage with the diverse views of their peers and educators, which expands the range of arguments and justifications that they are exposed to – so honing a skill that is essential in the legal profession when evaluating possible legal outcomes.<sup>89</sup> Bean states that learners must be encouraged to think critically about alternative answers and arguments and to take their time before reaching a conclusion to a problem.<sup>90</sup> Rideout and Ramsfield maintain that “[t]hrough this participation, [students] will also be constructing themselves, rhetorically, as lawyer-writers, a construction that entails the development of a writer's persona and a professional voice”.<sup>91</sup>

Bean agrees with Kurfiss that “peer questions and criticisms provide practice in formulating, evaluating, and defending ideas” and that “[i]ntellectual maturity ... requires many experiences investigating subjects from several perspectives and formulating a personal perspective on the subject in writing”.<sup>92</sup> Thus, Bean posits that teaching methods that aim to focus on critical thinking, in addition to focussing on student collaboration and class discussions, should be assignment-centred and problem-based in order to hold “students responsible for formulating and justifying their sources orally or in writing”.<sup>93</sup>

A second key teaching methodology which can be identified in the literature is the so-called conversations in feedback. The SAQA standards for the LLB degree create the imperative to provide ongoing formative assessment so that learners receive continual feedback on their progress and achieve the desired learning outcomes.<sup>94</sup> A process of ongoing formative assessment, which allows learners to play an active role in the process, can be viewed as a conversation in feedback. These conversations in feedback are essential to encourage student motivation and critical thinking.<sup>95</sup>

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<sup>88</sup> Bean op cit note 32 at 7.

<sup>89</sup> Crocker op cit note 37; see also Hedegaard “The Zone of Proximal Development as Basis for Instruction” in Daniels *An Introduction to Vygotsky* 227.

<sup>90</sup> Bean op cit note 32 at 5.

<sup>91</sup> Rideout & Ramsfield op cit note 1 at 48.

<sup>92</sup> Kurfiss *Critical Thinking: Theory, Research, Practice, and Possibilities* (1988).

<sup>93</sup> Bean op cit note 32 at 5.

<sup>94</sup> South African Qualifications Authority (SAQA). *Bachelor of Laws* available at <http://regqs.saqa.org.za/viewQualification.php?id=22993> (accessed 2023-7-3).

<sup>95</sup> Crocker op cit note 37.

This imperative to provide regular formative feedback is fully supported by academics who take the concept further by emphasising the importance of providing expert supervision and guidance throughout the writing process, as well as developing the capacity for conversations in feedback when designing an effective legal writing programme.<sup>96</sup> Learners need to be trained how to write critically like lawyers through a series of conversations held with relative experts in the field.<sup>97</sup> The literature suggests that providing useful formative feedback is a delicate process. It needs to be relevant without being overwhelming and should provide a balance between constructive criticism to ensure that the standard of the course is met, and positive feedback comments to inspire and boost student confidence.<sup>98</sup> However, as stated above, there is very little literature on how to provide such feedback within the short time frames of semesterised courses and big classes – as part of a cohesive ongoing legal writing programme – without incurring extra costs.

The concept of creating a conversation in feedback is underpinned by the fact that good writing is a complex multi-stage process. Rideout and Ramsfield write that “[a]t the most basic level, the process approach can shift some attention in the legal writing classroom from the written product to the ways in which law students arrive at that product”.<sup>99</sup> Greenbaum and Flower elaborate on this process approach to teaching professional writing skills. Flower maintains that professional writing begins as writer-based writing. While this is adequate to express the thoughts of the writer for his or her own use, writing at this stage of the process can have any number of problems, such as underdeveloped ideas or missing references – thereby detracting from its persuasive value. Williams describes how novice students will often incorrectly believe this initial stage of the writing process is adequate:

Having no richly organized knowledge about matters of court decisions, new law students will find it difficult to get control over the content and implications of any specific decision. Their predictable reaction is to write out in summary form what is in the decision: it is a way of getting

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<sup>96</sup> Bridge op cit note 27 at 424.

<sup>97</sup> Crocker op cit note 37; Laurillard *Rethinking University Teaching: A Framework for the Effective Use of Educational Technology* (1993) 105; Gamoran & Nystrand *Taking Students Seriously in Student Engagement and Achievement in American Secondary Schools* (1992) 40–41.

<sup>98</sup> Boughey ‘Responding to Students’ Writing: An Alternative Understanding’ (2008) *The Journal of Independent Teaching and Learning* 21; Laurillard op cit note 97 at 105.

<sup>99</sup> Rideout & Ramsfield op cit note 1 at 48.

that knowledge under control. But once the writers have filled up a few pages with that summary, it may seem to them that they have completed the assignment.<sup>100</sup>

This writing, however, must therefore first be transformed and processed into reader-based writing before it can be considered suitable for “public, reader-based expression”.<sup>101</sup> Flower explains that reader-based writing is cognitively demanding because it does not merely reflect the process of the writer’s thoughts but also the purpose of those thoughts.<sup>102</sup> Greenbaum suggests that students can be supported through this demanding process by receiving feedback on the various revisions, until they begin to “develop their own valid personal and professional voices”.<sup>103</sup>

Boughey and Laurillard describe this regular feedback as a “conversation in writing” or a “conversational framework”. The purpose of this kind of feedback is to develop the learner’s ability to self-monitor. Thus, encouraging conversations in feedback where students make incremental, practical improvements to their writing after regular feedback comments at each stage in the process will ultimately lead to self-monitoring.<sup>104</sup> Dialogue, whether in the form of written or oral feedback or as a dialogue in the learner’s mind that forms part of self-monitoring, is essential for effective teaching and learning.<sup>105</sup>

Boughey compares these conversations in feedback to having a “critical friend” or a “sounding board”. This helps the writing process because when students are aware that they may be required to justify and explain their ideas they will pay more attention to the logical coherence of their words and the fact that they are writing for a particular audience. This increases student engagement.<sup>106</sup> Gamoran and Nystrand agree with the notion that holding a conversation in learning increases student engagement. They believe that generating a conversation in response to a student’s ideas lends authenticity to the learning process because students feel like they are

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<sup>100</sup> Williams op cit note 3 at 20.

<sup>101</sup> Flower op cit note 53 at 19–37.

<sup>102</sup> Ibid.

<sup>103</sup> Greenbaum ‘Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives’ (2004) 15(1) *Stellenbosch Law Review* 14.

<sup>104</sup> Boughey op cit note 98 at 21. See, also, Crocker op cit note 59 at 128–153, which describes how senior law student peer tutors can be used to facilitate these conversations in feedback in order to alleviate staff resourcing constraints.

<sup>105</sup> Laurillard op cit note 97 at 105.

<sup>106</sup> Boughey ‘Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality’ (2012) 26(1) *South African Journal of Higher Education* 51 at 55, referencing Brumfit *Problems and Principles in English Teaching* (1980) and Resnick ‘Instruction and the Cultivation of Thinking’ in Entwistle (ed) *A Handbook of Educational Ideas and Practices* (1990) 698; Crocker op cit note 37.

able to influence the course of the conversation since their ideas are being taken seriously.<sup>107</sup> This, in turn, stimulates critical thinking. Kearney and Beazley maintain that “[g]ood writing results from good thinking”. They liken this conversational technique to the Socratic teaching process whereby teachers using this method ask challenging questions to encourage their students to think critically.<sup>108</sup>

The final teaching principle described in the literature – and perhaps also the most controversial one – is transformative contextualisation. Boughey and McKenna, when discussing the nature of academic discourses as posited by Gee, explain why some students cannot adapt to the rigours of law school. They speak of how power and privilege can develop “ways of being” that are valued by the university. This is particularly significant in a South African context with South Africa being one of the most unequal societies in the world. Gee posits that discourses are “inherently value-laden” and certain discourses will “become privileged because of their association with specific social spaces”. Students whose primary discourses are similar to the academic discourse of the university, as is common with students from educated, middle class families, will often find it easier to acclimatise to producing the standard of written work that is required a university level.<sup>109</sup>

Although controversial as it is a move away from the black letter law approach, many academics believe that value can be added to teaching and learning in law by placing the learning materials in context in order to demystify legal discourse. Rideout and Ramsfield state:

Learning to write as a lawyer writes means, in a very real sense, becoming a lawyer. When we teach people how to write, we are teaching them not only word choice, organization, or even composing habits; we are also inevitably leading them into the strategies and conventions of a particular discourse and thus offering them membership into that discourse community.<sup>110</sup>

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<sup>107</sup> Gamoran & Nystrand op cit note 97 at 40–61. It is, however, important to note that although the Socratic method of teaching can bolster class participation, it can also have the adverse effect of intimidating less confident, introverted students to the detriment of their learning. However, this can be remedied by introducing small-group supervision. In this way, the Socratic technique can be retained for large-class teaching “where socio-economic dynamics compel classes to be large and finances necessarily limit faculty supervision over students.” Trakman ‘Law Student Teachers: An Untapped Resource (1979) 30(3) *Journal of Legal Education* 334 at 337.

<sup>108</sup> Kearney & Beazley ‘Teaching Students How to ‘Think Like Lawyers’: Integrating Socratic Method with the Writing Process’ (1991) 64 *Temple Law Review* 885–887; Crocker op cit note 37.

<sup>109</sup> Boughey & McKenna ‘Academic Literacy and the Decontextualised Learner’ (2016) *Critical Studies in Teaching and Learning* 1–9.

<sup>110</sup> Rideout & Ramsfield op cit note 1 at 48.

Kress and Hedegaard posit that the contextualisation of learning is essential for students to absorb and gain a critical understanding of learning material. This is because psychological development is socially embedded and thus reading a text will always take place against the reader's background and social position.<sup>111</sup> Williams concurs, stating that learning to think critically requires both a social aspect and "an exercise of individual effort and intellect. Put this way, expert thinking is successful socialization."<sup>112</sup> In other words, students who successfully connect with both legal experts and fellow legal students as they engage with the relevant legal material will learn how to think critically. Rideout and Ramsfield believe that the differences in students' past experiences can be used to normalise and facilitate understanding of legal discourse.<sup>113</sup>

Biggs posits that if educators want students to be able to make good legal decisions, they must ensure that students achieve an understanding of the materials presented. This, he believes, will enable them to "see the world differently, and behave differently toward that part of the world".<sup>114</sup> A deep understanding of any text will therefore require an "analysis of the surrounding society and its social relations".<sup>115</sup> Kress notes that students who are situated outside of a particular social structure may find it difficult to understand the language that is used within that structure. He suggests that writers can be seen as "social agents" who are situated within a "social structure". Agents within specific structures will use, for example, grammar and syntax that is particular to that structure. Thus, speakers from professional environments that are outside of an agent's social network may use "facets of the linguistic system" that are situated outside of the structure with which that agent is familiar, and which will therefore seem strange.<sup>116</sup>

Therefore, contextualisation of teaching and learning draws on the concept of values-based teaching, which incorporates Habermas's theory of knowing. Lovat explains this theory as "the knowing and understanding that comes from critique of all one's sources of knowledge and ultimately from critique of one's own self or, in Habermas's terms, from knowing oneself,

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<sup>111</sup> Kress *Linguistic Processes in Sociocultural Practice* (1985) 42.

<sup>112</sup> Williams op cit note 3 at 13.

<sup>113</sup> Rideout & Ramsfield op cit note 1 at 48.

<sup>114</sup> Biggs op cit note 84.

<sup>115</sup> Hedegaard op cit note 89 at 227.

<sup>116</sup> Kress op cit note 111 at 42.

perhaps for the first time”.<sup>117</sup> Lovat thus believes that the ultimate task of an educator is to facilitate the transformation of students’ beliefs and behaviours. That is, to enable students to “step out of the shadow of one’s upbringing and cultural heritage, to challenge not only the preconceived beliefs and behaviours of this upbringing and heritage but, more painfully, one’s own deep seated comfort zone of beliefs and behaviours”.<sup>118</sup> However, it is important to understand that this transformation does not mean replacing the values and beliefs of the students with the values and beliefs of the educator. It means impressing on each student that their own world view is but one of many, and that it is essential that they also contemplate other ways of being.<sup>119</sup>

Quinot posits that knowledge can exist only “within context and within a relational network”.<sup>120</sup> In discussing legal education in South Africa, Quinot maintains that cognisance must be taken of the imperative to transform, which is set out in the South African Constitution. This, he suggests, requires legal educators to emphasise matters of morality, policy and politics as they strive to adopt a creative way of teaching legal analysis. This should involve using inclusive participatory teaching methodologies to develop an understanding of the law that is “socially constructed and situated” and which will “meet the aims of social transformation”.<sup>121</sup> In this way, students, under the guidance of the educator, and using an explicit set of normative values, will learn how to justify the knowledge that they have constructed in the knowledge community.

This call for a values-based teaching and learning environment is echoed in the exit-level outcomes of South African law students as articulated in the South African Qualifications Authority (SAQA) registered qualification document, as well as the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities drafted in terms of the Legal Practice Act. These documents require students who are entering the legal profession as lawyers

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<sup>117</sup> Lovat op cit note 78 at 4; Habermas *Knowledge and Human Interests* (transl. J. Shapiro) London: Heinemann, 1972.

<sup>118</sup> Lovat op cit note 78 at 4.

<sup>119</sup> Ibid. In a similar vein, Fink talks of increasing student motivation by providing students with ‘significant learning experiences’. These experiences, the author maintains, are learning experiences that change the students in some important way and have two outcomes: ‘Significant and lasting change: [The] course results in significant changes in the students, changes that continue after the course is over and even after the students have graduated. Value in life: What the students learn has a high potential for being of value in their lives after the course is over, by enhancing their individual lives, preparing them to participate in multiple communities or preparing them for the world of work.’ Fink op cit note 69 at 115.

<sup>120</sup> Quinot op cit note 87 at 421–422.

<sup>121</sup> Ibid at 422.

to uphold the values of the South African Constitution<sup>122</sup> and to “to accept their responsibility towards the realisation of a just society based on a constitutional democracy”.<sup>123</sup> The CHE has echoed this call for transformative constitutionalism to be incorporated throughout the LLB curriculum. The 2015 Qualification Standard for Bachelor of Laws (LLB) states that Legal Education

must produce skilled graduates who are critical thinkers and enlightened citizens with a profound understanding of the impact of the Constitution on the development of the law, and advancing the course of social justice in South Africa. Moreover, the law graduate must be equipped to discharge his or her social and professional duties ethically and efficaciously.<sup>124</sup>

The CHE, in its 2018 report on the national review of LLB programmes in South Africa, has recommended that all universities present to the Council a plan indicating how “staff and students are brought to an internalisation – respectively in their teaching and learning and socialisation activities – of this foundational principle in modern South African jurisprudence”.<sup>125</sup>

Freedman and Whitear-Nel reiterate the need for legal educators to develop students who are value-driven, with a “highly developed social conscience”.<sup>126</sup> Values-based teaching is underpinned by a constructivist teaching paradigm. Quinot states that there is a need for “a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution, for a shift towards a constructivist student-centred teaching model and for the recognition of a paradigm shift in knowledge from linear to non-linear, relational or complex”.<sup>127</sup>

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<sup>122</sup> This Code of Conduct is published in terms of section 97(1)(b) of the Legal Practice Act 28 of 2014.

<sup>123</sup> South African Qualifications Authority (SAQA) *Bachelor of Laws* available at <http://regqs.sqa.org.za/viewQualification.php?id=22993> (accessed 2023-7-3).

<sup>124</sup> Council on Higher Education op cit note 13 at 5.

<sup>125</sup> Council on Higher Education ‘The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa’ (2018) *Report on the National Review of LLB Programmes in South Africa* 52.

<sup>126</sup> Whitear-Nel & Freedman ‘A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics’ (2015) *Fundamina* 234, 236, 247.

<sup>127</sup> Quinot op cit note 87 at 421; Crocker op cit note 37.

## 2.5 *Using peer tutors to alleviate some of the law teaching staff resource constraints in legal writing programmes*

The issue of teaching with the ever-present challenge of resource constraints in higher education is not new. More than 15 years ago, Topping commented that “[t]he dual requirement to improve teaching quality while doing more with less has recently increased interest in peer tutoring in higher and further education”.<sup>128</sup> Both national and international literature was therefore consulted to determine how peer tutors can be used to facilitate legal writing programmes in a South African context. The literature shows that peer tutoring can be instrumental in not only alleviating resource constraints but also in articulating evolving understanding of the subject matter.

Colvin defines peer tutors as “those of the same societal group or social standing educating one another when one peer has more expertise or knowledge”,<sup>129</sup> and can provide both academic and non-academic help to learners.<sup>130</sup> Murray and Trimbur note that peer tutoring is a social collaboration – no longer an event characterised solely by an expert imparting knowledge to a novice learner but one which falls within a social constructivist paradigm.<sup>131</sup> Liu and Carless believe that social learning will take place when social conditions are created in which students are comfortable with making their work public.<sup>132</sup> Rideout and Ramsfield believe that students are novices who must be “socialized into the discourse and its practices” to acquire the analytical and writing skills that are required to master legal discourse and to perform adequately in legal practice. This is, however, not something that will happen overnight and “students cannot have the law and legal patterns of analysis drilled into them”.<sup>133</sup>

Final-year law peer tutors are in the ideal position to introduce first-year law students gradually into legal discourse by working consistently and closely with these students in a small-group teaching environment. Gottlieb and Greenbaum recommend that writing tutors be used to provide feedback on student legal writing. They advise supporting the writing tutors by giving them access to the expertise of the subject tutors who are allocated the marking of the

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<sup>128</sup> Topping *op cit* note 57 at 321–345.

<sup>129</sup> Colvin ‘Peer Tutoring and Social Dynamics in Higher Education’ (2007) 15(2) *Mentoring & Tutoring* 166.

<sup>130</sup> *Ibid* at 167.

<sup>131</sup> Trimbur ‘Peer Tutoring: A Contradiction in Terms?’ (1987) 7(2) *The Writing Center Journal* 21–28 at 23; Murray ‘Peer Tutoring and the Law School Writing Center: Theory and Practice’ (2010) 17 *Legal Writing: The Journal of the Legal Writing Institute* 1–31.

<sup>132</sup> Liu & Carless ‘Peer Feedback: The Learning Element of Peer Assessment’ (2006) 11(3) *Teaching in Higher Education* 281.

<sup>133</sup> Rideout & Ramsfield ‘*op cit* note 1 at 48.

substantive content of assignments. Thus, assessment training workshops that are offered to the subject tutors are combined with the feedback-training workshops that are offered to the writing tutors. The subject tutors are also included in all the preparatory meetings for writing tutors in which the marking memorandum is scrutinised before the writing tutors begin to give feedback on the tasks.<sup>134</sup> Clarence suggests using a participatory method of instruction to teach tutors during training workshops. She states that this training can be facilitated using “partnerships between lecturers and academic development practitioners specialising in tutoring development” and that “[t]hese partnerships can address both the need for more engaged, participatory tutor development, and the need for lecturers working with tutors to be mentored and supported as they undertake this important task”.<sup>135</sup>

Snyman-van Deventer and Van Niekerk, on the other hand, suggest a hybrid approach to peer-tutoring programmes which entails a collaboration with a university writing centre (called The Write Site at the University of the Free State and which is open to all students on campus). This writing centre can provide the necessary language and writing expertise in collaboration with the law subject lecturer, who can provide the topic, content and theory that ought to be contained in the student written work.<sup>136</sup> They emphasise that the main focus of the Write Site is on “developing writers, and not producing perfect assignments. The Write Site does not offer a quick fix; instead, it guides the students on a journey to becoming better, more proficient writers in the discipline of law.”<sup>137</sup>

In an example of this hybrid approach, Louw and Broodryk describe an initiative undertaken by the Faculty of Law, University of Stellenbosch, in terms of which three full-time consultants were employed to provide a voluntary one-on-one writing consultation service for law students. The qualifications and responsibilities of the consultants were

to provide daily, one-on-one writing advice to the Faculty’s undergraduate and postgraduate students. The Consultants’ primary responsibility is to assist students to develop their critical thinking, research and writing skills, achieved through the conduct of one-on-one contact sessions. For this reason, the Consultants comprise individuals with specialist language, research,

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<sup>134</sup> Gottlieb & Greenbaum op cit note 20 at 56.

<sup>135</sup> Clarence op cit note 76 at 58.

<sup>136</sup> Snyman-van Deventer & Van Niekerk op cit note 44 at 46.

<sup>137</sup> Ibid at 50.

and writing skills. All the Consultants have extensive legal practice experience, the majority of the Consultants being qualified attorneys.<sup>138</sup>

Louw and Broodryk provide several suggestions for the training of these legal writing consultants. For example, they suggest that writing consultants should attend a course which

is divided into sessions that comprise inter alia practical exercises and discussions regarding the writing process, approaches to student writing, pre-writing strategies, and exploring texts ... The sessions furthermore include discussions of the principles and goals of writing consultations, the role of the audience and consultation strategies with an emphasis on the role and nature of effective questions, as well as a discussion of ethical issues.<sup>139</sup>

## *2.6 Peer tutors in the United States and Europe: An international perspective*

The literature provides a general overview of the use of teaching assistants in legal writing programmes implemented at selected law schools in the United States and Europe. For example, Trakman notes that in Europe tutorials are an inherent part of the teaching programme:

The European system makes use of a "two-tier" educational program. Small tutorial units are meant to undermine the impersonality of large classes. Student tutors are utilized to provide individual instruction to students.<sup>140</sup>

In respect of North American legal writing programmes, it is important to remember that these programmes are typically located in postgraduate study. However, creative ideas can be gleaned from the teaching techniques used in these programmes. In his discussion on the comparison of North American and European strategies for teaching legal writing, Trakman observes:

The basic motives underlying all student teaching experiences have been profoundly similar. Central goals are common to all tutorial type systems thus far studied. All systems – continental and common law – do emphasize: the need to reduce the student–professor ratio to manageable

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<sup>138</sup> Louw & Broodryk op cit note 4 at 539.

<sup>139</sup> Ibid at 540.

<sup>140</sup> Trakman op cit note 107 at 350.

proportions; the desire to address student learning problems in a conducive environment; and the utility of a supplementary system of supervised education. The Europeans have echoed these goals in their educational systems. North American legal educators have shown similar disdain for large classes, aloof professors, intimidated students and the risk of saddling society with low calibre lawyers.<sup>141</sup>

The challenges highlighted by Trakman resonate strongly with the South African tertiary teaching experience. Thus, effective strategies for teaching legal writing used in international institutions can be successfully translated into a uniquely South African context, which considers the reality of teaching such a complex skill to undergraduate students in South African law schools. South African law students require not only meticulous instruction in legal writing but also strong senior student mentors who are sensitive to diversity and the learning issues that often plague second-language English speakers.

## 2.7 Selection of peer tutors

Cheslik gives a practical overview of the use of peer tutors in the facilitation of legal writing programmes in a number of North American law schools. According to Cheslik, the selection of these candidates is always carefully controlled, often requiring a stringent application process that requires a holistic evaluation of the applicant's skills, with strong academic skills being just one part of the skill set required.<sup>142</sup> Examples of desirable qualities include, "strong interpersonal communication skills ... dedication or willingness to work ... good writing skills ... patience and kindness ... maturity ... courage ... the ability to be at ease in a classroom setting ... and accessibility."<sup>143</sup> Cohen also emphasises the importance of the peer tutor selection process, and maintains that "[a]t the outset, attracting a suitable pool of applicants may require incentives". In addition to emphasising the prestige of the position, the teaching experience, and the opportunity to improve one's own writing and combat the "third-year doldrums", offering a salary and, at some schools, class credit, is typically necessary.<sup>144</sup> Cheslik

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<sup>141</sup> Trakman op cit note 107 at 356.

<sup>142</sup> Cheslik 'Teaching Assistants: A Study of Their Use in Law School Research and Writing Programs' (1994) 44(3) *Journal of Legal Education* 401. Although Feinman posits that TAs "need not be 'A' students; rather, students of ordinary competence will generally have the background and ability to perform well. Indeed, these students may have more time for their TA responsibilities than the very best students, who are apt to be committed to activities such as law review that leave less time for other responsibilities." Feinman 'Teaching Assistants' (1991) 41(2) *Journal of Legal Education* 277.

<sup>143</sup> Cheslik op cit note 142 at 402–403.

<sup>144</sup> Cohen op cit note 16 at 595.

reports that peer tutors are never expected to work voluntarily and are generally compensated in a combination of “class credit, hour stipend, or tuition credit”.<sup>145</sup>

The European system also takes the selection of tutors, or teaching assistants, very seriously, often requiring applicants for the position to attend an interview with a panel comprising the course professor, a selection of other professors, and a selection of outgoing student tutors.<sup>146</sup> These panellists look for a combination of traits in a successful applicant, such as good grades (although this alone is not sufficient); compatibility with the course professor’s teaching ideology; and personality traits exhibited during the interview.<sup>147</sup> It was interesting to note Trakman describe the varied academic levels from which European tutors were chosen at different European institutions. These tutors had a year-long relationship with their tutees. He writes:

Moniteurs at French universities were in their fifth year of legal education ...; at Cambridge University, tutors were graduate students, having completed a three year undergraduate program in law. Tutors at other European schools had between three and six years prior legal education.<sup>148</sup>

## 2.8 *Peer tutor roles*

Cheslik also notes the roles that senior law students may play in teaching legal writing, while working individually with students or in small-group classroom settings in conjunction with faculty staff.<sup>149</sup> For example, peers can be used to prepare lesson plans and host lectures, workshops and tutorials. They can also play an essential part in supervising useful roleplay exercises that students must engage in regularly.<sup>150</sup> They are given varying degrees of responsibility in reviewing and evaluating student legal writing – either by grading or providing substantive information.<sup>151</sup> Cheslik also raises the interesting question of “Whom does the TA [teaching assistant] assist?” If the peer tutors are involved in grading student work then they are more likely to be viewed by students as faculty assistants, while peer tutors who are limited to

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<sup>145</sup> Cheslik op cit note 142 at 398.

<sup>146</sup> Trakman op cit note 107 at 350.

<sup>147</sup> Ibid at 351.

<sup>148</sup> Ibid at 351–353.

<sup>149</sup> Cheslik op cit note 142 at 394.

<sup>150</sup> Ibid at 395–397.

<sup>151</sup> Cohen mentions the types of grading that senior law students might be required to carry out, such as pass/fail grading. He also addresses some of the pitfalls inherent in this complex process, such as inexperienced student tutors grading too leniently as a result of their subconscious feelings of inadequacy in carrying out this important role.

providing formative feedback will allow a cooperative relationship to develop and they will most likely be viewed as mentors and allies.<sup>152</sup> Montana supports this view stating that, “[l]aw students are typically very anxious as they work on their legal writing assignments. Therefore, it is easier for them to learn and adapt when they feel that their readers are not judging or grading them, as is the case of peer teaching assistants.”<sup>153</sup> However, on a practical note, Feinman suggests that to avoid this “dangerous complication” to the student–tutor relationship, the grading process should be double-blind to assure complete anonymity.<sup>154</sup>

Trakman remarks on the highly developed process of communication between the professor and tutors in European law schools, which clearly defined the terms of reference of those tutorials facilitated by peer tutors. He describes the role of these tutors:

Tutors were given specific tutorial problems to raise in small group sessions. Professors required tutors to report on tutorial progress. Tutors were responsible for suggesting the future direction of the course. Tutors were required to draw attention to particular tutorial impediments. Juniors in need of individual attention were to be carefully identified. Professors were to be consulted on methods of resolving tutorial encumbrances.<sup>155</sup>

## 2.9 *Benefits of peer tutors*

The literature consulted reveals that in addition to providing a solution for the lack of teaching resources experienced at tertiary institutions, using peer tutors to facilitate a legal writing programme is beneficial in a number of ways for first-year students, for peer tutors themselves, as well as for the law school.<sup>156</sup>

## 2.10 *Benefits of peer tutors to first-year students*

The benefits of peer tutoring to novice learners are many and include both academic and mentoring benefits. The theory underpinning this is Vygotsky’s theory of the zone of proximal development, which is defined as “the distance between the actual developmental level as

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<sup>152</sup> Cheslik op cit note 142 at 398.

<sup>153</sup> Montana ‘A Contemporary Model for Using Teaching Assistants in Legal Writing Programs’ (2016) 42(1) *Mitchell Hamline Law Review* 202–203.

<sup>154</sup> Feinman op cit note 142 at 274.

<sup>155</sup> Trakman op cit note 107 at 353.

<sup>156</sup> Crocker op cit note 59 at 128–153; Burke ‘Group work: How to use groups effectively’ (2011) 11(2) *The Journal of Effective Teaching* 88.

determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers”.<sup>157</sup>

The literature identifies the benefits of using peer tutors for learners as: gaining self-confidence and motivation to learn;<sup>158</sup> being inculcated into the student community;<sup>159</sup> providing constant, guided writing practice, with continual feedback on written drafts;<sup>160</sup> increasing individualised instruction with the use of a non-judging audience, so enabling students to apply their minds to critical thought;<sup>161</sup> creating an easy learning environment with advice being given by approachable educators with a marginal age difference;<sup>162</sup> and creating extra staffing resources to allow small-group teaching. Burke suggests that small-group teaching benefits novice learners by, for example: exposing learners to an increased knowledge base and diversity of experience; aiding in problem-solving, comprehension and memory retention; allowing learners to take ownership of their decisions; and developing interpersonal skills.<sup>163</sup> Cheslik describes the benefits to students as “emotional support ... increased student–teacher contact ... role models ... increased feedback on student work ... increased student satisfaction ... and greater in-depth study of the subject area”.<sup>164</sup>

### *2.11 Benefits of peer tutoring for the school of law and for peer tutors*

Academics agree that the benefits of peer tutors are not limited to novice learners but extend to the faculty and to the peer tutors themselves. The tutors develop a mutually beneficial relationship with their students, referred to by Greenbaum as a pedagogical alliance.<sup>165</sup> For example, both Cheslik and Trakman describe the benefits to the faculty, which include cost savings since peer tutors are often less costly to employ than permanent faculty; time savings since peer tutors lighten the faculty’s load and ease the time commitment necessary for one-

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<sup>157</sup> Vygotsky *Mind in Society: The Development of Higher Psychological Processes* (1978) 86.

<sup>158</sup> Lotkowski, Robbins & Noeth 2004, cited by Spark, De Klerk, Maleswena & Jones ‘Paving the Road to Success: A Framework for Implementing the Success Tutoring Approach’ (2017) 5(2) *Journal of Student Affairs in Africa* 79.

<sup>159</sup> Karp 2011, Loots 2009 & Wilmer 2008, cited in Spark et al. op cit note 158 at 79 and Nelson, Humphreys & Harper 2006, cited by Townsend, Delves, Kidd & Figg ‘Undergraduate Student Peer Mentoring in a Multi-faculty, Multi-campus University Context’ (2011) 4 *Journal of Peer Learning* 45.

<sup>160</sup> Kok, Nienaber & Viljoen *Skills Workbook for Law Students* (2003).

<sup>161</sup> Bruffee 1984:642, cited in Murray op cit note 131 at 1–31.

<sup>162</sup> Loots 2009, Maitland & Lemmer 2011 and Walsh, Larsen & Parry 2009, cited by Spark et al. op cit note 158 at 76.

<sup>163</sup> Burke op cit note 156 at 88.

<sup>164</sup> Cheslik op cit note 142 at 411–412.

<sup>165</sup> Greenbaum op cit note 103 at 3–21.

on-one meetings with students; and they can fulfil a variety of roles such as lecturer, supervisor or informal advisor.<sup>166</sup>

Feinman remarks that peer tutors can provide the subject lecturer with valuable information on the overall level of understanding of the class. The lecturer can then supplement where necessary with the help of the peer tutor to elevate class cognition – thereby improving motivation. Similarly, using information provided by the peer tutor, the lecturer can choose to move onto more complex topics where tutors indicate that the class is up to speed with the material.<sup>167</sup> Feinman comments that a further benefit accruing to the faculty is that:

[t]he use of teaching assistants, especially when contrasted with traditional modes of legal education, enriches the atmosphere of the law school by demonstrating a commitment to the success of its students and a concern for their welfare.<sup>168</sup>

Trakman, Montana and Colvin mention a number of further benefits for the faculty. Trakman makes an interesting comment that:

Indeed, the [law] community at large has much to benefit from a sophisticated breed of lawyers. There is need of lawyers who can articulate and instruct. The student-teacher is an excellent preliminary to the public responsibility of the lawyer.<sup>169</sup>

Montana notes that the use of peer tutors can also benefit the faculty by creating space in the lecturer’s schedule to attend to the higher-level, creative aspects of their work, such as “modifying the materials, evaluating new texts, developing new assignments, and experimenting with different teaching methodologies ... all of which lead to more current and exciting teaching”.<sup>170</sup>

Colvin notes the benefits to faculty, such as “support for overenrolled classes at no extra cost to Faculty”.<sup>171</sup>

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<sup>166</sup> Cheslik op cit note 142 at 411–412; Trakman op cit note 107 at 340.

<sup>167</sup> Feinman op cit note 142 at 271.

<sup>168</sup> Ibid at 282.

<sup>169</sup> Trakman op cit note 107 at 341.

<sup>170</sup> Montana op cit note 153 at 202–203.

<sup>171</sup> Colvin op cit note 129 at 166.

Speaking of benefits accruing to the peer tutors, Cheslik remarks that the peer tutors' own research and writing skills improve as a result of having to scrutinise the legal material being taught closely in order to teach the legal principles effectively. In addition to this, peer tutors often find their teaching and mentoring of first-year students extremely rewarding.<sup>172</sup> Trakman notes further that “[s]mall group discussions – impromptu questions also test the senior students’ lawyering skills” and “[p]roblems of student boredom in the senior years is now counteracted by a sense of commitment, a responsibility for others”.<sup>173</sup>

This, of course, assumes that the peer tutors are prepared to undertake this responsibility without financial compensation. A structured plan must be developed to motivate peer tutors to put in the long hours that are required to provide a quality tutoring experience spanning multiple years of the LLB degree.

### *2.12 The disadvantages of peer tutoring*

Feinman notes that “the greatest burden of a teaching assistant program is on the professor’s time”.<sup>174</sup> This includes time consuming tasks such as: marketing the legal writing programme and tutor training to prospective tutors; interviewing and recruiting applicants; weekly tutor training that comes with all the problem-solving duties arising from leading a team of young, inexperienced tutors who are attempting to lead their own team of young, inexperienced law students. Another prevalent disadvantage of using peer tutors that is further draining on the law lecturer’s time, is their potential to disseminate incorrect or misleading information.<sup>175</sup>

Greenbaum, Bean and Calleros also all agree that peer tutors may encounter a number of challenges when providing feedback on student written work. Challenges may include inappropriate amount of feedback;<sup>176</sup> insufficient knowledge of language errors;<sup>177</sup> and inconsistency in feedback comments and assessment grades awarded. However, these can be resolved by, for example: developing the tutors’ theoretical knowledge (such as Ramsfield’s “three-step system of training”) or encouraging a more revision-oriented philosophy on marking and the development of a persuasive writing style to allow tutors to provide deeper,

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<sup>172</sup> Cheslik op cit note 142 at 411–412.

<sup>173</sup> Trakman op cit note 107 at 340.

<sup>174</sup> Feinman op cit note 142 at 281.

<sup>175</sup> Cheslik op cit note 142 at 405.

<sup>176</sup> Greenbaum op cit note 59 at 79.

<sup>177</sup> Ibid.

more meaningful feedback; or implementing a system of feedback peer-tutor reviews and checklists.<sup>178</sup>

## 2.13 *Developing peer tutoring skills*

### 2.13.1 *Why peer tutors need development*

The literature indicates that faculty members may be sceptical of the ability of peer tutors to provide quality instruction and mentoring. For example, Trimbur remarks that “faculty traditionalists” often believe that “peer tutoring looks like a case of the ‘blind leading the blind’”.<sup>179</sup> Thus, academics point to a number of reasons for the need for development. For example, peer tutor development is essential to instil the necessary confidence needed to facilitate collaborative teaching and learning; peer tutors may doubt the constructivist teaching paradigm, especially if they excelled in their own studies without their instructors using collaborative teaching techniques; and peer tutors may initially be unaware of the role they need to play in the teaching and learning process, including the level of engagement needed in module assessment and outcomes.<sup>180</sup>

Importantly, Cohen notes that, “[l]aw schools must not assume ... that there is not sufficient time to help relatively inexperienced instructors learn how to teach and to sensitize them to the nuances of effective writing.” He notes further that, at the outset, the faculty instructor responsible for teaching recent law graduates the nuances of teaching legal writing must be aware of the “dynamic forces” at play. In his opinion these forces are: “(1) the pedagogical – what is dictated by the goal of effective teaching and learning; (2) the professional - what is demanded by professional responsibility; and (3) the interpersonal – what is desirable from the point of view of coping with the tensions inherent in being an instructor, particularly an instructor of fellow students.”<sup>181</sup> Training provided for peer tutors by the faculty supervisor varies considerably from formal weekly meetings to informal consultations throughout the semester and includes training in “the subject area ... in teaching or pedagogy ... in

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<sup>178</sup> Greenbaum *ibid*, citing Ramsfield 2001, Bean *op cit* note 32 at 68, Calleros *op cit* note 26 at 376 and Boud 2000, cited in Liu & Carless *op cit* note 132 at 288.

<sup>179</sup> Trimbur *op cit* note 131 at 23.

<sup>180</sup> *Ibid*; Murray *op cit* note 131 at 1–31; Crocker *op cit* note 59 at 128–153.

<sup>181</sup> Cohen *op cit* note 16 at 594.

interpersonal communication skills ... in crisis/conflict management ... in group interaction and management strategies ... in editing and/or grading guidelines and ... in diversity issues.<sup>182</sup>

Two models of peer tutor development strategies described in the literature are: the participatory peer-tutoring model and the peer tutor developmental-sequence model. Clarence describes the participatory peer-tutoring model as ongoing student-led tutor training that models teaching and learning in a collaborative learning environment.<sup>183</sup> Trimbur describes the peer tutor developmental-sequence model as a model that allows peer tutors to gradually change from co-learners with their students to apprentice teachers as their experience grows during the year – thus essentially moving from “peer” to “tutor”.<sup>184</sup>

The literature describes a number of ways in which the various models of peer tutor development can be implemented.

#### *2.14 Important topics to be covered during peer tutor training*

The literature highlights a variety of interesting aspects of the instructor–student relationship that should be covered during peer tutor training seminars. For example, Cohen supports the idea of inviting a psychiatrist into an early training seminar to discuss “tensions and discomforts inherent in the instructional role, particularly when the instructor is a fellow-student” [and to emphasise] the “psychological violence that may be inflicted by any legal educator utilising an unsuitable teaching approach”.<sup>185</sup> Feinman advocates preparing peer tutors “for their roles as group leaders and aides to individual students by offering insights from the scholarly literature on group dynamics, interpersonal learning theory, particularly on group leadership style and the learning theory that guides the course”.<sup>186</sup>

Cohen, Greenbaum and Liu and Carless posit that peer tutors can provide valuable and effective feedback on student legal writing. However, there can be challenges which must be addressed during tutor development.<sup>187</sup> In this regard, Cohen recommends that a number of topics relevant

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<sup>182</sup> Cheslik op cit note 142 at 398.

<sup>183</sup> Clarence op cit note 76 at 58; Crocker op cit note 59 at 128–153.

<sup>184</sup> Trimbur op cit note 131 at 23.

<sup>185</sup> Cohen op cit note 16 at 598.

<sup>186</sup> Feinman op cit note 142 at 279.

<sup>187</sup> Greenbaum op cit note 26 at iii and 81–83; Liu & Carless op cit note 132 at 282; Crocker op cit note 59 at 128–153.

to providing student feedback be discussed during tutor training, such as “common deficiencies in student writing”; conveying constructive criticism to the student; candid evaluations that “highlight competent efforts as well as deficiencies”; the meaning of legal writing and what it is to write like a lawyer; evaluating versus editing; and the importance of requiring second drafts of written work.<sup>188</sup> He further provides insight into the topic of problem development saying that the most crucial aspect is that writing exercises and problems must be challenging without being overly complicated.

Cohen, Crocker and Quinot advocate addressing student motivation during tutor training since this is essential for effective learning and therefore bears close scrutiny. Cohen suggests encouraging peer tutors to incentivise students to engage more deeply with study material, such as, for example, giving awards to students who perform well throughout the year or mentioning that top students will be recommended as apprentice instructors for the following year.<sup>189</sup> Crocker recommends that peer tutors be trained to use scaffolded teaching techniques “that take advantage of horizontal as well as vertical learning opportunities in a blended-learning environment” so as to increase learners’ intrinsic motivation.<sup>190</sup> Quinot maintains that “learning can only occur through construction of knowledge [and thus] teaching must involve learners as active participants”.<sup>191</sup>

### *2.15 Dealing with non-performance of tutors*

Cohen and Feinman also address the issue of inadequate performance of peer tutors. Cohen suggests addressing issues that may arise early in the tutoring journey, such as: instructor inadequacy, which could lead to, for example, peer tutors becoming defensive when teaching; the need for sensitivity to stresses that are particular to first-year students and ways of combatting these by, for example, adjusting lesson plans; and the level of professionalism that is required while fulfilling the role of tutor and mentor.<sup>192</sup> Feinman introduces the idea of retraining peer tutors who are not performing according to the required standard. He suggests meeting with the peer tutor to discuss alternative teaching approaches; occasionally combining

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<sup>188</sup> Cohen op cit note 16 at 604–607.

<sup>189</sup> Ibid at 601.

<sup>190</sup> Crocker op cit note 37 at 760; see also Quinot op cit note 87 at 421.

<sup>191</sup> Quinot (2012) *The South African Law Journal* 420.

<sup>192</sup> Cohen op cit note 16 at 597–599.

tutorials so that the tutor can observe another style of facilitation; or the professor could attend the tutor's tutorial as an observer.<sup>193</sup>

## *2.16 Conclusion*

In conclusion, although there is considerable literature on the principles that should underpin a legal writing module, it does not provide a practical, financially feasible guide to implementing a structured, multi-layered, progressive approach to teaching legal writing over the four years of the LLB degree in South African law schools – which can overcome the serious resource constraints often encountered in such programmes. From this literature review it is clear that research is needed into economical and feasible ways to implement a successful legal writing programme that can be adapted for use in South African law schools.

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<sup>193</sup> Feinman op cit note 142 at 280.

### 3 FINDINGS: LEGAL WRITING AND TUTORING PROGRAMME (ITERATIONS 1 AND 2)

The following article was published in the peer-reviewed journal, *Potchefstroomse Elektroniese Regsblad / Potchefstroom Electronic Law Journal (PER / PELJ)*:

Article 1: ‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’

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*Note: The formatting style of the published article has been preserved in this chapter.*

*Article 1: Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School*

**Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School**

AD Crocker\*



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open access online law publications

**Author**

Angela Diane Crocker

**Affiliation**

University of the Witwatersrand  
South Africa

Email crockera@ukzn.ac.za

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**Abstract**

Many first-year students in the School of Law at the University of KwaZulu-Natal, Howard College, who have been disadvantaged by a poor primary and secondary education, exhibit poor legal writing skills. Over a period of four years, in order to address this urgent need for legal writing instruction, the School of Law introduced two successive legal writing interventions. The first intervention was the Concise Writing Programme, followed by the Integrated Skills in Context Programme. The Concise Writing Programme focused on English writing skills and grammar in the hope that first-year law students would be able to transfer these generic writing skills to the more specific legal discourse within which they were learning to operate. The Law School reviewed the success of this initial programme and found that students who took part in the programme not only lacked the motivation to learn generic English writing skills, but that they also did not find it easy to transfer these skills to the more specific legal writing environment. The Law School then implemented a second legal writing intervention – The Integrated Skills in Context Programme. This programme acknowledged the fact that legal writing has a multi-faceted nature, encompassing legal analysis and application, as well as logical sequencing and argument, all of which could not be taught in a vacuum, particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language. This paper recognises that there is no silver bullet to improving the legal writing skills of these students. The reality is that it will take hard work as well as financial incentives to make a difference to these students' legal writing skills. Our students need intensive one-on-one attention by qualified academics, and this means that those doing the instruction must be recognised and adequately compensated.

**Keywords**

Legal writing skills; South African Law School; generic English writing skills; academic disadvantage; legal discourse; legal analysis and application.

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# FACING THE CHALLENGE OF IMPROVING THE LEGAL WRITING SKILLS OF EDUCATIONALLY DISADVANTAGED LAW STUDENTS IN A SOUTH AFRICAN LAW SCHOOL

AD Crocker\*

## Abstract

Many first-year students in the School of Law at the University of KwaZulu-Natal, Howard College, who have been disadvantaged by a poor primary and secondary education, exhibit poor legal writing skills. Over a period of four years, in order to address this urgent need for legal writing instruction, the School of Law introduced two successive legal writing interventions. The first intervention was the Concise Writing Programme, followed by the Integrated Skills in Context Programme. The Concise Writing Programme focused on English writing skills and grammar in the hope that first-year law students would be able to transfer these generic writing skills to the more specific legal discourse within which they were learning to operate. The Law School reviewed the success of this initial programme and found that students who took part in the programme not only lacked the motivation to learn generic English writing skills, but that they also did not find it easy to transfer these skills to the more specific legal writing environment. The Law School then implemented a second legal writing intervention – The Integrated Skills in Context Programme. This programme acknowledged the fact that legal writing has a multi-faceted nature, encompassing legal analysis and application, as well as logical sequencing and argument, all of which could not be taught in a vacuum, particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language. This paper recognises that there is no silver bullet to improving the legal writing skills of these students. The reality is that it will take hard work as well as financial incentives to make a difference to these students' legal writing skills. Our students need intensive one-on-one attention by qualified academics, and this means that those doing the instruction must be recognised and adequately compensated.

## Keywords

Legal writing skills; South African Law School; generic English writing skills; academic disadvantage; legal discourse; legal analysis and application

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\* Angela Diane Crocker. BSc LLB LLM (*cum laude*) (Natal). Lecturer at the School of Law, University of KwaZulu-Natal, South Africa. Email: crockera@ukzn.ac.za.

## 1 Introduction

Each year, thousands of South African students enter tertiary education weighed down by the legacy of a largely dysfunctional school system.<sup>1</sup> The disadvantage of a poor primary and secondary education runs deep and wide. Educational disadvantage – in the South African context at least – is not something to be wished away or easily dispelled with the wave of a pedagogical wand. Impressive-sounding theories which are rich on jargon but poor on practical details of how to accomplish the hard work of dislodging firmly entrenched poor writing practices will simply not do.

In response to this issue, the School of Law at the University of KwaZulu-Natal, Howard College Campus instituted a programme aimed at improving the poor legal writing skills that many disadvantaged first-year law students demonstrate. The process began in 2009 with a writing intervention – the Concise Writing Programme – which was primarily aimed at correcting English grammar skills and required a relatively small budget to implement. It culminated in 2012 in a context-embedded legal writing programme – the Integrated Skills in Context Programme – that focused on logical thinking and persuasive legal writing. This programme was based on real-world problems and required a fairly substantial budget to design, implement and administer.

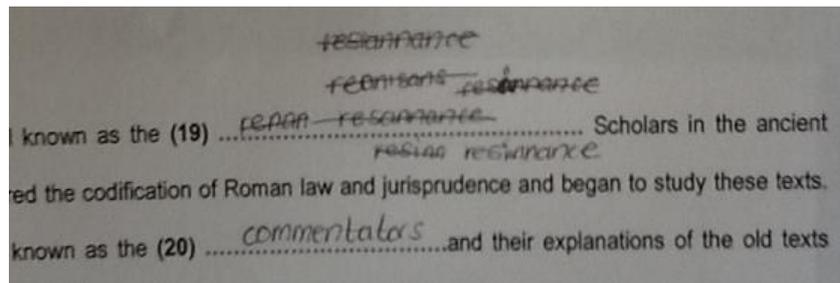
By 2009 the need to address the lack of legal writing skills among first-year law students at the University of KwaZulu-Natal had become critical. There were ever more plaintive pleas from the law profession and law lecturers that students should be helped to improve their basic legal writing skills. The University of KwaZulu-Natal, School of Law formally decided to take a stand against this aspect of disadvantage which had been ingrained in our first-year law students through years of inadequate writing instruction.<sup>2</sup>

The extent of the struggle confronting these students is illustrated by the following student's attempt to spell the word renaissance:

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<sup>1</sup> Swanepoel expresses a similar sentiment: '... there is the sad reality, but mammoth challenge, regarding the general unpreparedness of students to study law' (Swanepoel and Snyman-Van Deventer 2012 *Obiter* 121, 122).

<sup>2</sup> Greenbaum stresses the importance of teaching legal writing, which she says is an 'integral part of cognitive development' (Greenbaum 2004 *Stell LR* 8).



This simple example does not truly indicate the kind of challenge that educators at tertiary level were and still are facing. The challenge is not limited to teaching students how to spell difficult words and engaging with poor grammar or language skills. The superficial problems with these students' legal writing skills indicate a deeper underlying problem with their legal literacy and academic literacy skills.<sup>3</sup> Among other things, the challenges we are facing encompass poor critical thinking skills, weak logical argumentation skills, and the lack of a general frame of reference within which to address legal problems at a tertiary level.

As the Law School began the process of brainstorming the design and details of potential writing interventions in 2009, one fact that was clear to all the academics involved was that quick-fix solutions would not be sufficient to address the effects of a deeply rooted legacy of disadvantage on the legal writing skills of the students affected. There would be no miraculous solution to the problems we were facing. Achieving success in a programme such as this would take a continued concerted effort both on the part of the first-year students who would participate in the programme and on the part of the educators who would implement it.

This led to the introduction of the University of KwaZulu-Natal, Law School's first legal writing intervention – the Concise Writing Programme – in which the Law School teamed up with a language expert associated with the University of KwaZulu-Natal's English Department in order to develop a language course tailored to meet the legal writing needs of first-year law students. This programme was continually overhauled and expanded over two years, as the

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<sup>3</sup> Novice law students must learn to write within the legal writing conventions attached to legal discourse. Rideout and Ramsfield comment that law students are learning to write within a highly conventionalized discourse, law, in which legal arguments are constructed according to certain unwritten discourse rules, or conventions' (Rideout and Ramsfield 1994 *Wash L Rev* 60). Kress describes the writer '...not as an isolated individual, but as a social agent, located in a network of social relations, in specific places in a social structure. For that social agent the grammar of a language, its syntax, phonology, and lexicon, has a very specific look, not 'language 'as such' but rather a particular set of potentials and possibilities within the whole language system. For her or him certain facets of the linguistic system are familiar, accessible, in constant use. Others will seem strange, used by speakers beyond the social grouping of this language user, in different work or professional environments, by members of other social classes or ethnic groupings or maybe differentiated by age or gender.' (Kress *Linguistic Processes* 5).

School of Law learnt by experience. The Concise Writing Programme was finally replaced in 2011 by a more context-based programme, known as the Integrated Skills in Context Programme.

The purpose of this article is to describe the "nuts and bolts" of an educational endeavour carried out over four years by the School of Law at the University of KwaZulu-Natal, Howard College Campus. It will also evaluate, in some detail, each of the programmes referred to above, and will point out the fundamental differences between the two. After this the reasons behind the replacement of the Concise Writing Programme by the Integrated Skills in Context Programme will be discussed. Finally, the article will evaluate the relative success of the Integrated Skills in Context Programme, and also recommend improvements to be made to it.

## **2 The Concise Writing Programme**

In 2009, after some months of brainstorming on how to address the challenge of improving our students' legal thinking and writing skills, with few resources and a handful of eager but overloaded teaching staff, it was decided to introduce a formal writing intervention at first-year level. The idea behind this intervention was to catch the students as early as possible in their law degree, in order to improve their basic English grammar. The good habits learned could then be reinforced in subsequent years.

The fundamental point of departure, which was true to remedial trends at the time, was that as long as a student was taught basic English writing skills, even though not in the context of his or her particular discipline, these skills, once acquired, could quite easily and naturally be transferred by the student to his or her relevant writing discipline.<sup>4</sup> The remedial writing instruction practice at the time maintained that teaching students generic writing skills in collaboration with English language experts, would be sufficient to produce a significant improvement in the specific writing skills required. It was thought, for example, that this would lead to a major improvement in writing skills in the discipline of law – within one academic year.<sup>5</sup>

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<sup>4</sup> Greenbaum 2004 *Stell LR* 5.

<sup>5</sup> It is important to note, however, that certain authors had already begun to discredit this way of thinking and postulate a more integrated approach to teaching legal writing. In 2002 Candlin, Bhatia & Jensen wrote: '...we can argue that learning to write legal discourse is part of a process of learning to participate in the affairs of the legal community and its disciplinary culture. On this argument, it is not enough to be able to construct legal sentences as part of the mastery of some specialist genres, but also to be aware of the place of such

The pedagogical strategy underpinning the early development of this initial legal writing intervention was Vygotsky's theory of the zone of proximal development.<sup>6</sup> The intervention sought to implement the idea of an expert in the field giving specific, directed instruction to the students on the use of the English language in legal writing. This was adapted and developed by appointing final-year LLB students as tutors, who would closely guide the writing practice of small groups of learners. This was intended to provide a scaffolded<sup>7</sup> learning experience which, in accordance with the practice recommended by Cheyne and Tarulli, would be "informed by the tutor's constant appraisal of, and sensitivity to, the learner's level of functioning".<sup>8</sup>

The Concise Writing Programme was fully integrated into the first-year law module at the Howard College Campus of the University of KwaZulu-Natal. It consisted of two contact sessions per week: one large group lecture taken by an English specialist associated with the Law Faculty, and one small group tutorial, taken by students studying their Masters in English. The lectures had a legal flavour, but were focused mainly on grammar, punctuation and general English language skills. Students were taught, for example, to summarise a paragraph describing a legal dispute or to correct the grammar in an article about a legal matter. They were tested on their knowledge of English comprehension, grammar, and punctuation. For example, in tests, students would be provided with a paragraph which did not necessarily contain any legally-related content, and were asked to provide a synonym for a certain phrase or to provide a précis of the paragraph.

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genres in the disciplinary community; in essence to ask *why* such genres are written the way they are. To do so is to evoke the conditions and processes of legal practice. It is exactly this mix of generic and disciplinary knowledge which constitutes the training of legal specialists.' (Candlin, Bhatia and Jensen 2002 *ESP* 312).

<sup>6</sup> Vygotsky defines the zone of proximal development as: '... the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers' (Vygotsky *Mind in Society* 86).

<sup>7</sup> Scaffolding is described as a: 'process that enables a child or a novice to solve a problem, carry out a task or achieve a goal which would be beyond his unassisted efforts' (Cheyne and Tarulli 'Dialogue, Difference and Voice in the Zone of Proximal Development' 15, quoting Wood, Bruner and Ross 1976 *J Child Psychol Psychiatry* 90).

<sup>8</sup> Cheyne and Tarulli 'Dialogue, Difference and Voice in the Zone of Proximal Development' 15. The tutors involved in this programme received guidance from the lecturer in the form of a feedback workshop focusing on how to provide feedback to the students on both substance and writing.

After running the programme for several years, making minor changes to the materials along the way, the Law School undertook a careful review<sup>9</sup> of the various facets of the programme, including the feedback from students. The review showed that, although all the ingredients of a good legal writing module were present – with an experienced and senior staff member lecturing students relevant material, and with large-group lectures being supplemented by practical classes supervised by senior, engaged tutoring staff providing a scaffolded learning experience – the feedback from students on the usefulness of the programme, as well as their enjoyment of the programme was not universally positive. Students with very poor English language skills found the programme to be moderately useful. The vast majority of students, however, said that they found the programme boring and did not know what it had to do with law. So, while it had been an excellent learning experience for the University of KwaZulu-Natal Law School in that it had provided invaluable experience in launching an initiative such as this – with all the incumbent logistical hurdles associated with administering 20 to 25 small group tutorials each week, and the creative expertise that goes into designing course materials and tests focusing on English writing skills – the programme was not really what the Law School was looking for to solve the massive problem faced by the Law School and its disadvantaged students. It was clear to the Law School that a deeply entrenched legacy of disadvantage remained stubbornly intact, which left its students without the English language skills needed for skilled and effective communication in legal discourse,<sup>10</sup> without critical thinking skills, without legal argumentation skills, and without a general frame of reference which many simply expect students to possess at tertiary level.

In this respect, Boughey and McKenna make a valuable point about the nature of Academic Discourses as articulated by Gee. They maintain that:

One of the most important points made by Gee is that Discourses are inherently value-laden. Over time, particular Discourses become privileged because of their association with specific social spaces. Academic Discourses are privileged in the university. If an individual's primary Discourse is closely aligned to the academic Discourses of the university, and typically this is the case for students from educated, middle class homes, then the acquisition of academic Discourses

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<sup>9</sup> The programme was evaluated using three instruments: an extended writing assignment; student questionnaires; and qualitative feedback from primary stakeholders. This is discussed further in s 5 below.

<sup>10</sup> Kress describes the notion of 'discourse' as follows: 'A discourse provides a set of possible statements about a given area and organizes and gives structure to the manner in which a particular topic, object, process is to be talked about. In that it provides descriptions, rules, permissions and prohibitions of social and individual actions.' (Kress, *Linguistic Processes* 7).

is easier. An individual whose home Discourse is very different from those of the academy will encounter academic Discourses as alien and even incomprehensible. We can thus begin to see how power and social privilege are implicated in developing the 'ways of being' valued by the university.<sup>11</sup>

The inevitable "gap" between the knowledge and skills required at high school and those required at university has been referred to by Scott and Hendry as a "lack of effective educational continuity, or articulation, between consecutive educational levels". They believe that if there is not sufficient articulation between the levels then this will be a "counter-productive obstacle to student progression". They maintain that the path to effective articulation

... is not just about aligning formal entry requirements; rather, it is achieved by ensuring appropriate forms and levels of provision at the interface between educational types or phases, and by providing appropriate support for students making the transition. Articulation is thus a critical matter for educational planning as well as theory.<sup>12</sup>

The Law School concluded that, in order to increase student motivation and maximise its chances of success in a legal writing skills programme, it would have to focus on legal writing<sup>13</sup> rather than English grammar. Through the Law School's experiences with the Concise Writing Programme, it had become obvious that it was unreasonable to out-source the teaching of these practical skills, even to an expert in English writing. This out-sourcing amounted to teaching English grammar skills out of context and then expecting students to have somehow gained insight into legal discourse.<sup>14</sup>

It was obvious that the multi-faceted nature of legal writing, encompassing legal analysis and application, as well as logical sequencing and argument, could not be taught in a vacuum,<sup>15</sup> particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language. At the time, when researching possible

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<sup>11</sup> Boughey and McKenna 2016 *CriSTaL* 1–9.

<sup>12</sup> Scott, Yeld and Hendry *Higher Education Monitor*.

<sup>13</sup> Greenbaum summarises several authors' descriptions of the term 'legal writing', all of which emphasise that the legal writer, in addition to displaying competent grammatical skills, should also demonstrate an awareness of legal discourse and how to communicate within this community (Greenbaum 2004 *Stell LR* 6).

<sup>14</sup> Greenbaum also makes this point (Greenbaum 2004 *Stell LR* 5).

<sup>15</sup> On this point Vinson notes that 'Good legal writing includes the effective communication of legal analysis, rather than just technical proficiency with rules of grammar, syntax, and punctuation.' (Vinson 2005 *Touro L Rev* 510).

reasons for our first-years' poor legal writing skills, the Law School noted with interest that other South African legal academics had commented on the negative effect that a student's lack of familiarity with the legal discourse could have on their writing skills. For example, Greenbaum makes the point that:

... added to the non-English mother tongue speakers' difficulties, a factor that cannot be ignored is that most of these students have less cultural familiarity with the legal discourse community and the business milieu within which it operates.<sup>16</sup>

She refers to this specific knowledge as "insider" knowledge, which is most easily learned from "experts" in the legal field. Greenbaum suggests that:

Outsiders need to learn how arguments are constructed according to certain unwritten rules or conventions, and they need to master an entire new technical vocabulary. By allowing students to be active writers, discussing the discourse conventions explicitly in a collaborative setting that takes into account the different background and learning style of each student, the social perspective can contribute toward a genuine socialisation of novice legal writers.<sup>17</sup>

At this juncture it is important to note that the unique, complex discourse of the legal community is in fact completely foreign to most law students – even those proficient in the English language.<sup>18</sup> To master this complex and strange discourse is a major challenge for all law students.<sup>19</sup> Thus, legal writing instruction should not be reserved as a remedial tool for so-called "outsiders" – but should be mainstreamed into the law curriculum, recognising that the challenge faced with legal writing skills is common to all new law students (although the extent of the challenge may differ from student to student).<sup>20</sup> Rideout and Ramsfield write:

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<sup>16</sup> Greenbaum *Teaching Legal Writing* 3.

<sup>17</sup> Greenbaum 2004 *Stell LR* 14.

<sup>18</sup> Rideout and Ramsfield make the point that '...if we find that students lack the kind of writing proficiency that we assume, we often treat them in remedial ways...we may be overlooking the fact that these writers, regardless of the level of writing proficiency that they may have attained before law school, are now novices entering a new discourse. Their unfamiliarity with legal discourse may disguise their successes as writers in the past, or may make them appear remedial when grammar or sentence drills are not what they need. They may appear to have difficulty developing legal arguments, but such difficulties need not be symptomatic of a writer who has difficulty developing arguments 'generally'. Rather, a novice to legal discourse lacks the very methods of inquiry and internal dialogues available to someone who is 'situated' within the law.' (Rideout and Ramsfield 1994 *Wash L Rev* 69).

<sup>19</sup> Baker comments that 'The standard, and largely subconscious, repertoire of cognitive practices, reading techniques, and writing strategies students have relied on successfully in the past are frequently ill-adapted to the specialized demands of more purposeful discourse communities like legal practice.' (Baker 1997 *Wm Mitchell L Rev* 491).

<sup>20</sup> Greenbaum 2004 *Stell LR* 13.

Students cease to be 'empty' agents to be 'filled' with the law and legal analysis so that they can produce legal writing - legal words to represent legal thinking; rather they become novices to be socialized into the discourse and its practices. Students cannot have the law and legal patterns of analysis drilled into them so much as they must acquire them, in a manner analogous to the ways in which other students learn a foreign language. When students have difficulty writing legal analysis or making strong legal arguments, they are not necessarily hindered by poor thinking so much as they are struggling with the unfamiliarity of legal discourse and striving to master their entry into it. To label them as faulty writers is misleading; they are more like travelers, searching for a destination that is sometimes unclear to them and arriving at that destination at different rates.<sup>21</sup>

Armed with the knowledge gained from the implementation of the Concise Writing Programme, certain innovations were suggested in order to improve student learning and motivation. The Law School set out to meet the challenge brought by educational disadvantage and poor legal writing skills. The following principles were adopted:

- a) Law students should be taught the basics, as well as the more complex nuances of legal writing, by law lecturers or by legal practitioners.

The Concise Writing Programme showed that using experts in the English language to teach law students the intricacies of legal writing was ineffective in motivating law students to take the programme seriously or in improving their legal writing skills. It was thus important that law lecturers or legal practitioners were involved in the development of the teaching materials and in the teaching and facilitation of the programme itself. The developers of the programme – those who wrote the course materials and those who decided upon the teaching methodology – as well as the lecturers on the programme needed to have an in-depth knowledge of the subject material in order to present it in such a way as to motivate and immerse law students in it. To maximise motivation, students needed to understand in a very practical way the benefits of learning to write using particular legal writing conventions. It was not enough to be told "what" they had to do; they needed to be told "why" they were required to follow these

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<sup>21</sup> Rideout and Ramsfield 1994 *Wash L Rev* 69.

conventions, as well as the consequences that would ensue should they fail to heed the practical legal writing advice provided.<sup>22</sup>

The Concise Writing Programme also revealed that, in addition to having expertise in the subject matter of the module, it was desirable for the designers of as well as the lecturers on such practical modules to have some expertise in teaching methodology. This was so that they would be able to introduce the materials and facilitate student learning in such a way as to elicit a deep learning<sup>23</sup> response from the students.

An example of teaching in this way is given by Hedegaard, who recommends that:

The teacher's planning must advance from the general laws to the surrounding reality in all its complexity. In order to explain these laws the teacher must choose concrete examples that demonstrate the general concepts and laws in the most transparent form.<sup>24</sup>

Thus, it was important that the designers and lecturers on the programme were well versed in both the academic legal discourse and the professional legal discourse – so as to be able to provide a deep learning experience for the students and concrete examples of why, in the legal academic community or in the legal profession, certain writing conventions needed to be followed.

- b) The materials used to teach law students the intricacies of legal writing needed to be context-embedded.

It was clear to the academics involved in the programme that providing general guided instruction on the correct use of the English language in a programme that was required to impart the nuances specifically of legal writing was not enough. It was essential that scaffolded

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<sup>22</sup> Quinot emphasises the value of placing learning experiences in context: 'The complex nature of learning also implies that knowledge and its construction cannot be broken up into 'discrete sub-skills' that can be taught separately and in isolation, and that concepts cannot be taught out of context. It is only within context and within a relational network that knowledge can exist.' (Quinot 2012 *SALJ* 421–422). Also, Willimas and Williams highlight the importance of context in increasing student motivation. They maintain that motivation '...arises out of the interaction between a student and what he or she perceives as a significant and meaningful context' (Williams and Williams 2011 *RHEJ* 1–23).

<sup>23</sup> Fourie maintains that 'Students who adopt a deep approach to learning seek to understand what they are learning; are actively interested in the learning material; try to relate ideas in a subject to ideas from other areas; and attempt to base conclusions on evidence and reasoned arguments.' (Fourie 2003 *SAJHE* 123, quoting Ramsden *Improving Learning* 19).

<sup>24</sup> Hedegaard 'Zone of Proximal Development' 227.

learning opportunities be embedded within actual legal discourse. Hedegaard explains the importance of contextualising learning by elaborating on Vygotsky's theory of the zone of proximal development:

The underlying assumption behind [Vygotsky's] concept is that psychological development and instruction are socially embedded; to understand them one must analyse the surrounding society and its social relations.<sup>25</sup>

The need for socially embedded instruction takes on even more importance in the context of South Africa's constitutional dispensation. Quinot advocates that the constitutional imperative to transform encompasses legal education and that there is a need for "transformative legal education".<sup>26</sup> Quinot notes that, in practical terms, one of the consequences for legal education of the constitutional imperative to transform is:

Students should be educated not only in the new substance of the law but also in the new legal method or reasoning mode ... Matters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the lecture hall. Law teachers will be failing their students if they do not enable them to engage with these ostensibly extra-legal considerations in dealing with the law. This also requires a much greater emphasis on the context in which law operates, and the society that it intends to regulate, or in our case transform.<sup>27</sup>

A legal writing programme should thus provide students with the intellectual space in which to engage with their peers in meaningful discussions on the legal material and related social issues, while being led by a legally trained tutor who is well versed in the area of law – as well as the social and political context in which that law operates. One of the reasons behind adopting this teaching methodology on the programme is well articulated by Geo Quinot, who comments that:

Transformative constitutionalism forces us to imagine a different methodology. A methodology that enables students to participate actively in developing their own understanding of rules not only against their own background context, but also, critically, against the background context of

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<sup>25</sup> Hedegaard 'Zone of Proximal Development' 227.

<sup>26</sup> Quinot 2012 *SALJ* 412.

<sup>27</sup> Quinot 2012 *SALJ* 415.

others, would aid in developing an understanding of the law as a phenomenon that is socially constructed and situated.

In a similar vein, Dewey elucidates the "need for a theory of experience" in which there is an "organic connection between education and personal experience". However, he cautions that while this connection is essential to attaining a "genuine education", one must be mindful of the fact that not all experiences are "genuinely or equally educative".<sup>28</sup> This highlights the need for the educators in a legal writing programme to be experienced professional legal teachers who are not prepared to pay mere lip-service to the need for contextualised learning, but who are genuinely interested in providing the students with authentic examples of real-world experiences that will enhance their deep learning experience in a meaningful, transformative manner.

Thus, it was felt that allowing learners to apply their legal writing skills to a socially, politically and economically relevant fact statement reinforced by relevant teaching material written in legal language which was interesting and relevant to a first-year law student would enhance student cognition and motivation. It was felt that writing activities should be based on a scenario that the students could identify with strongly and even find themselves confronting in their first year of study.

c) Students must be exposed to a practical legal writing experience.

After reviewing the Concise Writing Programme it became clear that it was also imperative that students were involved in a practical legal writing experience in which they were afforded the opportunity to practice the skills taught in lectures through a series of tutorial tasks and assignments.<sup>29</sup> These tutorial tasks and assignments had to be designed to lead the students incrementally through the legal problem-solving process, allowing them to build their legal writing muscles gradually, until they were strong enough to produce well-rounded, persuasive

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<sup>28</sup> Dewey *Experience and Education* 25.

<sup>29</sup> Rideout and Ramsfield make the point that these students 'cannot afford to remain passive spectators in the legal writing classroom. Their very participation in the dialogue of the classroom – its questioning about and inquiry into legal issues, its efforts at paraphrasing and synthesizing the law, and its analysis, debates, and conclusions – is essential to their socialization into legal discourse and, hence, their ability to write well within it. Through this participation, they will also be constructing themselves, rhetorically, as lawyer-writers, a construction that entails the development of a writer's persona and a professional voice.' (Rideout and Ramsfield 1994 *Wash L Rev* 69).

pieces of writing on their own.<sup>30</sup> Greenbaum supports this so-called "process approach" to teaching legal writing skills, stating that:

Students should receive feedback on their writing during the various stages in the composing process, and revising takes on a new significance as students develop their own valid professional and personal voices ...<sup>31</sup>

Having articulated the pedagogical improvements that needed to be made to the Concise Writing Programme in order to make it more effective and tailored for law students, it became clear to the Law School that there was no silver bullet that would magically bring about these improvements. What was needed at that point was the hard work and goodwill of all involved, students and lecturers alike, and, perhaps most critically, the funds to bring these changes to life. Thus, the fourth change that needed to be made to the Concise Writing Programme was an injection of cash into the programme – in order to incentivise the endeavour.

d) Funds must be raised to support and enhance the legal writing skills initiative.

With a diverse class of upwards of 250 students, the Law School would need extensive financial resources to implement the improvements set out above. Thus it was fortunate that in 2011 the Law School received funding from the University for projects such as a legal writing programme. This was the ideal opportunity to introduce, in the following year, a more sophisticated legal writing programme tailored especially for law students. This gave rise to the development of the Integrated Skills in Context Programme.

### **3 Important principles underpinning the development of the Integrated Skills in Context Programme**

The recommendations for improvement set out in the previous section of this article were implemented in the development of the Integrated Skills in Context Programme as follows: Firstly, the developers of the programme materials and teaching methodology, as well as the lecturers on the programme, were all lecturers in law with an in-depth knowledge of the subject

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<sup>30</sup> Hedegaard notes that in a teaching experiment that constantly required learners to participate in a guided research activity, they were gradually led to critically evaluate concepts (Hedegaard 'Zone of Proximal Development' 247).

<sup>31</sup> Greenbaum 2004 *Stell LR* 14.

material. The materials for the Integrated Skills in Context Programme were developed by Professor Brook Baker – at the time a visiting honorary research fellow from the Northeastern University School of Law in Boston – in consultation with various staff members of the University of KwaZulu-Natal Law School. The academic coordinator responsible for the academic content of the lectures and tutorials within the programme was a senior lecturer at the University of KwaZulu-Natal Law School, as well as an advocate, and was well-versed in the conventions of legal writing in the academic domain and in the professional legal sector. The administrative coordinator responsible for the co-ordination of student tutorial groups and the allocation of lecturers and tutors to the programme was a University of KwaZulu-Natal Law School lecturer who was deeply invested in providing law students with a practical, context-embedded learning experience.

Secondly, in keeping with the Law School's vision to provide a set of context-embedded materials as a basis for the legal writing exercises, a series of tutorial tasks and writing assignments were developed that would capture the students' imagination and make them feel that they were learning to write like "real" lawyers. These tasks and assignments were administered in such a way that students could collaborate with so-called "experts" in the field, so as to be exposed to good quality legal discourse. In keeping with this ethos, during their first tutorial session students were informed that:

The course is designed to provide an opportunity for you to be much more active and lawyer-like in your learning. You are going to closely analyse and re-analyse a complex fact pattern involving a hypothetical case, *Khan v Singh*, involving the alleged harassment of a first-year female law student by a fellow first-year male student. The case file is quite thick and the facts are complex and multi-faceted.

The Integrated Skills in Context Programme materials supported a single factual scenario involving a case of alleged sexual harassment of one first-year law student by another first-year law student. The facts of this problem scenario were framed so as to capture the students' imaginations – as a problem with which they could readily identify. Then, using this single set of facts, the students were asked to deal with the problem at various levels. Starting at the lowest level, students were required to draft a legal opinion based on the University of KwaZulu-Natal Sexual Harassment Policy. The problem was then escalated to higher levels, and eventually students were instructed to address the matter from the perspective of the

*Domestic Violence Act 116 of 1998*. In other words, the students were taken through a number of what may be termed "legal levels", with detailed feedback and evaluation at each level, enabling them to follow this matter and improve their skills in an integrated step-by-step manner. Thus, students were not just being taught grammar or provided with legal knowledge in a decontextualised manner. This was a "real-world" problem with a significant ethical dimension, which was legally complex, and which could realistically be encountered by students in the "real world".

Thirdly, in order to provide a practical experience for the students, the programme tutorials and tasks were designed to encourage the students to collaborate in tutorial groups. They were then required to write and rewrite different drafts after receiving advice from the programme "experts". Students would be expected to complete a first and then a second draft of each assignment, each of which would be marked meticulously by Law School lecturers, paying careful attention to each student's work in the form of directed, detailed written feedback comments (and face-to-face consultations if requested) on each assignment draft.

Fourthly, when launching this labour-intensive programme, the Law School was well aware that it was imperative that the administration of the programme be well-planned and meticulously implemented so as to avoid logistical issues getting in the way of learning.

#### **4 Structure of the Integrated Skills in Context Programme**

The Integrated Skills in Context Programme was formally integrated into the second semester of the first-year law module Foundations of South African Law at the University of KwaZulu-Natal Howard College Campus, and made up 25% of the class mark. Each week students were required to attend one double period large-group lecture (taught by a law lecturer) and one single period tutorial (facilitated by a law Masters student).

As explained in the previous section of this article, students were required to examine a single factual scenario – the alleged sexual harassment of one first year student by another – on different legal levels. First, students extracted and applied the facts which they regarded as relevant to the University of KwaZulu-Natal Sexual Harassment Policy. They produced a first and then a final draft of a short, informal opinion as to the possible outcomes when the matter was brought before the student discipline court. Then they looked at the same set of facts

through the lens of the *Domestic Violence Act* 116 of 1998 in order once again to produce a first and then a final draft of an informal legal opinion, this time as to the possible outcomes if the matter was brought before the criminal court.

In order to prepare students for their assignments, they were lectured *inter alia* on the following topics:

- Reading and interpreting the University of KwaZulu-Natal Sexual Harassment Policy.
- Summarising the rules in the policy document.
- The conventions of legal writing - for example, solving problem-type questions using the FIRAC method (Facts, Issue, Relevant law, Application, Conclusion) and an introduction to the basic principles of logic needed to critically analyse legal material.
- Drafting and revising an informal legal opinion and responding to written feedback.
- The tutorials which complemented these lectures required students to complete, *inter alia*, the following tasks:
  - Analysing the applicability of a set of facts to legal documents such as the University of KwaZulu-Natal Sexual Harassment Policy, the *Constitution of the Republic of South Africa*, 1996 and the *Domestic Violence Act* 116 of 1998.
  - Drafting a rule from a policy document and an Act.
  - Applying the six rules of legal writing<sup>32</sup> to specific examples.
  - Completing an argument analysis exercise wherein they were expected to analyse a mock legal argument and redraft it more persuasively.

## **5 Research methodology used in this study of the Integrated Skills in Context Programme**

The research methodology used in evaluating the Integrated Skills in Context Programme was a combination of action research and evaluation research. Qualitative research methods were used to gain insight into the success of the programme.<sup>33</sup> The perceptions of such success were gathered from three primary stakeholders in the process: firstly, the first-year LLB students participating in the programme - by means of the annual student module evaluation; secondly, the lecturers and markers involved in the programme - by means of regular informal meetings;

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<sup>32</sup> Palmer and Crocker *Becoming a Lawyer*.

<sup>33</sup> Mouton *How to Succeed in Your Master's and Doctoral Studies*.

and thirdly, a small group of final-year LLB students who had participated in the same ISC programme three years earlier - by means of author notes on informal class discussions.

a) First-year LLB students

At the inception of the Integrated Skills in Context programme, all participants were informed that they were taking part in a pilot study specifically designed to improve their legal writing skills. The students were deliberately informed of the purpose of the programme so as to encourage them to view the study as a collaborative effort. In this way, students would have increased motivation to provide feedback on their perceptions of the programme on completion thereof.<sup>34</sup> Immediately after completing the Integrated Skills in Context Programme, they were asked to evaluate it.<sup>35</sup> A common theme that emerged in the responses was that they felt they were being taught how to think and write "like a lawyer". Even those students that complained of the programme's being very labour-intensive understood the logic behind the heavy workload and remarked that it had provided them with valuable insight into the legal writing process.

Fouché *et al* do caution, however, that, "a possible objection to using students' perceptions in determining the impact of an academic literacy intervention might be that information might not be entirely reliable". They recommend in such cases that, "additional feedback should preferably be obtained from subject experts". Thus, discussions were held with the lecturers involved in the programme in order to gather their perceptions of the programme.<sup>36</sup>

b) Lecturers and markers involved in the Programme

Regular meetings whilst the programme was running, as well as a debriefing meeting immediately after the conclusion of the programme, were held with the lecturers and markers involved in the programme to ascertain their views on the success or otherwise of the

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<sup>34</sup> Fouché, Van Dyk and Butler agree with Carstens, saying that 'the success of such interventions is equally dependent on how students perceive the interventions and the abilities addressed therein, as this determines, at least in part, students' motivation and the extent to which skills are transferred' (Fouché, Van Dyk and Butler 2016 *SPIL* 118).

<sup>35</sup> Examples of the types of questions asked in the first-year student questionnaires are: On a scale of 1–5, was your ISC tutor able to explain legal skills clearly?; Please tick the word which describes your ISC tutor's ability to help you learn legal analysis and writing: outstanding – excellent – very good – good – fair – poor; What is your overall evaluation of the ISC tutorials? Outstanding – excellent – very good – good – fair – poor; and General comments on the ISC tutorial system.

<sup>36</sup> Fouché, Van Dyk and Butler 2016 *SPIL* 118.

programme. The informal discussions held during these meetings provided useful anecdotal evidence of the strengths and weaknesses of the programme as perceived by subject-experts intimately involved with the Integrated Skills in Context lectures and materials. Information gathered at these meetings proved to be a useful supplement to the information collected from the student questionnaires and allowed a narrative to be constructed around the different stakeholders' perceptions of the effectiveness and practical application of the programme. However, it must be cautioned that the low degree of control over the informal group discussions could be a limitation on the validity of the anecdotal feedback received.

c) Final-year LLB students

Informal class discussions were held with a small group of final-year LLB students who had completed the Integrated Skills in Context programme three years before and were now involved in marking the legal writing of first-year students who had not had the benefit of a legal writing intervention. These discussions were aimed at encouraging the final-year students to explore, with the benefit of hindsight, whether they thought the principles of legal writing that they had learnt during the original Integrated Skills in Context programme had improved their own writing skills to a greater extent than the unguided writing tasks had improved the writing skills of the current first-year students.

The final-year students responded most positively, stating they were glad they had had the chance to participate in the programme, which was practical and well-structured. They commented that their early exposure to interpreting and analysing facts in such detail definitely helped to develop their legal writing skills and their ability to develop logically coherent arguments. They also remarked on the usefulness of the first draft/second draft process, which enabled them to gauge their progress continually, and to make adjustments to their legal writing as and when they were needed. The students concluded that the ISC programme had enabled them to achieve a more nuanced set of writing skills by the end of their first year than those displayed by the current first-year students, who were no longer being taught these skills. However, the issue of the labour-intensive nature of the programme and the heavy workload that was added to an already full first-year programme was reiterated. Many students emphasised that this was a demotivating factor.

After successfully completing the Integrated Skills in Context Programme for the first time, the Law School was able to stand back and take stock of positive features which could be entrenched in the programme going forward. Likewise, the challenges encountered during the year and improvements envisioned for future programmes were assessed in order to develop the initiative further.

## **6 Significant positive features of the Integrated Skills in Context Programme**

The Law School noted several significant positive features of the Integrated Skills in Context Programme, which were integral to achieving an improvement in the legal writing skills of its first-year students:

- a) The programme was fully integrated into the first-year law module, with a formal mark allocation. This prompted a definite improvement in student motivation to engage with the materials and to perform diligently in the assignments.
- b) There was a strongly contextualised set of facts. The tutors reported that the sexual harassment problem really seemed to capture the students' imaginations and engendered much debate during the tutorials. In fact, during the tutorial discussion sessions many students commented that the incidents described in the problem were something that they had themselves experienced. They were genuinely interested in discussing and debating the potential legal solutions to the issues raised. Another unexpected and valuable outcome of using this particular factual scenario was that many students felt empowered by the realisation that, even with their limited legal knowledge, they could solve a practical problem of this nature.

Also, because the programme's factual scenario involved an incident between students of different cultures and backgrounds, it raised issues of diversity on a number of levels, such as gender, religion, culture, background and personality. Discussions of these issues of diversity proved invaluable to the first-year students. For many of them it was the first time they had encountered issues such as these.

Lastly, because of the relative complexity of the facts, the problem allowed the students to experience at first hand the complexity and nuances of a real-world issue, where facts are

not always black and white and often can be argued on the basis of contradictory assumptions.

- c) Students were able to experience at first hand the difficulties of working with a document (the University of KwaZulu-Natal Sexual Harassment Policy) that had not been drafted by legally trained persons, and were able to appreciate the problems that ambiguities in a document such as this can generate. Although this "real-world ambiguity" can be taken as a strength of the programme, it must be noted that certain lecturers thought this was a flaw in the programme, since it made the student assignment materials unnecessarily complicated.
- d) The large-group lectures were taught by experienced members of the Law School, who would be teaching these same first-year students in future years of study and were thus, in the eyes of the students, experts in the field who commanded their respect and undivided attention. Similarly, tutorials were facilitated by senior law students, who quickly gained the respect of the first-year students.
- e) In addition to the inherent legal knowledge that the tutors possessed as final-year law students, they also received weekly training on the upcoming first-year tutorial, both in respect of the material to be taught and in the teaching methodologies relating to small group facilitation.
- f) The tutorial tasks and assignments were designed to start simply with a basic analysis of the fact statement, and thereafter to focus on building the students' writing, analytical and logical reasoning skills incrementally, until they were able to produce a legal opinion. The tutors were instructed to employ a variety of small-group facilitation techniques during their tutorials designed to encourage collaborative peer-learning. They were also very aware that they were to focus on constructing the knowledge together with the students in an active learning environment.
- g) Students received detailed written feedback on the first draft of each assignment, after which they were allowed to make the suggested changes, and then they were instructed to submit a second and final draft on which they once again received detailed written feedback. It was interesting and somewhat worrying to note that for some of the first-year

students this was the first time during their educational careers that someone had paid such detailed individual attention to their work. This process of providing in-depth, personalised, written feedback on both drafts<sup>37</sup> of a student's work also gave the programme's markers invaluable insight into the kinds of legal writing problems that these students were actually facing. The result was that Law School staff could now get involved on ground level in a relevant way, and could make a real difference to the quality of these students' skills.

- h) Assignments were marked by members of the Law School, who met to discuss the specific marking requirements of each assignment and who marked according to a marking rubric so as to ensure that the marking was as consistent as possible. The marking process, which included marking and feedback on both content and legal writing, was interesting. Due to the complexity of the factual scenario and because the legal document on which the problem was based was a real University of KwaZulu-Natal document (the University of KwaZulu-Natal Sexual Harassment Policy), the lecturers did not always agree on the most correct answers to the questions asked in the assignment. Having six or seven lecturers in the marking team meant that the markers often found themselves debating points of law. This again provided valuable insight into the dilemmas that students face when dealing with assignment questions.

Despite the programme's significant positive features, a number of challenges were also encountered, which would need to be addressed in future legal writing programmes.

## **7 Challenges encountered on the Integrated Skills in Context Programme, and recommendations for its improvement**

The programme was resource-hungry in terms of:

- *Staff*: A large number of Law School staff were needed to make the programme viable, and it was difficult to find enough staff who were genuinely interested in participating in

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<sup>37</sup> Boughey talks of the importance of establishing a 'conversation in writing' when providing feedback on student writing. She maintains that: 'Time spent on responding to students' writing is wasted if they are not able to use the comments and questions to improve the written task... It has been argued that much of the poor writing submitted at South African universities is in effect 'speech written down' and results from a failure to monitor meaning-making given students' predominant experience of having meaning monitored by other participants in face-to-face conversations. The purpose of the 'conversation in writing' advocated in this article is to teach the need for self-monitoring.' (Boughey 2008 *Journal of Independent Teaching and Learning* 21).

a programme of this nature. With the ever-increasing institutional emphasis on research, a teaching intervention such as this was not a priority for many lecturers, who felt that they were already stretched to capacity.

- *Funding*: Since the project was externally funded, the ten or so Law School staff participating in lecturing and marking the Integrated Skills in Context Programme were paid for their time. However, the programme had to be discontinued when the funding was withdrawn. Without external funding the lecturing and tutoring duties attendant on a programme such as this would either need to be worked into the official teaching load of the staff involved or be incentivised by other creative means. For example, data generated<sup>38</sup> from students' legal writing projects undertaken during the programme could form part of the empirical research of certain staff members researching in this area, or the legal writing produced by top students on the programme could be used as a basis for further research.
- *Lecture slots and venue allocations for timetabling*: The logistics of allocating an additional double period lecture and a single period tutorial to an already full first-year LLB timetable, as well as finding an additional large-group lecture venue for a double period and 20 small group tutorial venues per week, was a mammoth task. With numbers at the time at 250 per class, and pressure to increase the numbers, this was only going to get worse.
- *Time*: The programme was immensely time-consuming for the Law School staff, who were involved either in taking the lectures or in marking the two drafts of the assignments. Although the staff were paid for their extra work, all of the lectures took place during normal working hours. Also, producing extensive written feedback on two drafts of two relatively complex assignments was time-consuming for the markers.
- *The programme was time-consuming for first-year students*. The first-year modules were 16 credit-point modules, each carrying approximately 11 notional study hours per week. The law and writing lectures and tutorials for the module alone took up about seven notional hours, thus leaving only four hours per week for the students to prepare for lectures and tutorials, study for tests, and prepare assignments. The legal writing assignment would need to form a more substantial part of the summative assessment for

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<sup>38</sup> The kind of data that could be generated by students participating in these legal writing projects would depend on the research interests of the lecturer setting the writing task. For example, a lecturer interested in researching in the area of the use of translated materials for second language law students could set a legal writing exercise requiring the students to provide their informed opinions and perceptions on the use of isiZulu translations in law tutorials to enhance their comprehension of legal material. The insights provided by the student body could prove invaluable for this research endeavour.

the first-year module, so that the notional hours required to produce two drafts of a fairly complex legal opinion were justified.

- *The Law School markers on the programme decided to focus their attention on the quality of the legal writing produced when giving written feedback and not to pay too much attention to grammar deficiencies.* Thus, although the markers did pay some attention to grammar and punctuation, they focused their feedback comments rather on the structure and logical flow of student writing. In part, this was because as experienced as law lecturers are in legal writing, they are not trained English teachers, and in part because excessive attention to grammatical errors would ultimately distract the students from the actual task at hand and demotivate them.<sup>39</sup>
- *Consistency in marking:* Although the markers met to discuss the marking standard and marked to a rubric and model answer, there were still problems with consistency in marking standards, with some lecturers marking more leniently than others. Part of the problem, of course, was that the programme had not had time to bed-in, and there was no opportunity for all the teething problems to be addressed. A possible solution to this lack of consistency in marking would be to design a somewhat detailed set of grading criteria to guide the marking team more closely.

## 8 Conclusion

So – there is good news and bad news. The good news is that it is very possible to make a real difference to the legal writing skills of the vast majority of students in a relatively short time period.<sup>40</sup> The bad news is that there is no silver bullet to solving the problem. The reality we are faced with in overcoming the legacy of a poor secondary education is that it is not going to

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<sup>39</sup> The issue of editing grammatical errors is complex and interesting, with Bonanno commenting that grammatical errors have different levels of gravity. She notes that the seriousness of the grammatical error will be determined by whether the error affects the overall comprehensibility of the writing, as well as by whether the error would cause the reader to become irritated (Bonanno ‘Tolerance of Academic Staff’).

<sup>40</sup> Although this is beyond the scope of this article, it must be noted that it is notoriously difficult to show a causal link between a specific writing intervention and improved writing skills over a short period of time. This is not only because a number of instruments must be used to evaluate the success of the intervention but also because in the early stages of writing development there is much more to improving writing than just improving the writing skills themselves, much of which is intangible. An improved ability to write can take many forms, such as improved motivation to write effectively in a particular discourse or gaining understanding of the context of a particular piece of writing or becoming situated in a particular discourse by acquiring insight into the writing conventions of that discourse. For example, Van Dinther, Dochy and Segers maintain that ‘Though competent behaviour is largely understood in terms of developing relevant knowledge, skills and attitudes, researchers in educational settings are increasingly drawing attention to the role students’ thoughts and beliefs play in the learning process.’ They refer to this ability of the students to believe in their own competence as ‘self-efficacy’. (Van Dinther, Dochy and Segers 2011 *Educational Research Review* 96).

come cheap. If the University and the country are serious about improving student skills, then resources will need to be made available so that real, individual attention can be paid to students by senior law school staff. E-learning and the like may help, but there is nothing to replace one-on-one personal attention and guidance and repeated feedback by staff who do not see this as a lost cause. The author believes there is a vast reservoir of goodwill among academics, who are more than eager to attempt to address the problems bequeathed to our students by a poor primary and secondary education. But, if we are to engage in a grinding battle of attrition, which can be won only by hard fighting, then those in charge of the purse strings must know that they have to untie them. Our students need intensive one-on-one attention by qualified academics, and this means that those addressing the problem must be recognised and adequately compensated.

By focusing the attention of all senior staff members on high-level research at the expense of first-year teaching, by stripping resources from programmes such as the Integrated Skills in Context Programme, and by insisting on a continual increase in student numbers without any increase in resources we are simply asking for the problem to get larger and not smaller. Just give us the tools and we will finish the job.

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## **LIST OF ABBREVIATIONS**

CriSTaL	Critical Studies in Teaching and Learning
ESP	English for Specific Purposes
ISC	Integrated Skills in Context
J Child Psychol Psychiatry	Journal of Child Psychology and Psychiatry
RHEJ	Research in Higher Education Journal
SAJHE	South African Journal of Higher Education
SALJ	South African Law Journal
SPIL	Stellenbosch Papers in Linguistics
Stell LR	Stellenbosch Law Review
Touro L Rev	Touro Law Review
Wash L Rev	Washington Law Review
Wm Mitchell L Rev	William Mitchell Law Review

## 4 FINDINGS: LEGAL WRITING AND TUTORING PROGRAMME (ITERATION 3)

The following three articles were published in peer-reviewed journals:

Article 2: ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1’

**Citation:** Crocker, AD ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1’ (2020) 41(4) *Obiter* <https://doi.org/10.17159/obiter.v41i4.10486>

Article 3: ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2’

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Article 4: ‘Motivating Law Students to Write Like Lawyers: Contextualising Learning in the “Write it Like a Lawyer” Case Study’

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*Note: The formatting style of the published articles has been preserved in this chapter.*

# **MOTIVATING LARGE GROUPS OF LAW STUDENTS TO THINK CRITICALLY AND WRITE LIKE LAWYERS: PART 1**

Angela Diane Crocker  
*BSc LLB LLM*  
*Lecturer, University of KwaZulu-Natal,*  
*Attorney of the High Court of South Africa*

## **SUMMARY**

This two-part article explores two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The article examines these two themes through the lens of a case study on a legal writing programme, the “Write it Like a Lawyer” [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The design of the programme draws upon three distinct teaching principles – constructive alignment, learner participation and conversations in feedback. This article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing, containing well-substantiated arguments.

The article is in two parts.

Part 1 begins by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then goes on to describe the significance of the central themes to a legal writing programme such as WiLL.

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and the manner in which these principles were used to achieve the desired outcomes in the WiLL programme. Finally, the second part of the article evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

## **1 INTRODUCTION**

“Behind the scenes of a finished product is a messy process of exploratory writing, conversation, discarded drafts, midnight agony.”

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<sup>1</sup> Bean *Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 4.

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# 1 INTRODUCTION

“Behind the scenes of a finished product is a messy process of exploratory writing, conversation, discarded drafts, midnight agony.”<sup>1</sup>

Bean’s statement highlights how difficult it is to produce a high-quality, persuasive piece of writing, which is exactly what hundreds of law students are required to attempt every year at the School of Law at the University of KwaZulu-Natal. Over the years, the concept of legal writing, and how to teach this important skill, have been debated by numerous academic writers.<sup>2</sup> Bridge notes that these writers are not always in agreement on how to approach this concept:

“The existence of ‘legal’ writing is challenged; its major divisions are disputed; the possibility of teaching it is doubted. Agreement comes only at the point of bemoaning its low level”.<sup>3</sup>

It stands to reason that teaching law students how to improve their basic legal writing skills in order to produce high-quality writing is difficult, and this task is not made any easier by the hours of tedious practice and countless drafts required to hone these skills. However, the task is not impossible and with a little imagination, it can be achieved. The key is student motivation. If law students’ innate curiosity is piqued and they are motivated to engage on a sufficiently deep level with the learning process, their critical thinking skills can improve, which in turn can open the door to improving their ability to write like lawyers.

The aim of this two-part article is to explore two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The two parts examine these two themes through the lens of a case study of a legal writing programme, the “Write it Like a Lawyer” [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The programme’s design draws on three distinct teaching principles –

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<sup>1</sup> Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 4.

<sup>2</sup> Various models of teaching legal writing exist: Boughey advocates for discipline-specific academic literacies (Boughey ‘Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality’ 2012 26(1) *SAJHE* 51–65); Broodryk talks of the benefits of writing-intensive courses across the law curriculum (Broodryk ‘Writing-Intensive Courses Across the Law Curriculum: Developing Law Students’ Critical Thinking and Writing Skills’ 2014 35(3) *Obiter* 453–456); Quinot writes of transformative legal education (Quinot ‘Transformative Legal Education’ 2012 129 *South African Law Journal* 411); and Bean supports the concept of integrating writing, critical thinking and active learning (Bean *Engaging Ideas*). Greenbaum also summarises several authors’ descriptions of the term ‘legal writing’ (Greenbaum ‘Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives’ 2004 *Stellenbosch Law Review* 6).

<sup>3</sup> Bridge ‘Legal Writing After the First Year of Law School’ 1978 5(2) *Ohio Northern University Law Review* 411.

constructive alignment, learner<sup>4</sup> participation and conversations in feedback. This two-part article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing<sup>5</sup> containing well-substantiated arguments. All of these principles embrace constructivist, learner-centred, blended-learning teaching methodologies and all are intricately linked by a scaffolded teaching-and-learning experience.<sup>6</sup>

As stated above, this article is split into two parts. Part 1 begins by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then goes on to describe a five-week legal writing intervention [WiLL] implemented at the School of Law, University of KwaZulu-Natal (UKZN), Howard College Campus, and the significance of the central themes to a legal writing programme such as WiLL.<sup>7</sup>

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and how these principles were used to achieve the desired outcomes in the WiLL programme. Finally, part 2 evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

## **2 THEORETICAL UNDERPINNINGS: INTRINSIC MOTIVATION IN TEACHING CRITICAL LEGAL WRITING**

Learning how to write persuasively in legal discourse is challenging for the majority of law students at UKZN, not just because of the prevalence of second-language speakers in the

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<sup>4</sup> Note that the terms ‘learner’ and ‘student’ are used interchangeably throughout this article.

<sup>5</sup> See Crocker ‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’ 2018 21 *PER/PELJ* DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a1368>, fn 13, which points out that Greenbaum summarises a number of authors’ descriptions of the term ‘legal writing’, all of which emphasise that the legal writer, in addition to displaying competent grammatical skills, should also demonstrate an awareness of legal discourse and how to communicate within this community (Greenbaum 2004 *Stellenbosch Law Review* 6).

<sup>6</sup> Quinot states that there is a need for ‘a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution, for a shift towards a constructivist student-centred teaching model and for the recognition of a paradigm shift in knowledge from linear to non-linear, relational or complex.’ (see Quinot 2012 *SALJ* 412).

<sup>7</sup> The programme formed part of the 2019 Legal Research, Writing and Reasoning 2<sup>nd</sup>-year LLB module (LRWR). Details of the LRWR module will be elaborated on below. However, the focus of this article is on the 5-week legal writing intervention that formed part of the LRWR module.

student body,<sup>8</sup> but since it requires more than just writing clearly in order to communicate. Bean contends:

“[W]riting instruction goes sour whenever writing is conceived primarily as a ‘communication skill’ rather than as a process and product of critical thought. If writing is merely a communication skill, then we primarily ask of it, ‘Is the writing clear?’ But if writing is critical thinking, we ask, ‘Is the writing interesting? Does it show a mind actively engaged with a problem? Does it bring something new to readers? Does it make an argument?’”<sup>9</sup>

Persuasive legal writing requires learners to think critically – like lawyers do – by considering numerous elements before beginning the drafting process. These include: identifying an argument and then articulating cogent assertions to justify that argument; considering the target audience; maintaining a logical flow throughout the piece; and, challenging the *status quo* and finding alternatives that can be justified by evidence. Therefore, the ability to think critically is inextricably entwined with the concept of writing like a lawyer and it is imperative that legal educators focus on honing the critical thinking skills of their students.<sup>10</sup> Bean maintains, “writing is both a process of doing critical thinking and a product communicating the results of critical thinking”.<sup>11</sup> This seems to imply that good-quality legal writing requires the critical, creative use of relevant sources to develop and communicate a logical, persuasive argument. For example, an important aspect of thinking critically is to be able to use authority, not as an end in itself, but as a justification for a particular position. This focus on justification rather than authority helps develop learners’ ability to think creatively in any given situation – a particularly important skill in the legal profession.<sup>12</sup> Quinot develops this idea of justification further by suggesting that in the context of a transformative constitutional democracy in which learners are being trained to practise, they must be encouraged to reflect critically on the

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<sup>8</sup> Note that it is not only the second-language students who struggle to assimilate legal writing skills. Most new law students are participating in legal discourse for the first time and, as such, are novice legal writers and will need to learn to apply the particular conventions attached to writing in this foreign discourse. See Crocker 2018 *PER/PELJ* 3. See also Rideout and Ramsfield ‘Legal Writing: A Revised View’ 1994 *Wash L Rev* 60, speaking of the unwritten rules of legal discourse.

<sup>9</sup> Bean *Engaging Ideas* 3–4.

<sup>10</sup> It is interesting to note that the specific outcomes attached to the first exit level outcome of the Bachelor of Laws degree required by the South African Qualifications Authority (SAQA) focus strongly on critical thinking attributes, including requirements that: ‘The learner has acquired the ability to analyse and comment upon the law critically. The learner has acquired knowledge and understanding of, and ability to critically analyse and comment upon current and controversial legal issues ...The learner has developed the ability to explain, critically analyse and comment upon the relationship between law and society.’ <http://regqs.saqa.org.za/viewQualification.php?id= 22993>.

<sup>11</sup> Bean *Engaging Ideas* 3.

<sup>12</sup> Quinot 2012 *SALJ* 417.

underlying normative considerations behind legal authority when justifying any particular argument. This represents:

“a shift from a ‘culture of authority’ to a ‘culture of justification’ – that is, an understanding of the validity of a legal position not because of the force behind it (e.g., as contained in a statute or court judgment) but because of the sound normative considerations upon which it is explicitly based – our pedagogy needs to reflect justification and not authority”.<sup>13</sup>

The achievement of the twin goals of thinking critically and the effective communication of the results of that critical thinking is based on a number of building blocks. First, students must have an in-depth understanding of the legal materials, since they will otherwise find it difficult to engage with complex legal concepts at a sufficiently critical level. The inability to comprehend and engage at a critical level will inevitably lead to reduced student motivation, rendering many learners incapable of producing legal writing of the required standard.<sup>14</sup> Secondly, students must be motivated. It is argued that focusing on improving learner comprehension not only motivates students to engage at a deep level with the information, but also gives them the intellectual space to flex their critical thinking muscles in order to justify their arguments effectively.<sup>15</sup>

The key, therefore, to teaching critical thinking and writing skills lies in student motivation.<sup>16</sup> Academic engagement, however, implies more than simply being motivated to work hard, listen to instructions or respond effectively to questions posed during class. Newmann, Wehlage and Lamborn explain:

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<sup>13</sup> *Ibid.*

<sup>14</sup> This necessity for law students to engage in the learning process at a deep level is reiterated in the SAQA standards for the Bachelor of Laws degree, which recommends that learning and assessment be integrated and that assessments be designed to achieve, *inter alia*: ‘An integration of the achievement of exit-level outcomes in a way which demonstrates a ‘deep’ approach to learning and shows that the purpose of the qualification as a whole has been achieved.’ <http://regqs.saqa.org.za/viewQualification.php?id=22993>.

<sup>15</sup> Curtis and Karp make an interesting point that critical reading and critical thinking are inextricably linked: ‘Critical reading absolutely encompasses the concept of ‘critical thinking’. These two skills marry the finding of meaning with the evaluating of meaning, and indivisibly work together. Overall, critical skills should not be treated as something to be isolated – such as with specific courses or texts – but rather should be treated as a part of the atmosphere of every classroom by every teacher.’ (Curtis and Karp ‘In a Case, in a Book, They Will Not Take a Second Look!’ Critical Reading in the Legal Writing Classroom’ 2005 41 *Williamette Law Review* 293 295, making reference to Carr ‘How Can We Teach Critical Thinking?’ [www.risd.k12.nm.us/instruction/criticalthinking.htm](http://www.risd.k12.nm.us/instruction/criticalthinking.htm)).

<sup>16</sup> The idea of student motivation is specifically mentioned in the University of KwaZulu-Natal Policy on Assessment, in relation to providing feedback to students, in which it is stipulated that feedback should be ‘formulated in such a way that the student(s) can see how to improve their learning and are motivated to do so’. CO/01/0312/2012 last updated 3/9/2018. <https://soe.ukzn.ac.za/mdocs-posts/policy-on-assessment>.

“Engagement involves psychological investment in learning, comprehending, or mastering knowledge, skills, and crafts, not simply a commitment to complete assigned tasks or to acquire symbols of high performance such as grades or social approval. Students may complete academic work and perform well without being engaged in the mastery of a topic, skill, or craft. In fact, a significant body of research indicates that students invest much of their energy in performing rituals, procedures, and routines without developing substantive understanding.”<sup>17</sup>

Inspiring a large, diverse group of students to engage with the difficult, tedious, creative process of legal writing on a deep psychological level can only be achieved if learners are intrinsically motivated to learn. Learners who are intrinsically motivated to learn are driven to participate in the process, not only because they may want to attain a good mark for the module or to impress the lecturer, but simply because they love learning or because they want to understand.<sup>18</sup> The advantages of intrinsic motivation are well documented and include increasing learners’ ability to comprehend more complex materials, enhancing creativity and promoting long-term memory.<sup>19</sup>

So how do we inculcate such intrinsic motivation in our students? Part of the process is for educators to inspire their learners to excellence.<sup>20</sup> One way of providing this inspiration is to convince learners that lawyerly writing need not be a boring, lifeless exercise. Bridge makes the point that “writing is peculiarly personal; style can be more identifiable than handwriting”.<sup>21</sup> But what about *legal* writing? Is it possible that writing like a lawyer need not be dull and tedious, but that legal writing can have some soul? This article argues that it is a misconception that legal writing is a one-size-fits-all deal and that individual writing styles must be forsaken in order to produce a clear, concise piece of written work.<sup>22</sup> In fact, Bridge writes, “If a separate art of legal writing exists, it does not escape the influence of the writer. To the extent any writing becomes disembodied prose, it is unsuccessful communication between the writer and the reader.”<sup>23</sup> In other words, effective legal writing can indeed have a

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<sup>17</sup> Newmann, Wehlage and Lamborn *The Significance and Sources of Student Engagement in Student Engagement and Achievement in American Secondary Schools* (1992) 12.

<sup>18</sup> Voke ‘Motivating Students to Learn’ 2002 28 *Student Engagement*. See also Crocker 2018 *PER/PELJ* 11–12.

<sup>19</sup> Voke <http://www.ascd.org/publications/newsletters/policypriorities/feb02/num28/Motivating-Students-to-Learn.aspx>.

<sup>20</sup> In this respect, Bridge comments: ‘To attain minimal vocational proficiency is too narrow a goal, if it be a goal at all. If the law remains, or retains pretension of being ‘one of the principal’ literary professions, then lawyers, law students, and law teachers must acquire and nurture the desire for excellence.’ (Bridge 1978 *Ohio Northern University Law Review* 431.)

<sup>21</sup> Bridge 1978 *Ohio Northern University Law Review* 411.

<sup>22</sup> Allowing students to reflect their individual writing styles in their legal writing will, of course, raise further questions. Should learners earn marks for creativity or reflecting their individual writing styles? What proportion of the assessment mark should be allocated to this outcome? What are the minimum legal conventions that must still be met?

<sup>23</sup> Bridge 1978 *Ohio Northern University Law Review* 411.

soul. It is up to legal educators to convince their students that there is an art to producing an elegantly drafted, truly persuasive piece of legal writing – one that is clear, concise and unambiguous, without being dry and dull.<sup>24</sup> Calleros adds to this, stating that infusing a piece of legal writing with an individual writing style can actually enhance the persuasiveness of the piece:

“Clear, concrete, concise legal writing can and should be active, vivid, and engaging. Indeed, you can enhance the persuasive effect of your writing with a telling metaphor, a dramatic phrase, or an engaging description of events that tells a client’s story accurately but in a compelling fashion. In short, ‘law does have a poetic dimension’, and the narrative techniques employed in a novel can play a role in legal advocacy. If you can grab and hold the reader’s rapt attention with clear, concise, engaging writing, your memorandum or brief will drive your points home like a home run with the bases loaded.”<sup>25</sup>

However, motivating learners to put the time and effort into their writing that is required to elevate basic writing skills to a level of excellence requires a more creative approach to teaching than merely allowing some leeway in personal legal writing styles. Learners need to care about their subject matter and need to have a sense that learning to communicate effectively in writing could make a difference in a real, practical way. A way to stimulate student motivation and to develop in our learners a will to think critically – to breathe some life into the concept of legal writing – is to pique their natural curiosity by offering them interesting, relevant, contextual problems to solve. Bean believes in “the natural, healthy, and motivating pleasure of problems – and in the power of well-designed problems to awaken and stimulate the passive and unmotivated student.”<sup>26</sup>

Thus, it is argued that inspiring students to excellence in legal writing is a two-step process. The first is to motivate learners intrinsically by showing them that legal writing can have soul – that a creative, personal style can enhance persuasiveness, and be used to solve interesting, complex, relevant real-world problems. The second step is to encourage learners to engage at

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<sup>24</sup> In keeping with the idea that excellent legal writing will be infused with soul, Quinot posits that legal educators must take an entirely different approach to legal teaching and must consider that we are teaching within a transformative constitutional democracy. This means that legal writing, in addition to being concise and unambiguous, must embody the social context within which it operates. Quinot states that ‘matters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the law lecture hall ... The door of the law lecture hall can no longer be shut to what is going on outside it.’ (Quinot 2012 *SALJ* 415.)

<sup>25</sup> Calleros *Legal Method and Writing* (2014) 5.

<sup>26</sup> Bean *Engaging Ideas* 2–3.

a sufficiently deep level to allow them to think and write critically. It is submitted that ensuring that these curious, enquiring minds remain motivated and critically engaged requires the implementation of three teaching principles: constructive alignment (offering learners module materials that are constructively aligned and contextually relevant); learner participation (using teaching techniques that encourage class participation); and conversations in feedback (individualising the educator-learner contact).

The theoretical underpinning of these three teaching principles is discussed below with the practical application of the principles in the WiLL programme being discussed in detail in part 2 of this article.

### **3 THEORETICAL UNDERPINNING OF THREE NECESSARY TEACHING PRINCIPLES**

#### **3.1 Constructive alignment**

The first key teaching principle to be considered when designing an effective legal writing programme is constructive alignment. If a module is constructively aligned it will enhance learner comprehension by ensuring that the programme materials, teaching techniques and assessments are all logically linked and presented in order to achieve the module's intended learning outcomes (ILOs). A focus on learner comprehension stimulates intrinsic motivation by giving learners intellectual space to engage deeply and critically with the module materials. Biggs succinctly explains the process of implementing constructive alignment in a module:

“In setting up an aligned system, we specify the desired outcomes of our teaching in terms not only of topic content, but in the *level of understanding* we want students to achieve. We then set up an environment that maximises the likelihood that students will engage in the activities designed to achieve the intended outcomes. Finally, we choose assessment tasks that will tell us how well individual students have attained these outcomes, in terms of graded levels of acceptability. These levels are the grades we award.”<sup>27</sup>

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<sup>27</sup> Biggs ‘Aligning Teaching for Constructing Learning’ The Higher Education Academy [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf) (accessed 2019-07-29).

When deciding on ILOs for a module it is important to bear in mind that learners must acquire two different kinds of knowledge – both declarative and functioning knowledge. Thus, in addition to knowledge that learners are able to declare or reproduce, whether orally or in writing, they must also acquire knowledge that serves a function. With regard to legal writing, law students must acquire knowledge that will enable them to think and write like lawyers in a transformative South African context or, as Biggs points out:

“Understanding makes you see the world differently, and behave differently towards that part of the world. We want lawyers to make good legal decisions, doctors to make accurate diagnoses, physicists to think and behave like physicists.”<sup>28</sup>

Once the ILOs of a module have been defined, relevant teaching activities for the module must be determined and appropriate assessments must be designed, so as to allow learners to assimilate both declarative and functioning knowledge. Biggs emphasises the need for assessment tasks to mirror ILOs and that these must “refer to sought-for *qualities of performance*, and it is these that need to be stated clearly, so that the students’ actual learning outcomes can be judged against those qualities.”<sup>29</sup>

Lastly, educators should not only include constructive alignment in the design of any legal writing programme, but they should also take the time to explain to learners participating in the programme how and why it has been designed in this way. This should happen in the introductory lecture as it will awaken learners to the persuasive benefits of logical linkages – whether these links be in a programme or in a written work. Modelling logical linkages in this manner facilitates the development and understanding of how mindful alignment and analysis work together to deepen comprehension, enhance critical thinking, and inspire intrinsic motivation.

Effective constructive alignment of a legal writing programme enhances student comprehension of the materials associated with the legal writing activities presented in the programme, leading to much-needed intrinsic motivation for learners. Such an approach also ensures that all programme materials and activities (chosen for their contextual relevance) support critical thinking ILOs, which are essential to thinking like a lawyer; such skills are then rendered a focus of the programme rather than an unintended benefit.

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

## 3 2 Learner participation

The second key teaching principle to be considered when designing an effective legal writing programme is learner participation. This principle is best implemented by employing a constructivist teaching framework. Quinot agrees, maintaining that:

“learning can only occur through construction of knowledge, teaching must involve learners as active participants. The role of the teacher thus changes from that of the sole and authoritative holder of knowledge that must be imprinted on the blank slates of her students to a role of facilitator that must guide students’ own efforts at construction”.<sup>30</sup>

In addition to using constructivist teaching techniques, the design of class activities should embrace a scaffolded learning experience, which has been described as a “process that enables a child or a novice to solve a problem, carry out a task or achieve a goal which would be beyond his unassisted efforts”.<sup>31</sup> In this respect, Vygotsky’s theory of the zone of proximal development, which incorporates the idea of a relative expert in the field giving guided instruction to learners, is central. This theory is defined as:

“the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers”.<sup>32</sup>

By actively participating in discussions on the materials in order to contextualise the information, learners are able to construct their own knowledge as well as play an active role in the knowledge acquisition of their peers. In this way, they are able to enhance their own understanding while simultaneously motivating one another to produce high-quality, persuasive pieces of writing, rather than simply writing to complete an assigned task as quickly as possible. Hedegaard links Vygotsky’s theory of the zone of proximal development to the idea of contextualising learning, saying that, “(t)he underlying assumption behind the [Vygotsky] concept is that psychological development and instruction are socially embedded;

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<sup>30</sup> Quinot 2012 *SALJ* 420.

<sup>31</sup> See discussion on the concept of scaffolded teaching in Crocker 2018 *PER/PELJ* 5, quoting Cheyne and Tarulli ‘Dialogue, Difference and Voice in the Zone of Proximal Development’ in Daniels *An Introduction to Vygotsky* (2005) 135, quoting Wood, Bruner and Ross ‘The Role of Tutoring in Problem Solving’ 1976 17 *Journal of Child Psychology and Psychiatry* 89–100.

<sup>32</sup> Vygotsky *Mind in Society: The Development of Higher Psychological Processes* (1978). See discussion on Vygotsky’s definition of the zone of proximal development in Crocker 2018 *PER/PELJ* 5.

to understand them one must analyse the surrounding society and its social relations”.<sup>33</sup> Thus, it is essential that active, scaffolded learning opportunities be embedded in any legal writing programme.

In the constructivist teaching environment, however, the teaching and learning process is more complex than the simple transmission of information from educator to learner. Quinot and Greenbaum comment:

“The teaching-learning process is non-linear, that is knowledge does not flow from the teacher to the student in one direction. There is a complex interaction between what the teacher brings to and does in class and what the student brings to and does in class that defines learning.”<sup>34</sup>

Thus, scaffolded learning requires not only vertical learning between instructor and learner, but also horizontal peer learning between learners themselves. In this respect, Quinot comments:

“[Constructivism] implies that the richness of the knowledge community becomes a key consideration in effective teaching. Since students learn by engaging, not just on a vertical level with the teacher but also critically on a horizontal level with peers, diversity in the learning community becomes a strength, even a prerequisite. As students actively engage with a greater variety of background experiences (that is, with others that bring very different existing knowledge bases to the knowledge community) their own existing knowledge bases are increasingly challenged.”<sup>35</sup>

It is at this point of constructivist module design that challenges such as a lack of resources that may be present at the institution become apparent.<sup>36</sup> However, Biggs has a refreshingly positive take on these challenges, saying that these very problems might, in fact, force educators to include inherently constructivist learning activities that encourage deep learning and the acquisition of functioning knowledge. He states:

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<sup>33</sup> See Crocker 2018 *PER/PELJ* 11 quoting Hedegaard ‘The Zone of Proximal Development as Basis for Instruction’ 227 in Daniels *An Introduction to Vygotsky* 227.

<sup>34</sup> Quinot and Greenbaum ‘The Contours of a Pedagogy of Law in South Africa’ 2015 *Stell LR* 1 36.

<sup>35</sup> Quinot 2012 *The South African Law Journal* 421.

<sup>36</sup> It is an unfortunate reality that these kinds of challenges have been ongoing at the UKZN School of Law. For a discussion on the challenges encountered as far back as 2009 when implementing the first legal writing programme at UKZN, see Crocker 2018 *PER/PELJ* 21–23.

“In fact, problems of resourcing conventional on-campus teaching, and the changing nature of HE, are coming to be blessings in disguise, forcing learning to take place outside the class, with interactive group work, peer teaching, independent learning and work-based learning, all of which are a rich source of relevant learning activities.”<sup>37</sup>

In addition to providing intrinsic motivation to engage deeply with learning materials, active class participation creates opportunities for learners to think critically. Referencing Kurfiss,<sup>38</sup> Bean posits that when planning a module with a focus on critical thinking, learners should be presented with “‘problems, questions, and issues’ that make a course ‘assignment centred, rather than text or lecture centered’ and holds students responsible for ‘formulating and justifying’ their sources orally or in writing”. He also emphasises the importance of writing assignments “because they are perhaps the most flexible and most intensive way to integrate critical thinking tasks into a course and because the writing process itself entails complex critical thinking”, in addition to “class discussions, small group activities, and other teaching strategies that encourage students to work collaboratively to expand, develop, and deepen their thinking”.<sup>39</sup>

At this point, it must be noted that class participation can be enhanced by using a blend of constructivist teaching techniques and e-learning opportunities. It is imperative to consider participation in the wider blended-learning community and the impact that e-learning and digital information transmission has on teaching and learning. The Internet has revolutionised the way in which information can be accessed and manipulated, changing the very nature of teaching and learning. With more and more learners having access to digital information, be it on computer or smartphone, research and information gathering has become infinitely more dynamic and educators need to swim with these digital tides of change.

Quinot and Greenbaum maintain that the change in the way information is accessed, manipulated and assimilated via digital formats requires educators to incorporate blended-learning methodologies into their teaching repertoire so as to remain current with changing technology:

“It seems evident that different (or at least varied) skills are required to navigate this new knowledge world. Given the mode and ease of access to information, there is arguably less need

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<sup>37</sup> Biggs [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf).

<sup>38</sup> Kurfiss *Critical Thinking: Theory, Research, Practice, and Possibilities* (1988).

<sup>39</sup> Bean *Engaging Ideas* 5.

for memorising large portions of detailed information and more need for skills in finding and filtering information. The more fluid nature of the knowledge paradigm calls for a move away from a linear step-by-step approach to learning, to a more relational or networked approach.”<sup>40</sup>

In addition to this, multimedia tools can significantly enhance the motivational aspect of contextualising the subject matter – for example, by showing *inter alia* video clips of roleplays, news reports, and debates to illustrate real-world challenges. Quinot and Greenbaum advocate:

“[Information and communications technology (ICT)] thus makes it possible for law teachers to incorporate carefully designed real-world contexts into the learning process in a manner which is very difficult (if not impossible) to achieve in any other way. ICT can thus help the law teacher to bring the real-world context to the class without the logistical challenges of taking the class to the real-world context.”<sup>41</sup>

Thus, boosting learner participation by using scaffolded learning techniques that take advantage of horizontal as well as vertical learning opportunities in a blended-learning environment, will increase learners’ intrinsic motivation as well as improve their critical thinking skills. This has a direct impact on the achievability of the ILOs on critical thinking skills, as learners are motivated to grapple with critical thinking, which is inherent to thinking like a lawyer.

### 3.3 Conversations in feedback

The third and final key teaching principle to be considered when designing an effective legal writing programme is that of having conversations in feedback. Learners need to be guided through the process of how to write critically like lawyers through a series of conversations held with an expert in the field. Laurillard posits that, in order for effective teaching and learning to take place, it should occur within a “conversational framework” – that is, “a dialogue must take place somewhere, even if it is only in the learner’s mind”.<sup>42</sup> This idea is taken further by Flower who recommends implementing a “framework for enquiry” when

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<sup>40</sup> Quinot and Greenbaum 2015 *Stell LR* 37.

<sup>41</sup> Quinot and Greenbaum 2015 *Stell LR* 54.

<sup>42</sup> Laurillard *Rethinking University Teaching: A Framework for the Effective Use of Educational Technology* (1993) 105. See general discussion on Laurillard’s ‘conversational framework’ in Crocker *The Practical Considerations of Implementing Online Learning Technology at the Howard College School of Law, University of Natal, Durban, Using the Legal Method Module [DLA2LGM] as a Case Study, in Order to Develop an Appropriate Strategy for Its Implementation* (master’s thesis, University of Natal, Durban) 2003 29–30.

engaging in the learning process. This system of enquiry, she maintains, should go further than a simple dialogue and should take the more complex form of a negotiation as well as encourage interpretation of the knowledge being acquired.<sup>43</sup>

Gamoran and Nystrand link this idea of holding a conversation in learning to increased student engagement:

“When students' ideas are taken seriously, this tells the students that they are important members of a learning community, and the work of responding to teachers' questions is more authentic because the students can actually influence the course of the conversation. In this sense, questions that take students seriously promote engagement.”<sup>44</sup>

These conversations in feedback are a key element to improving student motivation and critical thinking. It is argued that actively engaging learners in conversations in formative feedback during the assessment process and requiring them to justify the critical thinking behind their arguments helps them become invested in their writing.<sup>45</sup> This further stimulates intrinsic motivation to elevate their standard of writing and to think more critically about what they want to say. It also serves the important purpose of ensuring that learners get exposure to what feedback means and how it can be used.

It is also important that these feedback conversations form part of a process. Writing in any form, but particularly legal writing, can be an intensely personal and sometimes overwhelming process; it is often slow and frustrating in the refinement stages – exacerbated by the amount of time and effort that needs to be invested into each persuasive word. Thus, Bean maintains that the progression of legal writing from first draft to final draft is a process that students should be forced to follow. In this way, learners are discouraged from neglecting to revise a

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<sup>43</sup> See general discussion on Flower's 'framework for enquiry' in Crocker *The Practical Considerations of Implementing Online Learning Technology* 30–31; Maharg and Paliwala 'Negotiating the Learning Process With Electronic Resources' in Burrige, Hinett, Paliwala and Varnava (eds) *Effective Learning and Teaching in Law* (2002) 90.

<sup>44</sup> Gamoran and Nystrand *Taking Students Seriously in Student Engagement and Achievement in American Secondary Schools* (1992) 40–41. Kearney and Beazley support this point by referring to Socratic teaching techniques, which they describe: 'In the traditional law classroom, teachers who use Socratic method ask questions designed to challenge their students' assertions and assumptions about cases, laws, and principles. In figuring out the answers to these questions, the students achieve a better understanding of both the legal issues being discussed and the process of legal analysis.' Just as Socratic methods are used to get students thinking critically like lawyers, Kearney and Beazley maintain that these techniques should also be used to get students writing critically like lawyers. They posit, 'Good writing results from good thinking. It makes sense, then, that tools used to teach good thinking should be combined with tools used to teach good writing when law students are learning how to conduct written legal analysis.' (Kearney and Beazley 'Teaching Students How to 'Think Like Lawyers': Integrating Socratic Method With the Writing Process' 1991 64 *Temple Law Review* 885–887.)

<sup>45</sup> Specific mention is made of the importance of providing ongoing formative feedback to students in the SAQA standards for the Bachelor of Laws degree wherein it is stated: 'Learning and assessment should be integrated. Ongoing formative assessment is required so that learners are given feedback on their progress in the achievement of specific learning outcomes.' <http://regqs.saqa.org.za/viewQualification.php?id=22993>.

first draft, and then attempting to submit an unrevised version as a final draft.<sup>46</sup> Greenbaum also promotes the value of this process in writing and suggests using repetition in feedback throughout each stage of the process in order to motivate learners:

“Students should receive feedback on their writing during the various stages in the composing process, and revising takes on a new significance as students develop their own valid professional and personal voices.”<sup>47</sup>

Novice writers therefore need to be guided carefully through the writing process by a series of conversations with a relative expert in the field providing feedback on each of their attempts. Bridge makes the point that this guidance or supervision is an essential element in the writing experience:

“In legal drafting, in seminars, in law review work, or in moot court work, a key element is supervision. Students must have expert support accessible to them. Readers who will review a written product, criticize its organization, content, and underlying assumptions, and suggest improvements are crucial to the benefit derivable from the experience.”<sup>48</sup>

These conversations in feedback can be provided in a number of different settings, each time adding to the process valuable intrinsic motivation and the opportunity to think critically. Examples include: delayed feedback given orally by a module lecturer in a large group setting some days after evaluating class work; instantaneous feedback given orally by a module lecturer in more intimate, small-group settings as learners work on a task; peer feedback given orally in small-group settings; delayed, written feedback given by a module lecturer on formal module assessments; instantaneous oral feedback given in one-on-one consultations with a module lecturer; and feedback given by peers.<sup>49</sup>

The two central themes of student intrinsic motivation and critical thinking, as well as the three key teaching principles discussed above, were applied when designing the WiLL programme. The practical application of the teaching principles that were used to encourage student motivation, leading to a deep, critical engagement with the programme content, are

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<sup>46</sup> Bean *Engaging Ideas* 8.

<sup>47</sup> Greenbaum 2004 *Stellenbosch Law Review* 14.

<sup>48</sup> Bridge 1978 *Ohio Northern University Law Review* 424.

<sup>49</sup> Bridge notes that student-controlled feedback can be just as helpful as that given by faculty: ‘The law review experience demonstrates that supervision need not be faculty supervision, as long as the critical reading is intelligent, careful and demanding.’ (Bridge 1978 *Ohio Northern University Law Review* 424.)

discussed in the second part of this article. Below are details of the structure of the WiLL programme.

#### **4 THE 2019 LEGAL RESEARCH WRITING AND REASONING MODULE AND THE WiLL PROGRAMME**

The LRWR module is an 8-credit, semesterised, second-year LLB module with an enrolment of over 300 learners per semester. Learners must each attend one double-period contact session per week. Over the past few years, in order to reduce the class size to approximately 150 learners per contact session, the class was split in half and the lecture was repeated to each group every week. The module content covered theory and practical exercises in critical thinking and legal writing skills, with some practical application. In 2019, however, the LRWR module was reimagined using a transformative, constructivist teaching pedagogical framework. The first part of the module kept a similar structure, with the class being split in two and lectures repeated once each week. These large-group lectures covered content on the theory of critical thinking and formed an essential part of the module, providing a theoretical underpinning for the materials and activities that were to follow. The latter part of the module introduced the WiLL programme, which took on a small-group, participatory, skills-based lecture format. This programme was designed, implemented and administered by a School of Law lecturer in consultation with an applied linguist working in the School of Law; it introduced an active learning ethos so as to encourage the students to put in the practical, hard work that such a module requires.<sup>50</sup>

The structure of WiLL introduced a further reduction in class sizes with the class being split into six groups of 50 students each. Learners were required to attend one weekly double-period contact session. Every week, learners had to complete lecture preparation tasks to enable them to participate in group-work activities during lectures. Assessment of the WiLL programme (comprising two written assignments worth 20 per cent each) formed 40 per cent of the assessment for the entire LRWR module. The first assignment required learners to draft a case summary and the second assignment required them to compose an article for a legal newspaper column.

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<sup>50</sup> Note that some of the positive features of previous writing interventions implemented at the UKZN Law School were incorporated into the programme. See Crocker 2018 *PER/PELJ* 19–20.

The materials, formal lecture preparation, lecture tasks and assessments were all carefully chosen and constructively aligned so as to be congruent with a constructivist teaching paradigm and blended-learning practices.

## 5 CONCLUSION

This article as a whole identifies two themes that are central to the teaching of legal writing to law students: student motivation and critical thinking. An examination of these themes through the lens of the legal writing programme case study, WiLL, reveals three teaching principles that were applied when developing the programme and that are closely linked to the central themes. These principles are constructive alignment, participation and conversations in feedback. All three principles, in addition to being closely linked to the themes of the programme are intricately intertwined, both with respect to their links within educational theory and in their practical application; thus, all must receive equal attention within the programme. This requires a commitment to student-centred, critical teaching using constructivist teaching methods.

Part 1 of this article began by giving an overview of the theoretical underpinnings of the two central themes, discussing, in particular, the way in which they relate to teaching law students how to write like lawyers. Here the importance of intrinsically motivating learners to engage deeply with the concept of critical legal writing – as well as with the programme materials used to facilitate the acquisition of this skill – was considered. It is argued that educators running an effective legal writing programme must encourage learners to want to learn and to want to be excellent at legal writing. In other words, learners must be intrinsically motivated to learn how to write like lawyers. This is not an easy task, but intrinsic motivation can be inspired in various ways, such as by revealing that legal writing can have soul – the idea that legal writing need not be dull but instead can have a personal style that assists in enhancing its persuasiveness. Learners can also be enticed into engaging more deeply with the writing that they embark upon by having their interest piqued with contextualised, relevant, interesting problems that they can solve in order to make a difference. An important part of this process is to ensure that learners comprehend the materials at a deep, critical level. This allows them the space to engage and think deeply about how to solve the problems with which they are presented using their legal writing skills. In other words, learners must be given every opportunity to excel.

The focus in part 1 of this article then shifted to a discussion of the theoretical underpinning of the three key teaching principles that were employed when designing the WiLL programme.

It was shown that each of these principles furthers student intrinsic motivation and maximises the opportunities for learners to engage in critical thought and critical legal writing.

Finally, part 1 of this article gave a detailed description of the ethos and background leading to the development of the WiLL programme, which was designed with the three key teaching principles in mind, in the context of the central themes and learning how to write like a lawyer.

Part 2 of this article explores the practical application of the four teaching principles identified as essential when implementing the WiLL programme. It scrutinises the importance of the constructive alignment of the module and the careful selection of module materials and classroom activities within a constructivist, learning environment focusing on participation and conversations in feedback. Thereafter, part 2 identifies challenges experienced and suggests recommendations for improvement. Final conclusions are then drawn in an attempt to plan a way forward within the context of a contemporary South Africa, balancing the needs of a diverse student body and the necessity to motivate law students to apply critical thinking techniques.

## **ACKNOWLEDGEMENT**

Thanks go to Dr Caroline Goodier for her assistance in designing and developing the LRWR legal writing programme.

## **MOTIVATING LARGE GROUPS OF LAW STUDENTS TO THINK CRITICALLY AND WRITE LIKE LAWYERS: PART 2**

Angela Diane Crocker  
*BSc LLB LLM*  
*Lecturer, University of KwaZulu-Natal,*  
*Attorney of the High Court of South Africa*

### **SUMMARY**

This two-part article explores two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The article examines these two themes through the lens of a case study on a legal writing programme, the “Write it Like a Lawyer” (WiLL) programme implemented at the University of KwaZulu-Natal, Durban in 2019. The design of the programme draws upon three distinct teaching principles – constructive alignment, learner participation and conversations in feedback. This article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing, containing well-substantiated arguments.

The article is in two parts.

Part 1 began by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then went on to describe the significance of the central themes to a legal writing programme such as WiLL.

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and the manner in which these principles were used to achieve the desired outcomes in the WiLL programme. Finally, the second part of the article evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

### **1 INTRODUCTION**

This is the second part of a two-part article exploring the theoretical underpinnings behind two central themes – student<sup>1</sup> motivation and critical thinking – as they relate to teaching law students how to write like lawyers.

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<sup>1</sup> Note that the terms “student” and “learner” are used interchangeably throughout this article.

# MOTIVATING LARGE GROUPS OF LAW STUDENTS TO THINK CRITICALLY AND WRITE LIKE LAWYERS: PART 2

Angela Diane Crocker

*BSc LLB LLM*

*Lecturer, University of KwaZulu-Natal,*

*Attorney of the High Court of South Africa*

## SUMMARY

This two-part article explores two central themes – student motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The article examines these two themes through the lens of a case study on a legal writing programme, the “Write it Like a Lawyer” (WiLL) programme implemented at the University of KwaZulu-Natal, Durban in 2019. The design of the programme draws upon three distinct teaching principles – constructive alignment, learner participation and conversations in feedback. This article argues that by applying these principles when teaching legal writing, law students are motivated to engage critically with legal materials, thereby enabling them to produce persuasive, logical, coherent legal writing, containing well-substantiated arguments.

The article is in two parts.

Part 1 began by focusing on the theoretical underpinnings of the main themes of the article as well as the teaching principles applied in the WiLL programme. It then went on to describe the significance of the central themes to a legal writing programme such as WiLL.

Part 2 of this article moves on to a discussion of the three teaching principles – constructive alignment, learner participation (including blended-learning techniques) and conversations in feedback – and the manner in which these principles were used to achieve the desired outcomes in the WiLL programme. Finally, the second part of the article evaluates the relative success of employing the three principles in order to further student motivation and critical thinking in the programme. The article concludes with recommendations for improvements that could be implemented in future such programmes.

## 1 INTRODUCTION

This is the second part of a two-part article exploring the theoretical underpinnings behind two central themes – student<sup>1</sup> motivation and critical thinking – as they relate to teaching law students how to write like lawyers. The article as a whole examines these two themes through the lens of a case study of a legal writing programme, the Write it Like a Lawyer (WiLL) programme, which was implemented on the Howard College Campus of the University of KwaZulu-Natal (UKZN) in 2019; in so doing, the article focuses on the three key teaching principles that were drawn upon when designing and implementing the programme. All three principles – constructive alignment, learner participation and conversations in feedback – link closely to the article’s central themes. The main contention of this article is that applying these principles to teaching legal writing in a participatory learning environment has the potential intrinsically to motivate law students to engage critically with context-embedded legal materials, thereby enabling them to improve their legal writing skills.<sup>2</sup>

Part 1 of this article began by focusing on the theoretical underpinnings behind the main themes of the article, pointing out that if students are to learn to write persuasively – like lawyers do – then legal educators must design their legal writing modules with both student intrinsic motivation and critical thinking in mind. It is argued that these two themes are intimately linked. Without being intrinsically motivated to engage deeply with the module materials and to think critically about the issues raised in those materials, learners will not be sufficiently invested in the process nor will they have sufficient depth or critical understanding of the materials to produce excellent, persuasive legal writing.

Part 1 also discussed the theory behind the three key teaching principles that were used in the design of the WiLL programme. It is argued that when designing a legal writing programme that aims to motivate students intrinsically to think critically and ultimately produce writing that persuades, first, all elements of the programme must be constructively aligned – from the choice of contextually relevant materials to the teaching techniques employed to the methods of assessment selected. Secondly, learner participation using constructivist teaching methods must be maximised, taking advantage of both vertical and horizontal learning opportunities. Thirdly, conversations in feedback must be implemented in order to provide a personalised

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<sup>1</sup> Note that the terms ‘student’ and ‘learner’ are used interchangeably throughout this article.

<sup>2</sup> See Crocker ‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’ 2018 21 *PER/PELJ* DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a1368>, fn 13, which points out that Greenbaum summarises a number of authors’ descriptions of the term ‘legal writing’, all of which emphasise that the legal writer, in addition to displaying competent grammatical skills, should also demonstrate an awareness of legal discourse and how to communicate within this community (Greenbaum ‘Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives’ 2004 15 *Stellenbosch Law Review* 3 6).

learning experience for students, aimed at encouraging critical debate and eliciting justification for the use of sources and arguments. Finally, part 1 of the article described the WiLL programme in some detail and the significance of the two central themes to this programme.<sup>3</sup>

Part 2 of this article discusses the practical implications and challenges of employing the three main teaching principles – constructive alignment, learner participation and conversations in feedback – and how these principles were applied within a constructivist teaching paradigm in order to achieve the desired outcomes in the WiLL programme. The point is made that all three principles are at the same time both discrete and overlapping, and that giving equal attention to each of the principles when designing a legal writing programme provides learners with an interlinking web of sound pedagogical design that will support student motivation and critical thinking. Finally, part 2 concludes with recommendations for improvements that could be implemented in future such programmes.

## **2 OVERVIEW OF THE 2019 WRITE IT LIKE A LAWYER PROGRAMME (WiLL)**

In 2019, the WiLL programme was incorporated as a pilot project in the latter half of a second-year LLB module – namely, the Legal Research, Writing and Reasoning module [LRWR]. Since part of the ethos of the WiLL programme was to encourage learner participation and peer-learning in small group lecture sessions, when the time came for learners to participate in this section of the LRWR module, the class of 300 was split into six groups of 50 students each. Learners were required to attend one weekly double-period contact session. Every week, learners had to complete lecture preparation tasks to enable them to participate in group work activities during lectures. The assessment of the legal writing programme (comprising two written assignments worth 20 per cent each) formed 40 per cent of the final assessment for the entire LRWR module. The first assignment required learners to draft a case summary; in the second assignment, they had to compose an article for a legal column in a newspaper.

Three key teaching principles were considered when designing the WiLL programme so as to encourage student motivation leading to a deep, critical engagement with the programme content. The first of the three principles – constructive alignment – is discussed below.

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<sup>3</sup> The programme formed part of the 2019 Legal Research, Writing and Reasoning second-year LLB module (LRWR). Details of the LRWR module will be elaborated on below. However, the focus of this article is on the 5-week legal writing intervention that formed part of the LRWR module. Note that some of the positive features of previous writing interventions implemented at the UKZN Law School were incorporated into the programme. See Crocker 2018 *PER/PELJ* 19–20.

## 2 1 The constructive alignment teaching principle

It is argued in part 1 of this article that careful consideration of the constructive alignment of a legal writing programme can cultivate intrinsic learner motivation. Intrinsic motivation can be described as the will to engage without the need for external motivating factors, students being driven simply by the desire to learn.<sup>4</sup> If they are intrinsically motivated, learners will be inspired to engage deeply with context-relevant materials and will be in a position to take advantage of the learning opportunities provided to develop their critical thinking and writing skills.<sup>5</sup> Thus, the programme design must consciously align the intended learning outcomes (ILOs), the programme materials (and the framework within which learners are to engage with those materials) as well as the process by which learners are assessed, so as to maximise opportunities for students to connect in a meaningful way with the programme content and to develop a desire to produce excellent written work.

In designing the constructive alignment of the WiLL programme, certain knowledge, skills and values outcomes were identified as being of particular importance. The programme's ILOs were specifically chosen so that learners achieving those outcomes would leave the programme having not only improved their critical thinking, reading and legal writing skills, but also having acquired the intrinsic motivation to think, read and write critically.<sup>6</sup> The ILOs were activated by a set of source materials selected for their contextual relevance and interesting, transformative nature – features that would motivate learners to critically engage with their content.<sup>7</sup> These materials, which pertained to South African dignity jurisprudence, aimed to inspire students by exposing them to excellent, persuasive legal writing that enhanced their knowledge of issues relating to this concept within an important social context. These

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<sup>4</sup> Voke 'Motivating Students to Learn' 2002 28 *Student Engagement* <http://www.ascd.org/publications/newsletters/policy-priorities/feb02/num28/toc.aspx>. (accessed 2021-02-02).

<sup>5</sup> The theoretical underpinning to this concept of constructive alignment is discussed in more detail in part 1 of this article. See Biggs 'Aligning Teaching for Constructing Learning' The Higher Education Academy [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf) (accessed 2019-07-29).

<sup>6</sup> Collectively, the programme's ILOs link closely to the graduate attributes listed in the SAQA standards for the Bachelor of Laws degree. For example, one of the programme's values outcomes – 'providing students with an opportunity to reflect on how to critically align one's own values with those embedded in South Africa's dignity jurisprudence, including the Constitution of South Africa' – links to the first graduate attribute listed in the SAQA standards – that is, 'The learner will have acquired a coherent understanding of, and ability to analyse fundamental legal and related concepts, principles, theories and their relationship to values critically'. See <http://regqs.saqa.org.za/viewQualification.php?id=22993>.

<sup>7</sup> It must be noted that, although not always possible to select interesting, well-written legal materials when teaching substantive law subjects based on complex legal materials that many students might find tedious and boring to read, the concept of intrinsic motivation must always be considered. Thus, to counteract the potential boredom, additional, interesting, values-based materials can be sourced to supplement learning and to contextualise and personalise those complex legal materials and, in so doing, inject enthusiasm into the learning environment.

contextually relevant materials also provided ample opportunity for values-based class discussions around the topic to demonstrate the importance of critical thinking, reading and writing.

The three key ILOs for this aspect of the module were:

1. knowledge outcomes, which encompassed an understanding of:
  - various case law and academic writings underpinning dignity jurisprudence in South Africa today;
  - what it is to write like a lawyer and the importance of persuasive writing and critical thinking, reading and writing in law; and
  - the difference in writing styles employed in legal journal articles, cases and newspaper articles covering legal issues;
2. skills outcomes, which encompassed the ability to:
  - critically read statutes, cases and journal articles, having reference to the importance of dignity jurisprudence in South Africa today;
  - summarise case law;
  - think and write creatively, using a personal writing style within the parameters of a clear, concise, logically coherent legal argument; and
  - formulate an argument, accessible to the general public, for a legal newspaper column, justified by multiple sources, including cases, statutes and journal articles; and
3. values outcomes, which included providing students with an opportunity to reflect on:
  - the importance of dignity jurisprudence in a transformative constitutional South Africa;
  - how critically to align one's own values with those embedded in South Africa's dignity jurisprudence, including the Constitution of South Africa; and
  - how to reflect these values when writing like a lawyer.

Once the ILOs of the module were determined, constructivist teaching techniques were then chosen to facilitate the implementation of these learning outcomes.<sup>8</sup> Finally, the ILOs were

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<sup>8</sup> Each level of Bloom's Taxonomy is addressed in the module's ILOs: knowledge (students are required to recall case information); comprehension (students are required to understand the argument and principles laid out in the journal article and case judgments, as well as understand the importance of persuasive legal writing, and summarise the cases); application (students are required to apply the knowledge gained from the case reading when discussing relevant current events); analysis (students are required to organise the ideas gained from the journal article and case judgments to create their own argument and analysis in the newspaper column assignment);

mirrored in the assessment methods employed. Details of these teaching methods and assessments are discussed in more detail below.

The materials used in the WiLL programme comprised three sources of legal writing, showcasing three different writing styles. Each of these sources was eloquently and persuasively written, and each was specifically chosen because of its distinct link to the other so as to support the learners' comprehension of the subject matter as well as their comprehension of the arguments that each source put forward.

The first source that learners were required to engage with was an academic legal journal article written by Professor Stephen Peté<sup>9</sup> that critically discussed the importance of dignity jurisprudence in South Africa, with specific reference to the writings of eminent Constitutional Court Justice Albie Sachs in the *Fourie*<sup>10</sup> judgment. This article was chosen as the first source because it was written simply and concisely as well as the fact that it was closely linked to the second source that would be introduced to the learners in due course. Peté's article demonstrated to the learners what it means to discuss an issue critically (particularly since this was an opinion drafted by an experienced legal academic who had engaged deeply with the content of the *Fourie* judgment) as well as what specific writing skills and writing style are needed to produce a persuasive legal journal article. As an added bonus, learners could familiarise themselves with the arguments and assertions of the second source – the *Fourie* case – and identify on a logical as well as an emotional level with the more complex legal language, writing style and legal conventions of a judgment.<sup>11</sup>

The second source, the *Fourie* judgment, was introduced to learners next, in order to show them the more formal, complex style of case judgment writing and how to draft a case summary. Learners were taken through a critical reading of the judgment in some detail to illustrate how mini-summaries and sub-headings were used throughout the piece by Justice Sachs to break up chunks of text and to keep the reader engaged and up to speed with the

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synthesis (students are required to synthesise the information and ideas gleaned from the case notes and journal article to create a new argument in the newspaper column assignment, as well as during class and group discussions); evaluation (class discussions focus strongly on comparing ideas and values relating to current social issues and brainstorming ways to solve these issues and, in so doing, critically align their ideas to South Africa's dignity jurisprudence).

<sup>9</sup> Peté 'South Africa's Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation' 2010 31 *Obiter* 1.

<sup>10</sup> *Minister of Home Affairs v Fourie (Doctors For Life International and Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

<sup>11</sup> The sources used and their order of presentation could be changed in future legal writing programmes. For example: first, introduce the students to the Marriage Act 25 of 1961, so that they become familiar with reading and analysing legislation; second, bring in the *Fourie* case to demonstrate how the Act was interpreted by the courts in light of the key issue of dignity; and, finally, allow students to read Peté's article, which critically discusses the important issue of dignity jurisprudence in South Africa today as it relates to the *Fourie* case.

arguments being presented. However, in addition to showing learners the necessity of a simple, structured writing style to aid in the comprehension of a lengthy legal text with complex, nuanced arguments, this judgment was selected as it showed Sachs's ability to engage in a creative, critical discussion of important social issues in such a way that readers are elegantly persuaded of his point of view. Learners were then taken, step-by-step, through the process of producing a case summary, after which they were given the opportunity to summarise the *Fourie* case in a small-group setting, using guiding worksheets.

The third source was a legal newspaper column article written by experienced legal journalist Carmel Rickard.<sup>12</sup> Although the subject matter of this source did not mirror the subject matter of the previous sources, it did link with them because of the skill applied in the article, which was case summarising.<sup>13</sup> Rickard's newspaper piece showed the learners a third and final style of legal writing – the informal, factual abbreviated writing style of newspaper journalists with a completely different target audience to that of an academic journal article or case judgment. Just as importantly, this source illustrated in a deft, uncomplicated fashion, the creative development of an argument.

Learners were assessed twice in the programme. The assessments were essential to anchor the programme within the LRWR module, which formed part of the mainstream LLB syllabus; they lent credibility to the programme and motivated learners to participate to the best of their abilities. The assessments used in the WiLL programme were closely aligned with the module's ILOs and therefore were designed to promote critical thinking (around issues such as the importance of social transformation, its practical implications and the value of dignity jurisprudence in South Africa today) and to motivate students to engage deeply with the source material by showing them that good legal writing can indeed make a practical difference.

The first assessment used was a case summary. The judgment that learners were required to summarise was drafted by Justice Langa in the *Pillay* case.<sup>14</sup> This judgment was chosen for the assessment not only because of the elegant, persuasive way in which it was written, but also because of its seamless alignment with the programme's theme of dignity jurisprudence to fit in with the ILO of understanding the value of dignity in South Africa today and testing their functioning knowledge. In addition, the *Pillay* case contains arguments with which learners would immediately be familiar, since both the *Fourie* and *Pillay* cases discuss issues relating

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<sup>12</sup> Rickard 'Lessons for Courts on Domestic Violence' (2015-09-25) *Mail & Guardian*.

<sup>13</sup> It would be preferable for the general themes of all the source materials studied in the programme to link more closely. In this way, for example, students could learn the important skill of summarising a case with the general public as the target audience, as well as how to structure a critical argument in such a newspaper article linking to the themes of the programme.

<sup>14</sup> *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

to the violation of human dignity.<sup>15</sup> In this way, learners would be able to focus on applying their case summary and critical reading skills learnt during their interaction with the *Fourie* case without being unduly distracted by unfamiliar complex arguments.

The second and final assessment was to write an article for a newspaper's legal column discussing any aspect of South Africa's dignity jurisprudence. The assignment instructions clearly defined the maximum word count and writing style. However, the topic of the assignment was kept vague by design, encouraging learners to think creatively while maintaining the need for them to justify their arguments.

Thus, the WiLL programme was constructively aligned from inception to assessment with the goal of increasing learner motivation to apply themselves to understanding the materials, thereby giving them the best possible chance of enhancing their critical reading and critical thinking skills, and, as a consequence, their legal writing skills.

## 2.2 The learner participation teaching principle

As discussed in part 1 of this article, the WiLL programme is based on a constructivist teaching paradigm. Therefore, when designing the teaching techniques to be employed in the programme, careful attention was paid to the active role that students would play in the construction of knowledge within the classroom.<sup>16</sup> Learner participation, which is the second key teaching principle, is crucial for two main reasons. First, the intrinsic motivation of the learners is triggered, raising the energy levels in the learning environment and inspiring learners to engage deeply with the materials.<sup>17</sup> Secondly, learners are empowered to think, read and write critically. Thus, when designing a legal writing module, careful attention must be paid to the teaching techniques to be applied in the module to ensure that they support active class participation. This also enables learners to hear the diversity of views and voices of their peers, allowing them to engage critically with a wide range of arguments and justifications, modelling the way in which lawyers are required to constantly evaluate various legal positions.<sup>18</sup>

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<sup>15</sup> In the *Fourie* case, the discrimination was based on sexual orientation, and in the *Pillay* case, it was based on cultural and religious practices.

<sup>16</sup> Quinot 'Transformative Legal Education' 2012 129 *The South African Law Journal* 411 420.

<sup>17</sup> Voke 2002 *Student Engagement*. Also see Crocker 2018 *PER/PELJ* 11–12.

<sup>18</sup> Bean *Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 5.

Since the overarching goal when choosing the teaching activities in the WiLL programme was to encourage class participation, as many practical vertical and horizontal peer-learning opportunities as possible were incorporated into the teaching design. The task-orientated activities presented to learners during the programme included:<sup>19</sup>

- lecturer-led class discussions to facilitate vertical learning;
- guided small-group peer work, including group discussions and group writing tasks using worksheets, to encourage horizontal learning;<sup>20</sup>
- the presentation of contextually relevant problems for critique and analysis both as a class and in small groups; and
- various blended-learning tasks.

The first step taken to encourage peer interaction was to split the class of around 300 learners into groups of no more than 50 students per group. Lectures were held in the computer LAN and each lecture was repeated six times per week in order to accommodate all the groups. Prior to attending lectures, learners were required to complete formal preparation. The two reasons behind this requirement were, first, to encourage independent learning, and secondly, to ensure learners came to lectures armed with the relevant knowledge in order to participate meaningfully in active class discussions. During the lectures themselves, vertical and horizontal peer learning took place in the form of lecturer-led class discussions and in the form of formal, guided, practical class activities in groups of three or four students per group.

### 2.2.1 *Lecturer-led class discussions*

The lecturer-led class discussions facilitated the assimilation of both declarative and functioning knowledge.<sup>21</sup> Topics discussed included:

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<sup>19</sup> The theoretical underpinnings of this concept are discussed in detail in part 1 of this article. See discussion on scaffolded teaching in Crocker 2018 *PER/PELJ* 5, quoting Cheyne and Tarulli 'Dialogue, Difference and Voice in the Zone of Proximal Development' in Daniels *An Introduction to Vygotsky* (2005) 135, quoting Wood, Bruner and Ross 'The Role of Tutoring in Problem Solving' 1976 *17 Journal of Child Psychology and Psychiatry* 89–100.

<sup>20</sup> It would be interesting to introduce a group work task that would require learners to reflect on their own challenges experienced with legal writing, followed by a group brainstorm on ways to overcome these challenges.

<sup>21</sup> As discussed in part 1 of this article, Biggs maintains that learners must acquire two different kinds of knowledge – namely, declarative and functioning knowledge. In other words, in addition to knowledge that learners are able to declare or reproduce, whether orally or in writing, they must also acquire knowledge that serves a function (Biggs [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf)).

- an analysis of contextualised persuasive writing techniques and the motivation behind improving the skills needed to write like a lawyer as well as the need to encourage a critical learning environment of justification rather than authority;<sup>22</sup>
- an analysis of the writing skills and writing style necessary to write an academic journal article as compared to those skills necessary to write a case judgment or a legal newspaper column;
- the relevance of academic journal articles for law students and lawyers and how to write an introduction and abstract for such an article;
- how to read a case and write a case summary;
- how to formulate a persuasive argument; and
- using critical reading and thinking skills to understand and critically assess the value of dignity jurisprudence in contemporary South Africa.

### 2.2.2 Guided small-group peer work

The small-group tasks incorporated two distinct aspects: first, the groups were encouraged to continue the lecturer-led discussions in small groups among their peers, thereby encouraging horizontal peer learning and critical discussion on values-based topics; and secondly, learners were encouraged to practise legal writing and thinking like a lawyer by completing practical writing tasks in class.

Groups were asked to complete a number of practical tasks, which were designed with two goals in mind: first to pique the students' interest and encourage them to think critically about values-based issues affecting ordinary South Africans; and secondly, to get them to practise legal writing as much as possible, using worksheets, short paragraphs, summaries and a series of drafts. Some of the small-group activities included:

- writing an abstract for an academic journal article;
- critically reading and summarising the *Fourie* case;
- comparing the majority and minority judgments in the *Fourie* case;
- completing a worksheet on the value of dignity jurisprudence in the *Fourie* case;

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<sup>22</sup> This concept of encouraging learners to focus on providing justification for their ideas rather than simply relying on authority is particularly important when teaching, learning and practising law in the transformative, constitutional democracy of South Africa and is discussed in part 1 of this article. Quinot explains this concept as: 'a shift from a 'culture of authority' to a 'culture of justification' – that is, an understanding of the validity of a legal position not because of the force behind it (e.g., as contained in a statute or court judgment) but because of the sound normative considerations upon which it is explicitly based – our pedagogy needs to reflect justification and not authority.'

- completing a worksheet on creating and justifying an argument in a legal newspaper column; and
- writing a series of drafts of a legal newspaper column on the general topic of dignity jurisprudence in South Africa today.

While the groups were completing each task, there was a strong emphasis on scaffolded learning with the lecturer moving from group to group to take part in the group discussions by: playing devil’s advocate where necessary to extend the learner’s critical thinking opportunities; clarifying any points of confusion that learners might have had with respect to the source materials; and providing instantaneous feedback on the completed practical group writing. All of the tasks encouraged learners to think critically by having to debate the correct answer among themselves before committing their consensus to paper and then defending this in a plenary discussion at the end of the lecture.

### *2 2 3 The presentation of contextually relevant problems*

Taking advice from Bean, who recommends piquing the curiosity of students in order to motivate them to engage deeply with a concept, when designing the class participation activities, every opportunity was used to present the learners with unique, contextualised problems to discuss as a class as well as in their small groupings.<sup>23</sup> These problems provided the perfect backdrop to motivate learners intrinsically to engage deeply and think critically. Table 1 below depicts how a number of Bean’s suggestions for the unique presentation of problems were incorporated in the WiLL programme.<sup>24</sup>

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<sup>23</sup> Bean *Engaging Ideas* 2–3.

<sup>24</sup> Bean *Engaging Ideas* 6–7.

**Table 1: The presentation of problems in the WiLL Programme**

<b>Bean’s Suggestion for Problem Presentation</b>	<b>WiLL Activity</b>
“Problems presented as thought-provokers for exploratory writing” and “problems presented as tasks for small group problem solving”	Learners were required to complete in-class worksheets in groups. These worksheets required learners, after some group discussion, to provide critical opinions on questions on the text currently being studied.
“Problems presented as formal writing assignments”	The second assignment that learners were required to complete was a persuasive legal writing assignment, which formed part of their formal evaluation. This assignment had learners formulating an argument as part of a legal newspaper column. Students were instructed to draw justification for their argument from three sources: Peté’s journal article; the <i>Fourie</i> case judgment; and the <i>Pillay</i> case judgment. All of these had been extensively covered in class by this time.
“Problems presented as starters for inquiry-based class discussions”	Contextualising learning and how to write persuasively was a central focus through the WiLL programme lectures. Learners were expected to apply their minds to this concept each time when justifying their viewpoints in a class discussion.
“Problems presented as think-on-your-feet questions for in-class ‘cold calling’”	General discussions on the value of dignity jurisprudence involved the lecturer posing off-the-cuff questions to individual members of the class, asking them their opinions, as well as to the class in general to brainstorm ideas on the topic.

#### 2 2 4 Blended-learning tasks

Learner participation was also encouraged by introducing a blended-learning aspect into the programme. The WiLL programme classes were held in the university computer LAN, with

each group of three learners being assigned one computer. This enabled them to access materials and to complete group work tasks while in class. Class notes, PowerPoint presentations and assignment instructions were all made available on the university e-learning platform Moodle. However, learners were required to access additional source materials (such as the academic journal article and case judgments) directly from the Internet or legal databases for perusal during class. In addition, learners were given access to a podcast of an interview with Justice Albie Sachs, which was valuable in further contextualising the subject matter of the programme.<sup>25</sup> In the words of Greenbaum and Quinot, “confronting students with the real-world story behind a particular case in multimedia format can be a powerful instrument in facilitating engagement with the contextual nature of law and harness(ing) the “cognitive power of storytelling”.”<sup>26</sup>

In addition to active class participation, made possible by the use of constructivist teaching techniques and blended-learning opportunities, learners were provided with unique, highly individualised conversations in feedback so as to promote motivation and enhance the critical learning process.

### **2.3 The conversations in feedback teaching principle**

The final key teaching design principle (conversations in feedback) speaks to the idea of improving student motivation by providing more one-on-one, scaffolded learning opportunities for the learners, thus catering for different learning styles, while using a constructivist teaching methodology.<sup>27</sup> To facilitate these conversations, programme instructors are required to work with learners individually through guided group work as well as oral and written feedback on individual and group work student tasks and assessments. This principle makes use of expert-novice interaction in terms of which a relative expert in the field gives specific, directed instruction to the learners on an individual basis. Learners are encouraged to participate in conversations about the feedback received on their writing, both with their peers and with the

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<sup>25</sup> The Story of Judge Albie Sachs ‘I Was Born Into It – Judge Albie Sachs’ What’s Your Story? Heartlines <https://www.youtube.com/watch?v=OkBialqGsis&feature=youtu.be&list=PLD46IzNE0l-ECI-4n5nTPGdFoDkS-aQmY> (accessed 2021-02-02).

<sup>26</sup> Quinot and Greenbaum ‘The Contours of a Pedagogy of Law in South Africa’ 2015 26 *Stell LR* 54.

<sup>27</sup> The theoretical underpinnings of this concept are discussed in part 1 of this article. See Laurillard *Rethinking University Teaching: A Framework for the Effective Use of Educational Technology* (1993) 105; and general discussion on Laurillard’s ‘conversational framework’ in Crocker *The Practical Considerations of Implementing Online Learning Technology at the Howard College School of Law, University of Natal, Durban, Using the Legal Method Module [DLA2LGM] as a Case Study, in Order to Develop an Appropriate Strategy for its Implementation* (LLM thesis, University of Natal, Durban) 2003 29–30.

person giving the feedback. Boughey likens these conversations in feedback to having a “critical friend” or a “sounding board”, all of which aid in the writing process. He says:

“[T]he process of having to justify, explain, rephrase or clarify arguments for a critical audience reinforces the writer’s own understanding; knowing that one may subsequently be forced to justify what one has written makes writers more likely to anticipate some of that criticism as they write. The presence of a critical friend, or sounding board, can thus be instrumental in moving the writer towards the practice of ‘expert writers’ ‘who treat the process of composing an essay as a complex task of shaping a communication that will appeal to and convince an intended audience rather than simply writing down everything they know on a topic.’”<sup>28</sup>

Thus, in implementing the principles mentioned above in the WiLL programme, care was taken to provide as much individual formative and summative feedback to the learners as possible. Cognisance was taken of previous writing interventions implemented at UKZN, which noted that providing in-depth, personalised, written feedback on a number of drafts of student written work was pedagogically sound.<sup>29</sup> However, in the current programme, the student feedback was enhanced by placing a greater focus on individual, instantaneous oral feedback.

Learners were required to attend the penultimate lecture of the programme having completed a first draft of their newspaper legal column assignment. Then, after discussing the first stage of their progress in developing an argument for their assignment in a large-group setting, with learners also providing feedback on their peers’ progress, the class was divided into small groups and instructed as follows:

1. Learners must interrogate the lecturer-led class discussion further with their peers in their small groups.
2. Learners must then each present their arguments to the other members of their group who must give oral feedback on these arguments. This feedback should not be limited to the nature of arguments, but should also interrogate the justification<sup>30</sup> for the argument.

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<sup>28</sup> Boughey ‘Department-Specific Writing Centres Linked to Tutorial Programmes: The Quest for Quality’ 2012 26 *SAJHE* 51 55, referencing Brumfit *Problems and Principles in English Teaching* (1980) and Resnick ‘*Instruction and the Cultivation of Thinking*’ in Entwistle (ed) *A Handbook of Educational Ideas and Practices* (1990) 698.

<sup>29</sup> See Crocker 2018 *PER/PELJ* 20.

<sup>30</sup> The idea of justifying an argument rather than merely quoting authority is developed by Quinot and discussed in more detail in part 1 of this article (Quinot 2012 *SALJ* 417).

3. Learners must also give feedback on grammar, punctuation, logical flow, structure and the presence of critical thinking in the presentation.

While the small groups were interacting, the module lecturer moved from group to group, providing instant oral feedback on students' arguments and taking part in the small-group discussions. After completing this exercise and receiving advice from the programme expert and peers in their groups, students were then required to write and rewrite subsequent drafts.

So, having had the opportunity to brainstorm arguments during class and the space to refine their thinking and writing in this regard in small groups and in their own time, learners were afforded the opportunity to receive focused, one-on-one oral feedback from the module lecturer during individual feedback consultations. Learners used these consultations to explain the thought process behind the development of their arguments, and then debated with the module lecturer their justification for these arguments. These sessions thus operated as an extension of the peer discussions that the learners had participated in during the class small-group sessions. Discussion in these individual consults also centred around the argument and flow of the article, as well as the target audience, effectiveness of writing style, grammar and punctuation, and overall persuasiveness of the writing. Learners were then given a chance to reflect on this discussion before making the necessary amendments to their writing and submitting a final draft for formal assessment, which received summative written feedback. It was encouraging to note that the process of having conversations in feedback and negotiating reasons for revisions on student writing worked effectively and a marked improvement was noticed by the lecturer in terms of learners' subsequent drafts.

In carrying out this series of writing tasks, which required numerous drafts and an in-depth, ongoing critical dialogue with an expert in the field around formative and summative feedback comments, learners were forced to engage fully in the process of writing. This process then, is best implemented using a scaffolded teaching methodology within the framework of the expert-novice theory, with a strong emphasis on repetition and individualised feedback. In this way, students are guided step-by-step by a relative expert in the field through multiple drafts of a piece of writing, gradually moulding their first draft attempts into polished final drafts.

The three principles of constructive alignment, learner participation and conversations in feedback discussed in part 1 and applied in part 2 of this article represent significant positive features of the WiLL programme. However, the programme also encountered a number of challenges that would need to be resolved in future legal writing programmes. These challenges are addressed below.

### **3 CHALLENGES ENCOUNTERED ON THE WiLL PROGRAMME AND RECOMMENDATIONS FOR IMPROVEMENT**

Three main challenges were encountered during the implementation of the WiLL programme: insufficient staffing resources; limited use of digital tools to enhance constructivist teaching activities; and lack of learner preparation. In one way or another, all of these challenges diminished the intrinsic motivation of the learners and reduced their opportunities to engage and think critically.

#### **3.1 Insufficient staffing resources**

The first challenge encountered was that of insufficient staffing resources. Only one lecturer was appointed to run – that is, design, teach, consult and assess – the five-week legal writing programme with 300 students. The structure of the WiLL programme (featuring repeat-teaching as well as oral, formative feedback and written, summative feedback on assessments and group writing tasks) generated an extremely heavy teaching load for one lecturer, who, of course, also had other teaching and research responsibilities. In addition, it was an impossible task for one lecturer to engage critically in every small-group discussion and attend to every query generated during the double lecture period allocated to the module each week; thus some students missed out on this valuable learning experience. It was also impossible for one lecturer to consult individually with all 300 learners in order to hold a meaningful conversation in feedback; this would obviously affect student motivation for those learners who were not given the chance to engage in these sessions.

However, although the lecture load required by the programme was tiring and time-consuming, it was at the same time extremely gratifying for the lecturer to notice learners coming alive during class discussions on values-based topics. Learners who at first were shy to speak up during class began responding with energy and enthusiasm to questions posed as the participatory teaching techniques were rolled out in the programme. Spontaneous debate also broke out on numerous occasions among learners during the small-group activities, with students commenting time and again that they had received fresh insights into the importance of protecting dignity in South Africa today. On many occasions, a number of students continued debating issues for some time after the allotted lecture time was over, showing intrinsic motivation to learn and to subject the issues at hand to critical analysis.

There are two potential solutions to the problem of insufficient staffing resources:

1. Written and oral feedback could be shared among all School of Law lecturers. Legal writing and the ability to think critically are skills that must permeate all aspects and levels of the LLB programme and, as such, this load should be shared across the curriculum, which would work to ease the teaching load. Synergy between skills-based modules and substantive law modules within the same academic year could also be explored. Assignments could be linked across two modules, with lecturers sharing the marking burden across the modules, taking advantage of the legal writing instruction given in the skills module and the legal content disseminated in the substantive law module. This recommendation would require some debate among School of Law staff members and, of course, authorisation from the School of Law executive staff since there is a strong chance that it would only be supported by other staff if the additional teaching was factored into their formal teaching loads.
2. Alternatively, final-year LLB students who have taken on the role of tutors as part of the final-year Public Law elective module “Teaching Legal Skills” at UKZN, Howard College, and who have received substantial peer tutor training as part of this module, could be used to provide immediate oral feedback on in-class, small-group written work and discussions.<sup>31</sup> In addition to the inherent legal writing skills that the Law School tutors possess by virtue of the fact that they are final-year law students, these students also receive weekly training on providing feedback on student work, as well as in the teaching methodologies relating to small group facilitation. The use of student tutors, rather than School of Law staff members, could be an important way of addressing the resource constraints of the programme.<sup>32</sup>

### **3 2 Lack of learner preparation**

The second challenge encountered was the lack of learner preparation. Some learners did not complete the lecture preparation tasks, reducing the quality of class and small-group discussions. The classroom tasks were implemented to encourage learners to think critically by

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<sup>31</sup> See Greenbaum *Teaching Legal Writing in a South African Context: An Evaluation of the Work of Student Tutors in Assisting with the Development of Legal Writing Skills in First Year Law Students at One South African Law School* (Master of Education dissertation, University of Natal) 2001 79–83. Also see Boughey 2012 *SAJHE* 55.

<sup>32</sup> See detailed discussion in Crocker ‘Developing Factors to Underpin a Legal Writing Programme at the University of KwaZulu-Natal, Howard College, School of Law: An Analysis of Two Writing Interventions’, submitted for publication.

teaching them to justify their ideas and to communicate those justifications effectively. However, those students who were under-prepared were reluctant to speak out in class discussions, which adversely affected class motivation as well as the depth of critical debate. For example, learners were required to come to class prepared to give informal presentations of the arguments contained in the first draft of their newspaper column assignments in small-group clusters. However, there were some groups where certain students were simply not prepared and thus could not give a meaningful presentation of their arguments; thus these individuals did not receive valuable peer critique and the group could not participate in an in-depth, critical discussion during this time. It must be noted, however, that although this lack of learner preparation did have some negative effect on student motivation and critical discussion, there were a number of learners who did prepare effectively and participate meaningfully in class discussions and critical debates. The participation from these learners was sufficient to demonstrate that the constructively aligned, participatory teaching techniques implemented were effective in increasing student motivation to think critically and to instigate vigorous debate on various values-based discussion topics. Learner motivation and participation could also possibly be improved if the materials studied and skills learnt in this legal writing skills module were more overtly linked to the students' other substantive law modules for which they were registered in the same year. If students' participation and success or failure in the Legal Writing module was closely linked to their success or failure in other second-year modules, this could be a strong motivating factor.

A potential remedy for the lack of learner preparation is suggested by Fink, who makes the point that learners can be intrinsically motivated to prepare and read ahead of lectures by making them aware that they will be held accountable for their preparation. Here are two examples of how students can be held accountable for their lecture preparation:

1. An assessment quiz on the relevant material can be administered before beginning the class activities.<sup>33</sup> These in-class assessment quizzes can be administered online. These quizzes are easy to set up online and, since the lectures all take place in the computer LAN, they will also be easy to administer. Learners will also be discouraged from skipping class since doing so will mean that they will miss the quiz and a chance to earn marks in the module.

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<sup>33</sup> Fink *Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 115.

2. Learners can be forewarned that they are expected to take part in an informal presentation or small-group discussion and that a mark – albeit a low percentage of the overall module mark – will be allocated for their effective participation. School of Law student tutors could be used to facilitate and evaluate these presentations. Alternatively, learners could be expected to hand in a single page, setting out their argument and justification, taking into account their individual learning styles, and receive a mark for this. So, for example, visual learners could submit a flow diagram or mind map of their argument, and linear learners could submit this information in point form. This lecture preparation could be marked by the School of Law tutors.

### 3.3 Limited use of digital tools

The third challenge encountered was that although some digital tools, such as the Albie Sachs Life Story podcast, were used during the WiLL programme in order to enhance the teaching and learning experience, more could have been done to exploit such resources. It is well documented that incorporating e-learning and digital tools into a constructivist teaching strategy will enhance student learning.<sup>34</sup> These digital resources can have a positive effect on intrinsic motivation and critical thinking in a number of ways, four of which are mentioned below.

First, learners can witness, via videos and podcasts posted on the Internet, actual court scenes, thought-provoking debates or inspirational speeches by prominent leaders. Secondly, learners can be given opportunities to connect with other learners and educators at institutions around the world, enabling them to tap into the wider digital community and allowing them to contextualise information in a very real way. Thirdly, exposing learners to digital tools can also improve their computer and digital research skills, which will serve them well on entering the legal profession. Fourthly, the 2019 Open University Innovation report makes the interesting observation that using digital tools as a pedagogical enhancement can allow learner thinking to become visible. For example, digital response systems can allow individual learner responses around a class discussion question to be represented visually as the discussion continues; visually comparing and contrasting responses, then and there, allows for inclusivity from a

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<sup>34</sup> For example, see Crocker 'Blended Learning: A New Approach to Legal Teaching in South African Law Schools' 2006 31 *Journal for Juridical Science* 1–25.

greater number of participants and adds depth and contextualisation to the discussion.<sup>35</sup> Finally, the Open University report also mentions that digital tools can be used to facilitate “just-in-time” teaching strategies. These are online activities that learners are required to complete as preparation for lectures. Educators can then integrate these learner responses into their upcoming teaching activities, essentially extending the constructivist teaching methods outside of the classroom, again adding depth to class participation. Most importantly, the report posits:

“The assignments and the way in which they’re used is not only about making student thinking visible for the teacher. This approach makes students more aware of their own thinking and prompts them to reflect on their learning process. They have opportunities to shed light on their misunderstandings. Students become aware of what they can do and what they understand, and can identify topics that are important to work on further.”<sup>36</sup>

However, it is important to remember that, as exciting as the opportunity to make student thinking visible through new technology may seem, one must not lose sight of the fact that, first and foremost, sound pedagogical principles must always be followed.<sup>37</sup>

## 5 CONCLUSION

This article as a whole examines the two central themes of student motivation and critical thinking in the context of teaching the skill of persuasive legal writing to second-year law students at the University of KwaZulu-Natal, Howard College, in the WiLL legal writing programme. The teaching design of the WiLL programme fits within a constructivist teaching paradigm and employs three key teaching design principles: constructive alignment, learner participation and conversations in feedback – all of which are closely linked in educational theory.

Part 1 of this article examined the theoretical underpinnings of the two central themes as well as the three teaching design principles employed in WiLL. It was pointed out that in order for students to learn how to think and write like lawyers it was imperative that they were able to engage critically with the values-based knowledge being disseminated and with the persuasive legal writing skills being demonstrated in the programme. However, students would

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<sup>35</sup> Ferguson, Coughlan, Egelanddal, Gaved, Herodotou, Hillaire, Jones, Jowers, Kukulska-Hulme, McAndrew, Misiejuk, Ness, Rienties, Scanlon, Sharples, Wasson, Weller and Whitelock *Innovating Pedagogy 2019: Open University Innovation Report 7* (2019) 36.

<sup>36</sup> Ferguson *et al* *Innovating Pedagogy 2019* 37.

<sup>37</sup> Ferguson *et al* *Innovating Pedagogy 2019* 38.

need to be intrinsically motivated to spend the time and energy required to hone these skills. Part 2 of this article has discussed the practical application of the three key teaching principles in the WiLL programme. All three of these teaching principles represent significant positive features of the programme and the student response to the use of these techniques was overwhelmingly positive.

The constructive alignment of the programme (beginning with a focus on the critical reading of a journal article setting the scene for the Constitutional Court case to follow) allowed students to come to grips with the complex wording and values-based arguments contained in the judgment. It is submitted that without this initial soft introduction to the themes contained in the judgment, students might have struggled to comprehend the subtle writing nuances that added to the persuasiveness of the judgment and might not have noticed the logical persuasive links contained in the writing. After receiving a critical introduction to the case and to the life and personality of the man who penned the judgment, students were eager to read further and motivated to take part in an in-depth critique of the ideas put forward in the case.

The constructive, participatory teaching activities incorporated in the programme further motivated the learners and resulted in lively, critical debate during class on current values-based issues affecting ordinary South Africans. Many students continued to participate in discussions on the contextually relevant materials even after the lecture was over, inspired by the valuable insights that they were getting into their peers' backgrounds and world views. The digital tool in the form of an inspiring podcast on the life of a Constitutional Court Justice also played a part in motivating students to engage deeply with the material being studied.

The views formed during the class and peer-group discussions translated into a critical writing style as persuasive arguments were developed in the participatory writing tasks that students completed both in small groups and individually. This was complemented by the conversations in feedback initiated during peer-group discussions and in the oral feedback given by the lecturer. A marked improvement in writing style, logical linkages in arguments and overall persuasiveness of students' written class activities and assessments was noticed over the course of the semester, after students had received extensive oral feedback from both their peers and their lecturer.

However, in a resource-constrained environment such as that at UKZN, there are a number of challenges to overcome before it is feasible to implement a high quality resource-hungry programme such as this. The challenges identified during the implementation of the WiLL programme include: insufficient staffing resources; lack of learner preparation; and limited use of digital tools. A number of creative solutions to the challenges highlighted above were

suggested, including: employing the services of student tutors to provide ongoing formative oral and written feedback in both group and individual settings to help alleviate the staffing resource deficits; incorporating online quiz assessments to encourage students to prepare for lectures; and making better use of digital tools to enhance the constructivist teaching methods already employed, such as student digital response tools to make student thinking visible.

In conclusion, from the insights gleaned in parts 1 and 2 of this article, it is submitted that, with creative thought, it is possible to motivate large groups of second-year law students at UKZN, Howard College to put in the time and effort necessary to improve their legal writing skills and to teach them how to think and write critically about values-based issues affecting ordinary South Africans today.

# **MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS: CONTEXTUALISING LEARNING IN THE “WRITE IT LIKE A LAWYER” CASE STUDY**

Angela Diane Crocker  
*BSc LLB LLM*  
*Lecturer, University of KwaZulu-Natal,*  
*Attorney of the High Court of South Africa*

## **SUMMARY**

This article explores the incorporation of contextualisation as a teaching method in legal writing programmes in South African law schools. The article argues that teaching legal writing using contextualisation can take students on a transformative journey as they learn how to write like lawyers. This will enhance student comprehension and motivation, inspiring them to engage critically with the learning materials and encouraging them to transform both on a personal level and in the context of practising law within South Africa’s constitutional dispensation. This concept is examined through the lens of a case study on a legal writing programme, the “Write it Like a Lawyer” [WILL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The article begins by emphasising the importance of critical thinking and student motivation when teaching students how to write persuasively. It then goes on to describe the significance of transformative, values-based teaching in South Africa today. The article concludes with recommendations for further research that could be carried out to inform the implementation of future legal writing programmes in South African law schools.

## **1 INTRODUCTION**

“Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted, if not impossible. Good lawyering appreciates and is sensitive to the power of language to persuade or antagonize, facilitate or hinder, clarify or confuse, reveal or deceive, heal or hurt, inspire or demoralize.”<sup>1</sup>

This quote emphasises the influence that persuasive legal writing can have on a target audience and makes the point that a well-written legal document can have the power to produce an intended outcome. In a recent two-part article in this journal, the author argued that law students must be able to think critically – like lawyers – in order to write critically and produce high-quality, persuasive legal writing. Also, it was submitted that students had to

<sup>1</sup> Feerick “Writing Like a Lawyer” 1994 21(2) *Fordham Urban Law Journal* 381–388.

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## **1 INTRODUCTION**

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This quote emphasises the influence that persuasive legal writing can have on a target audience and makes the point that a well-written legal document can have the power to produce an intended outcome. In a recent two-part article in this journal, the author argued that law students must be able to think critically – like lawyers – in order to write critically and produce high-quality, persuasive legal writing. Also, it was submitted that students had to be intrinsically motivated to engage with their learning materials and develop their ability to think critically.<sup>2</sup> The article further discussed three distinct teaching principles that are instrumental in intrinsically motivating students to engage with their writing in order to produce logical, coherent text containing well-substantiated legal arguments. These teaching principles are constructive alignment, student participation and conversations in feedback. The article also stated that each of these three principles embraces constructivist, participatory, peer-learning teaching methodologies. Part One outlined the theoretical underpinnings of the pedagogical practices considered essential to teaching and learning in a legal writing programme. Part Two focused on how the teaching principles discussed in Part One were applied in practice to the “Write it Like a Lawyer (WiLL)” case study.<sup>3</sup> This legal writing programme was piloted in 2019 at the University of KwaZulu-Natal, Durban (UKZN).<sup>4</sup> The WiLL programme formed part of a larger action research study comprising four iterations of legal writing programmes carried out over a period of about 10 years at UKZN.

Upon further evaluation of the pedagogy employed in the WiLL programme, however, it became clear that there is a further teaching principle that plays an equally important role in motivating law students to think and write critically. This additional teaching principle is transformative contextualisation.<sup>5</sup>

The purpose of this article is to expand on the discussion of the teaching principles that were incorporated into the WiLL legal writing programme by examining the transformative-contextualisation teaching principle. This teaching principle is particularly significant when striving to enhance student motivation, since the contextualisation of learning materials within

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<sup>2</sup> Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1’ 2020 41(4) *Obiter* 751–766.

<sup>3</sup> Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2’ 2021 42(1) *Obiter* 1–19.

<sup>4</sup> The face of teaching has forever changed since the advent of the Covid-19 pandemic so as to incorporate online teaching, or blended-learning practices at the least. However, although an in-depth discussion of online teaching techniques is beyond the scope of this article, it must be noted that the WiLL legal writing programme was conducted as a face-to-face programme before the Covid-19 restrictions on teaching practices were implemented. The pedagogical principles underpinning the concept of transformative contextualisation outlined in this article, however, remain unchanged, whether they are implemented solely online, in a blended-learning approach or in a face-to-face teaching environment. Also, the larger study referred to above, of which the WiLL programme forms a part, does address the necessity of using online and blended-learning teaching techniques post-pandemic and how this might impact the practical implementation of a legal writing programme using the teaching principles mentioned in this article.

<sup>5</sup> It must be noted that the term ‘transformative contextualisation’ was coined by the author.

the personal experiences of the students and in a contemporary, transformative South African constitutional democracy enables students to engage with materials in a very real way, thereby piquing their interest and increasing motivation. Thus, this article examines the importance of transformative teaching in South Africa today. It also considers how the contextualisation of legal study materials can be an important motivating factor when encouraging students to engage deeply with learning material – thereby inspiring the critical thought required to produce persuasive writing.

## 2 THINKING LIKE A LAWYER IN ORDER TO WRITE LIKE A LAWYER

Law students must be taught the skill of critical thinking. Wegner describes “thinking like a lawyer” as “dealing with uncertainty in a very profound way” or, in an interesting turn of phrase, “domesticating doubt”. She maintains that “uncertainty is inevitable in every profession that introduces students to situations that are abstract in the first instance, but then are shaped in reality by a host of individual circumstances”.<sup>6</sup> Thus, if legal educators are to teach their students how to think like lawyers, they need to teach them strategies for dealing with uncertainty. For example, law students must be taught how to reason by posing questions, developing a routine, and by reconstructing knowledge.<sup>7</sup>

Much has been written about the production of a persuasive piece of legal writing being a process, and about the importance of critical thinking to that process. Bean believes:

“Good writing ... grows out of good talking – either talking with classmates or talking dialogically with oneself through exploratory writing. A key observation among teachers of critical thinking is that students, when given a critical thinking problem, tend to reach closure too quickly. They do not suspend judgment, question assumptions, imagine alternative answers, play with data, enter into the spirit of opposing views, and just plain linger over questions. As a result, they often write truncated and underdeveloped papers.”<sup>8</sup>

So, students who are learning how to write need to learn how to engage critically with the material they are writing about. They need to be made aware that legal writing – good,

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<sup>6</sup> Wegner ‘Better Writing, Better Thinking: Thinking Like a Lawyer’ 2004 10 *The Journal of the Legal Writing Institute* 9–22.

<sup>7</sup> Wegner 2004 *The Journal of the Legal Writing Institute* 14.

<sup>8</sup> Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 7.

persuasive legal writing in any case – is not an easy process and that it involves an “intellectual and often emotional struggle”.<sup>9</sup> Bean argues:

“[S]tudents come to college imagining knowledge as the acquisition of correct information rather than the ability, say, to stake out and support a position in a complex conversation. Eventually, students develop a complex view of knowledge, where individuals have to take stands in the light of their own values and the best available reasons and evidence.”<sup>10</sup>

However, merely thinking like a lawyer is not sufficient, students must also acquire the skill of writing like a lawyer. But what is it to “write like a lawyer”? Feerick speaks of sound advice received as a young lawyer from experienced legal professionals who emphasised that “legal writing must be clear, precise, factually-based, and ethically sound”.<sup>11</sup> Greenbaum states that the term “legal writing” implies:

“[a]n understanding of rhetorical structure and certain stylistic conventions, and an appropriate use of legal terminology within a range of fairly well-defined genres of legal texts, such as judgments, legal opinions, heads of argument and formal communications between members of the discourse community, as well as written communications to non-members, that is clients.”<sup>12</sup>

The nature of legal writing, however, is often more nuanced than this and may take on different characteristics in order to achieve a desired outcome. This outcome may be to persuade a client to accept a legal opinion using simple, clear wording devoid of legal jargon; or to persuade a judge of a client’s innocence in legal heads of argument using clear, unambiguous legal terminology and legal justification; or to provide an opportunity for negotiation at a later date in a labour contract by intentionally leaving certain clauses open-ended; or to draft government regulations using clear and unequivocal technical phrasing. Feerick illustrates the nuanced nature of legal writing:

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<sup>9</sup> Bean *Engaging Ideas* 19.

<sup>10</sup> Bean *Engaging Ideas* 25.

<sup>11</sup> Feerick 1994 *Fordham Urban Law Journal* 387.

<sup>12</sup> Greenbaum ‘Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives’ 2004 1 *Stellenbosch Law Review* 3–21, discussing the ideas of Benson in Benson ‘The End of Legalese: The Game is Over’ 1985 *Review of Law and Social Change* 518–522.

“Some language that seems to be bad legal writing is not that at all. Vagueness or ambiguity is sometimes deliberate. It may result from compromises which are necessary to resolve a present dispute even though the possibility of future disagreement or even litigation is left open.”<sup>13</sup>

Thus, legal writing must use whatever literary devices are necessary to communicate persuasively. This is not an easy skill to teach but it can be done, and it begins with student motivation.

### 3 MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS

Bean argues that, in order to think critically and write persuasively – like lawyers – students must engage deeply with the topic and with the materials underpinning that topic. In order to engage deeply, they must talk about the topic, be patient and sit with the topic, suspend their own judgement and look at alternatives, pose questions to expose any doubt contained in the materials, and enter into the spirit of opposing views.<sup>14</sup> In this way, they will then be in the position to deconstruct the doubt that was exposed so that their knowledge of the topic can ultimately be reconstructed.<sup>15</sup> Thus, students must realise that there is no one correct answer. Instead, they must be encouraged to take a stand in light of their personal values and the best available reasons supporting their decision.

Getting students to engage deeply with the required legal materials to produce well-written, critical comment requires motivation.<sup>16</sup> Keller makes the assumption that providing students with motivation is, for the most part, the responsibility of the educator. He states:

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<sup>13</sup> Feerick 1994 *Fordham Urban Law Journal* 382.

<sup>14</sup> Bean Engaging Ideas 5.

<sup>15</sup> Wegner 2004 *The Journal of the Legal Writing Institute* 14.

<sup>16</sup> There is extensive literature confirming the importance of student motivation in effective teaching and learning. Keller ('How to Integrate Learner Motivation Planning into Lesson Planning: The ARCS Model Approach' *Paper presented at VII Seminario, Santiago, Cuba* 11) writes: '[There has] never been any doubt about the importance of learner motivation, but there have been difficulties obtaining methods and approaches for systematically predicting and influencing motivation'. Keller advocates the use of the ARCS model of motivation, which, he writes, '(is) based on a synthesis of motivational concepts and characteristics into the four categories of attention (A), relevance (R), confidence (C), and satisfaction (S). These four categories represent sets of conditions that are necessary for a person to be fully motivated' (Keller *Paper presented at VII Seminario, Santiago, Cuba* 2). However, Keller also contends that, despite being widely recognised and implemented around the world, this model is still evolving and that alternative approaches will still be developed. See also Keller 'Strategies for Stimulating the Motivation to Learn' 1987 *Performance and Instruction* 1–7.

“This assumption is important because educators, both designers and instructors, all too often assume that motivation is the student’s responsibility. ‘I can design (or teach) a good course,’ we often hear, ‘but it’s up to the students to decide if they want to learn it.’”<sup>17</sup>

Bean’s simple, practical approach of getting students to talk can be used to great effect to enhance student motivation to engage with legal material at a deeper, more critical level. If students are offered a range of materials that lend themselves to alternative views and creative solutions, this will spark their imagination and the will to start talking. They can then develop the stamina to continue this communication beyond the surface level. Then, as these students develop intellectually in a supportive learning environment, they can learn how to formulate insightful opinions and persuasive, cogent, complex arguments from disparate sources and evidence. Encouraging students to talk among themselves in groups or in pairs or in lecturer-led class discussions is the first step to motivating them really to think about the issues at hand. The more they talk in a guided environment, the more critical and worthwhile the discussions will become. However, Bean’s view that this approach needs time to embed in the minds of the students is also vitally important when considering the intrinsic motivation of students.

Materials must be carefully chosen around a complex, creative, central theme. This will allow them to delve deeper into more critical discussions about the topic, inevitably leading to more nuanced and interesting insights. These discussions are key factors in enhancing the intrinsic motivation of law students. Materials that contextualise issues so as to resonate with students at a personal level and transform their mindsets in a broader, values-based societal context can raise students’ interest level in class discussions and lead them on to more critical debates. One of a number of teaching principles that can be used to motivate students is transformative contextualisation.

#### **4 THE TRANSFORMATIVE-CONTEXTUALISATION TEACHING PRINCIPLE**

Implementing the transformative-contextualisation teaching principle in a legal-writing programme requires a great deal of thought to be given to the type of materials used to encourage intrinsic student motivation. It is vital that materials be contextualised. In other words, the materials about which students will be writing must place the writing exercise in a

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<sup>17</sup> Keller and Burkman ‘Motivation Principles’ in Fleming and Levie (eds) *Instructional Message Design: Principles From the Behavioral and Cognitive Sciences* 2ed (1993) 4.

familiar reality that they understand on a personal level. In addition, ultimately the materials and facilitated discussions must be relatable, but still complex enough to take the students out of their personal context and into a new way of thinking about and understanding the issues raised by the writing exercise.

The transformative-contextualisation teaching principle leads students on a journey of transformation from the familiar (for example, a student's experience of racial prejudice) to the unfamiliar (for example, a gay or lesbian student's experience of homophobia or a disabled student's experience of ableism). It helps them to use their understanding of an issue such as discrimination but apply it to new contexts, thus exposing them to transformative thinking. The journey takes them out of one way of thinking (the rush to judgement based on a superficial understanding) and introduces them to a new way of values-based, critical thinking (taking their time and becoming immersed in the topic). This approach keeps students motivated, as the issue is relevant but potentially challenging to their value system.

This journey of transformation, however, cannot simply be personal. Given that South Africa has a transformative Constitution and that part of the role of lawyers is to contribute to achieving the goals of the Constitution, this journey has also to pay attention to wider societal needs and goals. In this way, contextualisation and transformative, values-based teaching are inextricably linked. Thus, a legal-writing programme (ranging from the theme chosen for discussions, to the materials chosen to support those discussions, and the forms of assessment used) must be contextual in a personal sense *and* in a transformative sense. The overall design of a legal-writing programme must situate the programme in a social context that is relevant to students at a personal level, as well as in the broader South African constitutional context of the transformative imperative. In this way, student motivation and engagement will be enhanced.

The discussion below unpacks this teaching principle and the link to intrinsic motivation. First, the contextualisation aspect of the principle is analysed, and then the transformative, values-based teaching aspect is reviewed.

#### **4 1 Contextualised teaching**

When teaching legal writing to law students, it is vital to encourage intrinsic motivation. To do this, it is important to use contextualised legal material and employ contextualised practical exercises to supplement teaching methods, as well as ensure that the programme's assessments are appropriately contextualised. This is especially important when teaching in our multi-

cultural South African society where very often “words that may seem to have a single meaning may not be understood in the same way with people living and working in varying cultural contexts”.<sup>18</sup>

To motivate students intrinsically, the materials used must not only demonstrate how to write persuasively, but must also implicitly show why a law student should want to write persuasively. They must answer the student’s questions: what is the purpose of persuasive writing and why should I care about this? In other words, when choosing the module materials to support the writing process, law teachers must choose materials that link to the lived experiences of the students that are to engage with those materials.<sup>19</sup> This will stimulate discussion and active participation, as students will be inspired by their ability to contribute to the dialogue.

The pedagogical strategy underpinning the contextualisation principle uses Quinot’s ideas on transformative legal teaching<sup>20</sup> and Lovat’s writings on values education.<sup>21</sup> Both these pedagogical concepts (discussed in more detail below) provide rich opportunities to contextualise material, thereby motivating law students to think critically and ultimately write like lawyers. Not all legal writing needs to be dry and formalistic. It may incorporate life stories<sup>22</sup> that are intrinsically motivating because they expose real-world values that will resonate with students.

A careful selection of high-quality, contextualised subject matter is invaluable; only once students have seen the powerful difference that high-quality writing can make, will they be motivated to put in the hard work required to improve their legal writing. The material chosen must also aid the transformation journey that students embark upon in the legal writing programme and enable students to understand the importance of creative, persuasive writing in a transformative, contemporary South Africa. Quinot maintains that responsible teaching requires law teachers to follow a transformative teaching framework that

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<sup>18</sup> Wegner 2004 *The Journal of the Legal Writing Institute* 16.

<sup>19</sup> An example of contextualised legal material that could be used to teach writing skills to UKZN law students would be the case of *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC). The case discusses the right to dignity of a South Indian High School pupil. The principles discussed in this case would resonate with many students who are of a similar ethnicity and age and live in a similar geographical location to the persons in the case. These aspects will pique their interest and encourage deep engagement with the material.

<sup>20</sup> Quinot ‘Transformative Legal Education’ 2012 129 *South African Law Journal* 411.

<sup>21</sup> Lovat *Values Education: The Missing Link in Quality Teaching, Values Education for Australian Schooling* Keynote address summary, Values Education Forum (May 2006).

<sup>22</sup> These life stories could include, for example, actual and fictionalised events, biographies, fables, literature, poems and songs.

“embraces the normative framework put forward by the Constitution in its methodology. This involves not only overt substantive reasoning but also recognition of the possibilities for creativity in applying and developing the law to meet the aims of social transformation.”<sup>23</sup>

## 4 2 Transformative, values-based teaching

When teaching legal writing in the context of a country bound by a transformative constitution, it is not enough merely to awaken a curiosity in law students in order to encourage critical thinking.<sup>24</sup> Students need to be aware of the need to move beyond the views expressed in the legal materials with which they are engaging and to consider the transformative imperative laid down by the South African Constitution. The South African Constitution in its Preamble challenges South Africans to “(h)eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.<sup>25</sup> Legal practitioners as guardians of the law are perfectly placed to uphold these foundational values that ought to permeate every aspect of legal practice. Freedman and Whitear-Nel note that lawyers are critical to the success of our democracy as they are able to use the law to hold the State accountable and to promote social justice. They suggest it is the responsibility of lawyers to ensure the Constitution does not become “dead letter” law.<sup>26</sup>

This emphasis on the living law and its ability to transform not only the views of law students at a personal level, but also ordinary South Africans in society, has a powerful motivating effect. Legal educators who are committed to teaching law responsibly in a climate of transformative education are in the ideal position to transform student thinking by inculcating a social conscience in their students. This is reiterated in the writings of Freedman and Whitear-Nel on the 2013 LLB summit:

“Concerns that were prominent at the summit included the need to develop knowledgeable, skilled, value-driven and ethical law graduates who would be able to contribute meaningfully to society, who would have a highly developed social conscience, and who would strive towards social justice.”<sup>27</sup>

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<sup>23</sup> Quinot 2012 *The South African Law Journal* 414.

<sup>24</sup> Crocker 2020 *Obiter* 756.

<sup>25</sup> Constitution of the Republic of South Africa, 1996.

<sup>26</sup> Whitear-Nel and Freedman ‘A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics’ 2015 21(2) *Fundamina* 234 236.

<sup>27</sup> Whitear-Nel and Freedman 2015 *Fundamina* 247.

Legal writing in South Africa today requires nuanced critical thinking and problem-solving skills, and curriculum design cannot be carried out in isolation. If legal educators are committed to teaching law responsibly, they must be aware of the wider context within which they teach, including the transformative constitutional dispensation of contemporary South Africa.<sup>28</sup>

Quinot posits that teaching students how to think, read and write like lawyers in South Africa today requires some reimagining. He comments:

“As law teachers, our legal culture manifests in the way we teach and it is thus our teaching methodology with which we need to engage critically in order to align what we do with the transformative aspirations of our Constitution.”<sup>29</sup>

He believes that constructivist teaching methodologies that encourage active participation to enable students to construct their own knowledge of the law are the best fit for a transformative teaching paradigm.<sup>30</sup>

A teaching paradigm that incorporates transformative contextualisation also encompasses a values-based teaching approach. Lovat draws on Habermas’s theory of knowing, which he says “has been instrumental in much of the thought that educationists have seized on in attempting to deepen our understanding of learning and stretching conceptions of the role of the teacher”.<sup>31</sup> Lovat maintains that values education should further Habermas’s ideas of what it is to understand, which he says is

“the knowing and understanding that comes from critique of all one’s sources of knowledge and ultimately from critique of one’s own self or, in Habermas’s terms, from knowing oneself, perhaps for the first time.”<sup>32</sup>

To encourage understanding in this way is to further values education, the focus of which is:

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<sup>28</sup> Quinot 2012 *SALJ* 417. See also Crocker (‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’ 2018 21 *PER/PELJ* 1 7), who makes the point with respect to teaching legal writing skills in particular that ‘the multi-faceted nature of legal writing, encompassing legal analysis and application, as well as logical sequencing and argument, could not be taught in a vacuum, particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language’.

<sup>29</sup> Quinot 2012 *SALJ* 416–417.

<sup>30</sup> Quinot notes: ‘Under constructivist pedagogy, the teacher is no longer the sole authoritative figure in the class, presenting students with ready-made knowledge for them simply to accept. Rather, the process of learning occurs by students engaging with the materials and each other and forming their own constructions that they must justify within the knowledge community, guided by the teacher using a set of explicit and clear normative values.’ Quinot 2012 *SALJ* 422.

<sup>31</sup> Lovat *Values Education: The Missing Link in Quality Teaching* 3.

<sup>32</sup> *Ibid.*

“[t]o push student learning towards self-reflectivity, that knowing of self that allows one to step out of the shadow of one’s upbringing and cultural heritage, to challenge not only the preconceived beliefs and behaviours of this upbringing and heritage but, more painfully, one’s own deep seated comfort zone of beliefs and behaviours. The task, in other words, is to transform.”<sup>33</sup>

Lovat makes another important point. This transformation of student beliefs and behaviours

“[d]oes not mean imposing a different set of beliefs and values on students than those they came in with. Imposing someone else’s comfort zone would be a contradiction of everything implied by critical and self-reflective knowing. It does however mean challenging students to see that whatever beliefs and values they brought with them are but one set, one life-world, and to consider the life-worlds of others.”<sup>34</sup>

This ability to accept other world views is essential to thinking like a lawyer, since lawyers are obliged objectively to assess problems presented by clients and then advocate the best course of action for those clients, regardless of who they might be.<sup>35</sup> Lawyers are frequently required to advise and represent clients whose values do not reflect their own. Therefore, in order to represent their clients adequately and to maintain the standard of professionalism required, they must learn to manage this separation between their own beliefs and that of their clients.<sup>36</sup>

The importance of upholding the transformation imperative as set out in the Constitution, and by extension the necessity for law teachers to adopt values-based teaching methodologies, is echoed in several documents that are designed to regulate the conduct of legal professionals

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<sup>33</sup> Lovat *Values Education: The Missing Link in Quality Teaching* 4.

<sup>34</sup> *Ibid.* In a similar vein, Fink (*Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 115) talks of increasing student motivation by providing students with ‘significant learning experiences’. These experiences, the author maintains, are learning experiences that change the students in some important way and have two outcomes, namely: ‘Significant and lasting change: Course results in significant changes in the students, changes that continue after the course is over and even after the students have graduated. Value in life: What the students learn has a high potential for being of value in their lives after the course is over, by enhancing their individual lives, preparing them to participate in multiple communities or preparing them for the world of work.’

<sup>35</sup> An in-depth exploration of values-based teaching practices and ethical pedagogy are beyond the scope of this article. However, in this respect, the pedagogy developed by Mary Gentile – giving voice to values (GVV) – is important to note. Holmes (‘Giving Voice to Values: Enhancing Students’ Capacity to Cope with Ethical Challenges in Legal Practice’ 2015 18(2) *Legal Ethics* 115–137, discussing Gentile *Giving Voice to Values. How to Speak Your Mind When You Know What’s Right* 2010) makes the comment: ‘Legal ethics pedagogy does not often attend to the gap between principles and effective action. A pedagogy that directly addresses this gap is ‘Giving Voice to Values’ (GVV). Developed by US academic, Mary Gentile, GVV focuses not on the normative question of ‘what is the right thing to do?’, but on the behavioural question of ‘how do we get the right thing done?’’

<sup>36</sup> This concept is not dissimilar to the idea of decolonisation of the mind.

– from the time they begin their tertiary studies as potential legal professionals to the time they enter legal practice as qualified legal professionals. For example, the exit level outcomes of South African law students are clearly articulated in the South African Qualifications Authority (SAQA) registered qualification document, which describes the purpose and rationale of the Bachelor of Laws qualification as, *inter alia*:

“To provide the South African community with lawyers who are empowered to accept their responsibility towards the realisation of a just society based on a constitutional democracy and the rule of law within an international legal order.”<sup>37</sup>

Also, the Legal Practice Act<sup>38</sup> requires the professional conduct of legal practitioners to be regulated in terms of the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. Sections 3.1 and 3.2 of the Code state:

“Legal practitioners, candidate legal practitioners and juristic entities shall–

- 3.1 maintain the highest standards of honesty and integrity;
- 3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution.”<sup>39</sup>

The transformative-contextualisation teaching principle was implemented in the WiLL legal writing programme, which formed part of the LLB module “Legal Research, Writing and Reasoning” at the University of KwaZulu-Natal.

## **5 TRANSFORMATIVE CONTEXTUALISATION IN THE WiLL LEGAL WRITING PROGRAMME: A CASE STUDY**

The Legal Research, Writing and Reasoning module (LRWR) is an eight-credit,<sup>40</sup> semesterised, second-year LLB module. The module content covers theory and practical

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<sup>37</sup> <https://regqs.saqqa.org.za/viewQualification.php?id=22993> (accessed 2021-03-04).

<sup>38</sup> 28 of 2014.

<sup>39</sup> This Code of Conduct is published in terms of s 97(1)(b) of the Legal Practice Act 28 of 2014.

<sup>40</sup> An 8-credit module is one that has 80 notional study hours allocated to it and usually has two 45-minute lecture slots per week for 13 weeks.

exercises in critical thinking and legal-writing skills, with some practical application, and uses a transformative, constructivist teaching pedagogical framework.<sup>41</sup> The Write it Like a Lawyer legal writing programme (WiLL) took a small-group, participatory, skills-based lecture format, using an active learning ethos to encourage student motivation. The materials, formal lecture preparation, lecture tasks and assessments (examples of which are discussed under heading 6 to follow) were all carefully chosen, so as to be congruent with a contextualised, transformative teaching paradigm.

The WiLL programme began by introducing the theme of the programme: the right to dignity in South Africa. This theme was chosen because it allowed for the transformative contextualisation of the module materials in two ways. First, much of the material dealing with the right to dignity contextualises real-world issues relating to this right, thereby enabling students to identify at a personal level with the issues discussed in the academic articles and law reports that are studied throughout the programme. Secondly, the theme highlights a range of important societal issues that the right to dignity addresses, both in a historical context and currently in a transformative South African society.<sup>42</sup> This transformative contextualisation of the teaching materials increases students' intrinsic motivation, encouraging students to engage deeply and to think critically about the issues raised in the materials, thereby enhancing their persuasive writing skills.

Thus, the subject materials chosen to facilitate the acquisition of legal writing skills in the WiLL Legal Writing programme were specifically selected to fit within a transformative teaching framework and to contextualise the use of creative, values-based, persuasive legal-writing skills. The materials are embedded in a contemporary South African context, illustrating the power of critical, persuasive writing to transcend conservative legal thinking and to promote social reform and transformative constitutional norms and values. Quinot states:

“Matters of morality and policy, even politics, can no longer be excluded from legal analysis ... It will call into question our own professional sensibilities and will require a critical self-assessment of whether we are able to engage in the kind of value-based reasoning that we are now required to teach.”<sup>43</sup>

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<sup>41</sup> See a detailed discussion on the structure of this module in Crocker 2020 *Obiter* 763.

<sup>42</sup> For example, the interrelationship between the right to freedom of culture and the right to dignity, which addresses the expression of cultural identity in the form of dress, as well as the plight of same-sex partners and their historical legal struggle for the right to marry under the same law as heterosexual couples.

<sup>43</sup> Quinot 2012 *SALJ* 415.

Three main source materials were used in the programme: an academic journal article written by Peté, entitled “South Africa’s Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation”;<sup>44</sup> the Constitutional Court judgment of *Minister of Home Affairs v Fourie*;<sup>45</sup> and a legal blog article written by De Vos entitled “Newsflash: Sex Workers Also Have Dignity”.<sup>46</sup> These materials were chosen to highlight the value of the right to dignity and the dignity of difference in South Africa. Thus, the sources were chosen not only because they are simply and persuasively written and thus demonstrate how to write clearly and simply – like a lawyer – but because these sources lend themselves to a critical, values-based discussion on an important foundational value of the Constitution, namely dignity. This is a value that requires the protection of the highest court in the land and which, if adequately protected, will lead to the transformation of the lives of ordinary South Africans. The topics discussed in the materials were also contextually relevant to the students. Programme facilitators encouraged a close reading of and discussion on the legal language, legal argumentation and legal logic of these three sources in order to demonstrate how persuasive quality writing can be.

The first source, the academic journal article written by Peté,<sup>47</sup> discusses a Constitutional Court case<sup>48</sup> about the right to dignity and the background of the judge who penned the judgment, Justice Albie Sachs. The persuasiveness of the academic journal article lies not only in its eloquent outline of the importance of human dignity as an abstract value, but also in its focus on the human connection, that is, the man behind the Constitutional Court judgment that was creatively and elegantly written and which strongly facilitated the protection of dignity in South Africa. Students were able to connect with the creative, story-telling writing style of the journal article on a number of levels. It enabled them to contextualise the subject matter of dignity jurisprudence in an easy-to-understand manner and to appreciate how a well-written piece can draw in the reader, while still encouraging critical thought. Peté’s focus on personalising the man behind a Constitutional Court judgment was a strong motivation for students to appreciate not only the profound impact that Sachs J’s words had on certain sectors

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<sup>44</sup> Peté ‘South Africa’s Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation’ 2010 *Obiter* 1–15.

<sup>45</sup> *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

<sup>46</sup> De Vos ‘Newsflash: Sex Workers Also Have Dignity’ (7 June 2010) <https://constitutionallyspeaking.co.za/newsflash-sex-workers-also-have-dignity/>.

<sup>47</sup> Peté 2010 *Obiter* 1–15.

<sup>48</sup> *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra*.

of society, but also to appreciate the passion and care behind the Constitutional Court Justice's powerful words. Peté voices this sentiment:

“What, however, of the man behind the stark details set out above? A romantic and idealistic thread is apparent throughout both the judgments and other writings of Sachs. Indeed, it is precisely the emotional thrust behind his ideas, his sensitivity to the pain of others, his willingness to dream, and his courage not to allow the dream to die, which has endeared him to lawyers, academics and ordinary South Africans.”<sup>49</sup>

The second source used in the WiLL programme was the Constitutional Court case of *Minister of Home Affairs v Fourie*.<sup>50</sup> This is the case that is also discussed in Peté's academic journal article used for the first source. This case was introduced after the article to students in order to demonstrate the more formal, complex style of judgment writing and how to draft a case summary. Wegner maintains that “[c]ases provide a very neat framework by which to advance people's cognitive skills – higher-order thinking skills, through systematic exploration”.<sup>51</sup> An in-depth exploration of this case allowed students to witness how the relevant legal principles were expertly applied to a complex set of facts supported by sound legal reasoning. This was a practical demonstration of how to write like a lawyer. They were then encouraged to discuss alternative outcomes to the case, should the facts have differed in any way – that is, a demonstration of how to think like a lawyer. In addition to this, students were taken through a critical reading of the judgment in some detail – to illustrate how mini-summaries and sub-headings were used throughout the piece by Justice Sachs to break up chunks of text and to keep the reader engaged and up-to-speed with the arguments presented.

However, in addition to showing students the necessity of a simple, structured writing style to help with the comprehension of a lengthy legal text with complex, nuanced arguments, this judgment was selected as it showed Sachs J's superior, persuasive legal-writing skills and the ability to engage in a creative, critical discussion of important social issues in such a way that readers are elegantly persuaded by his point of view.

Thus, this source demonstrated how a creative writing style can be used, even within the confines of a formal judgment, in order to elevate the persuasiveness of the arguments. An excellent example of this is Sachs J's eloquent writings about the right to be different:

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<sup>49</sup> Peté 2010 *Obiter* 4.

<sup>50</sup> *Supra*.

<sup>51</sup> Wegner 2004 *The Journal of the Legal Writing Institute* 17.

“The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are ... At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”<sup>52</sup>

This text also served to remind students of the importance of changing their mindset from one of authority to one of justification; to this end, they were asked to compare the different perspectives that emerged from the majority and minority judgments in the *Fourie* case. Students were encouraged to conduct a close critical reading of both the majority and the minority judgments, and to use their critical thinking skills to decipher how judicial opinion in a single judgment can be both the same and different.

An important aim of studying this particular judgment, which dealt with the right of same-sex couples to marry, was to take the students on a transformative journey on two levels: first, at a personal level, learning about South Africans who may embrace a different lifestyle to themselves but who are nevertheless deserving of being treated with equal dignity; and secondly, at a broader societal level, seeing the powerful difference that dignity jurisprudence can make in certain sectors of South African society.

The third source used in the WiLL programme was a legal blog article written by De Vos, an experienced legal journalist and constitutional law commentator. The subject matter of this source mirrors the subject matter of the previous sources and provides an interesting discussion on the inherent right to dignity of sex workers. De Vos’s legal blog piece illustrates to the students a third and final style of legal writing: the informal, factual, abbreviated writing style of newspaper journalists, with a completely different target audience to that of an academic journal article or judgment. Just as important, this source illustrates in a deft, uncomplicated fashion, the creative development of an argument. It also touches on the transformative, societal debate about the controversial topic of sex work in South Africa.

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<sup>52</sup> *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra* 549 E–G.

Thus, the transformative contextualisation of the materials used made the sources relevant to students at a personal level, which increased student comprehension of the subject matter and their intrinsic motivation to engage deeply with the materials. This deep engagement enabled students to think creatively about how a specific writing style could be used to communicate most persuasively with their target audience. The complex issues raised in the materials gave students the space to pose questions and debate any areas of doubt and ultimately reconstruct their knowledge of the issues addressed. Thus, the materials took students on a journey of transformation from a personal revelation of the importance of dignity to them as individuals – to a realisation of the importance of this right to South African society as a whole.

## **6 ASSESSMENT IN THE WiLL LEGAL WRITING PROGRAMME**

The constructive alignment of the WiLL legal writing programme was designed to ensure that the transformation journey on which the students were taken during class translated into achievable module outcomes that were assessed by continuous assessment.

Students were given two assessments in the programme. These assessments were essential to anchor the programme in the Legal Research, Writing and Reasoning (LRWR) module, which formed part of the mainstream, second-year LLB syllabus lending credibility to the programme and motivating students to participate to the best of their abilities. The assessments used in the WiLL programme were designed to promote critical thinking around issues such as the importance of social transformation, its practical implications and the value of dignity jurisprudence in South Africa today. They also served to motivate students to engage deeply with the source material by showing them that good legal writing can indeed make a practical difference.

The first assessment used was a case summary.<sup>53</sup> Students were required to summarise a judgment by Chief Justice Langa in the *Pillay*<sup>54</sup> case. This judgment was chosen for the assessment, not only because of the elegant, persuasive way in which it was written, but

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<sup>53</sup> The case summary was assessed by means of a rubric. Key ingredients to be assessed in the case summary fell into two categories: writing skills and substantive knowledge. So, for example in the skills category, an excellent case summary would make use of all the correct headings; include all relevant information, and be written succinctly, avoiding waffle and verbosity. In the substantive knowledge category, for example, the correct *ratio decidendi* had to be identified and the main principles of the case summarised and clearly explained. It is important to note that prior engagement during class on a deep level with judgments that discuss similar principles and issues to the assessment case is pivotal in ensuring that students can apply their minds to drafting a case summary that is not just rote but engages with the principles in the way a lawyer would – with understanding and intention.

<sup>54</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

because of its seamless alignment with the programme's theme of dignity jurisprudence. Understanding the principles outlined in this assessment judgment serves to supplement the knowledge required for the module outcome of understanding the value of dignity in South Africa today, as well as to test the students' functioning knowledge. In addition, the *Pillay* case contains arguments that students would immediately be familiar with, since both the *Fourie* case and the *Pillay* case discuss issues relating to the violation of human dignity. In this way, students were able to focus on applying their case-summary and critical-reading skills learnt during their interaction with the *Fourie* case, without being unduly distracted by unfamiliar complex arguments.<sup>55</sup>

The second and final assessment was to write an article for a newspaper's legal column, discussing any aspect of South Africa's dignity jurisprudence. The assignment instructions clearly defined the maximum word count and writing style. However, the topic of the assignment was kept vague by design, encouraging students to think creatively while maintaining the need for them to justify their arguments.<sup>56</sup>

## **7 EVALUATION OF THE WILL PROGRAMME AND RECOMMENDATIONS**

The Write it Like a Lawyer programme was a reflective research project, undertaken at the time solely for the purposes of improving my own teaching practices. Evans interprets the concept of "reflective practice" as, "the constant striving for improvement by a process involving evaluative reflection to identify areas for improvement and creative reflection to identify remedial practice."<sup>57</sup> Evans then relates this practice to educational research, saying:

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<sup>55</sup> In addition to learning the nuts and bolts of how to summarise a case, students were encouraged to engage in a more nuanced analysis of the facts of the case and to brainstorm (as part of their class participation) possible outcomes of alternative legal interventions. Feerick (1994 *Fordham Urban Law Journal* 386) notes that any legal-writing programme should teach the essential skill of fact analysis, which 'requires the ability to engage in different problem-solving techniques, such as brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation'.

<sup>56</sup> For example, some students wrote about the importance of South Africa's dignity jurisprudence in protecting the rights of certain minority groups in South Africa, while others argued that South African jurisprudence is not doing enough to protect the right to dignity of South African citizens. This assessment was designed to test the students' ability to draw together the threads of a number of sources of information (including the case summary assessment judgment) to formulate an opinion based on these sources and then to justify that opinion. Key ingredients to be identified in an excellent opinion would be a clearly defined aim and focus, supported by a well-reasoned, persuasive argument with logical flow.

<sup>57</sup> Linda Evans 'Reflective Practice in Educational Research' 2002 Continuum, London.

“[T]his is achieved by a cycle whereby researchers analyse what they do, evaluate their output, seek a better way of doing things where they feel one is needed, and then apply to their research practice as much of that better way of doing things as circumstances permit.”<sup>58</sup>

This project forms part of a larger reflective teaching exercise conducted at UKZN to improve the legal writing skills of first- and second-year law students, which comprises four cycles. The WiLL project is the last in the series of iterations of the project. The first three cycles were evaluated using a variety of instruments, including: personal student questionnaires; feedback from students by means of annual student module evaluations, regular informal meetings with students; author notes on informal class discussions; and reflective comments of peer tutors and first- and second-year students that were recorded in the module reports to the internal moderator and external examiner.<sup>59</sup> The fourth and final action research cycle – the Write it Like a Lawyer programme – was evaluated using the author’s personal observations as lecturer and course designer. These observations take place after a number of years of teaching legal writing in this module, during which time the author used a variety of teaching methods and perused hundreds of student essays each year.

When comparing student motivation and the persuasive writing skills of students who have been taught using a transformative-contextualisation approach to those of students from previous years (when the approach was not used), it was observed that students did in fact experience a transformation in their thinking as well as in their writing. Students in the WiLL programme were more motivated to take part in robust, respectful class discussions, often interrogating the course materials with enthusiasm long after the allotted lecture time had ended. Also observed was a marked difference in the persuasiveness of the students’ legal writing, with nearly every student showing an interest and willingness to complete more than one draft in order to hone their argument, despite not being required to do so.

The teaching approach used is also well grounded in literature, which links the contextualisation of study materials to intrinsic motivation leading to critical thinking and critical writing. Further research is, however, needed to measure these outcomes formally, including the perceived increase in student motivation and improvement in the persuasiveness of the students’ legal writing. It is therefore recommended that this study should be continued

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<sup>58</sup> *Ibid.*

<sup>59</sup> See Crocker ‘Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law’ 2020 45(1) *Journal for Juridical Science* 93–118; and Crocker ‘Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School’ 2018 21 *PER/PELJ* 1–27.

by testing these lecturer observations using qualitative instruments such as student and lecturer questionnaires.

## **8 CONCLUSION**

If students are to be taken on a journey of transformation, it is essential that values-based teaching techniques and contextualised teaching materials are used to facilitate learning at a deep level. Thus, transformative contextualisation is an important teaching principle to incorporate into the curriculum design of legal-writing programmes at South African universities. Using this technique will provide students with the intrinsic motivation that is essential to engage at a deep level, which in turn gives students the intellectual space to think, to read and to write critically. This is imperative in South Africa today, where legal educators have a responsibility to heed the constitutional mandate to promote a society based on social justice, by inspiring a social conscience in their students.

## 5 FINDINGS: LEGAL WRITING AND TUTORING PROGRAMME (ITERATION 4)

The following article was published in a peer-reviewed journal:

Article 5: ‘Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law’

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*Note: The formatting style of the published article has been preserved in this chapter.*

*Article 5: ‘Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law’*

RESEARCH ARTICLE

**AD Crocker**

Lecturer in Law,  
School of Law,  
Howard College  
Campus,  
University of Kwazulu-  
Natal,  
Attorney of the High  
Court of South Africa.  
ORCID ID 0000-0002-  
2012-054X.

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## USING PEER TUTORS TO IMPROVE THE LEGAL WRITING SKILLS OF FIRST-YEAR LAW STUDENTS AT UNIVERSITY OF KWAZULU-NATAL, HOWARD COLLEGE SCHOOL OF LAW

### SUMMARY

Over the past few decades, the University of Kwazulu-Natal's Howard College School of Law (UKZN School of Law) has paid considerable attention to improving the legal writing skills of its first-year law (LLB) students. In its quest to improve these skills, the School of Law has implemented a number of writing interventions, which have focussed on finding a creative solution to the problem of balancing the need for time-intensive student support and the lack of staff capacity to provide it. This article argues that one such solution could be to use senior Law School students acting in the capacity of peer writing tutors. The article begins by discussing the concept of using peer tutors to teach persuasive legal writing to first-year LLB students within the context of a collaborative and social constructivist teaching and learning paradigm. It proceeds to discuss the substantial benefits of using senior law students as peer tutors and the training that must be provided to them. This tutor training is essential, since many of the peer tutors, despite being senior law students, lack experience in teaching persuasive writing and therefore must still develop these skills. Thus, the article explores the significance of the training aspect of using senior law students to tutor persuasive writing to first-year law students, including the theoretical underpinnings of this training as well as its practical application. In this discussion, two models of peer tutor development are examined – “participatory peer-tutor development” and “peer-tutor development sequencing” – before discussing the practical (and necessary) application of both of these models in the module Teaching Legal Skills (“TLS”) at the UKZN School of Law. Finally, the article makes recommendations that could inform the design of a viable, cost-effective, energy-efficient future legal writing programme, and suggests possible ways of overcoming or avoiding the challenges identified.



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### 1. INTRODUCTION

Every year over 200 students gain acceptance to the first-year LLB modules — Introduction to South African Law and Foundations of South African Law — at the

# **USING PEER TUTORS TO IMPROVE THE LEGAL WRITING SKILLS OF FIRST-YEAR LAW STUDENTS AT UNIVERSITY OF KWAZULU-NATAL, HOWARD COLLEGE SCHOOL OF LAW**

## **AD Crocker**

Lecturer in Law,  
School of Law,  
Howard College Campus,  
University of KwaZulu-Natal,  
Attorney of the High Court of South Africa.  
ORCID ID 0000-0002-2012-054X.

## **Summary**

Over the past few decades, the University of KwaZulu-Natal's Howard College School of Law (UKZN School of Law) has paid considerable attention to improving the legal writing skills of its first-year law (LLB) students. In its quest to improve these skills, the School of Law has implemented a number of writing interventions, which have focussed on finding a creative solution to the problem of balancing the need for time-intensive student support and the lack of staff capacity to provide it. This article argues that one such solution could be to use senior Law School students acting in the capacity of peer writing tutors. The article begins by discussing the concept of using peer tutors to teach persuasive legal writing to first-year LLB students within the context of a collaborative and social constructivist teaching and learning paradigm. It proceeds to discuss the substantial benefits of using senior law students as peer tutors and the training that must be provided to them. This tutor training is essential, since many of the peer tutors, despite being senior law students, lack experience in teaching persuasive writing and therefore must still develop these skills. Thus, the article explores the significance of the training aspect of using senior law students to tutor persuasive writing to first-year law students, including the theoretical underpinnings of this training as well as its practical application. In this discussion, two models of peer tutor development are examined – “participatory peer-tutor development” and “peer-tutor development sequencing” – before discussing the practical (and necessary) application of both of these models in the module Teaching Legal Skills (“TLS”) at the UKZN School of Law. Finally, the article makes

recommendations that could inform the design of a viable, cost-effective, energy-efficient future legal writing programme, and suggests possible ways of overcoming or avoiding the challenges identified.

## 1. Introduction

Every year over 200 students gain acceptance to the first-year LLB modules — Introduction to South African Law and Foundations of South African Law — at the Howard College School of Law, University of KwaZulu-Natal (“UKZN School of Law”), hopeful that they will be successful in their academic endeavours in the LLB programme. However, it is an unfortunate reality that, despite a generally optimistic outlook and positive work ethic, many of these young students find themselves struggling to produce written work of an acceptable standard in their first year of study. First-year university students will often base their expectations of university life on their academic experiences at high school and thus may have an unrealistic idea of the standard of work required at university, making them unable to cope with the academic environment.<sup>1</sup> Rote learning and regurgitation of class notes will no longer guarantee them a pass because law students are expected to write in a professional style, using sound arguments supported by legal authority.<sup>2</sup>

The poor legal writing skills that many of these first-year law students demonstrate may be attributed to several factors. Some of these include the poor primary and secondary education that they might have received;<sup>3</sup> the fact that they may be conversing and writing in a language other than their mother tongue (UKZN being an English-medium institution in a province of primarily isiZulu speakers);<sup>4</sup> the fact that these students might be overwhelmed by the vast amount of new substantive legal knowledge that they are required to absorb, as well as the critical thinking and analytical skills that they must assimilate and master at this stage in order to progress in their studies; and the fact that they are entering into a legal community defined by a unique, complex discourse which is completely foreign to most first-year law students — even those proficient in English.<sup>5</sup> Against this background, it is clear that active steps need to

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<sup>1</sup> Hill 1995:10–21, Jacklin & Robinson 2007:114–123 and Loots 2009:211–235, cited in Spark *et al.* 2017:76.

<sup>2</sup> Foster 2016:ix.

<sup>3</sup> Swanepoel & Snyman-Van Deventer 2012:123.

<sup>4</sup> Greenbaum 2004:4.

<sup>5</sup> This is discussed in some detail in Crocker 2018:8.

be taken to ensure that these students not only survive the four years of arduous study that form part of the LLB curriculum, but that they will master the art of writing like a lawyer.<sup>6</sup>

Over the past few decades, several interventions have been implemented at UKZN's School of Law in an attempt to improve the legal writing skills of its first-year LLB students.<sup>7</sup> A review of the challenges encountered during the implementation of each of these interventions revealed, amongst other things, that the inherently labour-intensive structure of these legal writing programmes posed a serious challenge.<sup>8</sup> It is an unfortunate reality that School of Law staff are already thinly stretched by teaching, supervision, research, and the PhD credentialing requirement. Staff members are simply not in a position to take on additional time-consuming small-group teaching, and provide written and oral feedback on numerous drafts, both of which are needed to motivate students to engage deeply and critically with the legal writing process in order to improve their legal writing skills.

Faced with this conundrum of the need for time-intensive student support and a lack of staff capacity to provide it, this article argues that a creative solution to this problem — at the UKZN School of Law — could be found in the form of the use of senior Law School students as peer tutors. Drawing on the findings from a previous study undertaken by the author investigating the successes and challenges of the Write it Like a Lawyer legal writing programme [WiLL],<sup>9</sup> this article critically discusses the use of peer tutors as a solution to the challenges of providing the intensive learning experience required in a successful legal writing programme.

The article begins by unpacking the concept of peer tutoring within the context of a collaborative and social constructivist teaching and learning paradigm. The fact that peer tutoring lends itself to a collaborative-learning classroom environment has significant benefits for learners making the leap from a secondary to a tertiary learning environment. The substantial benefits of using senior law students as peer tutors — in both an academic and non-academic capacity — to teach persuasive legal writing to first-year LLB students are thus

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<sup>6</sup> Crocker 2020:3.

<sup>7</sup> The details of two of these legal writing interventions — the Concise Writing Programme and the Integrated Skills in Context Programme — are set out in Crocker 2018:1–27. Details of a third writing intervention — the WiLL legal writing programme — are discussed in Crocker 2020:3 and Crocker 2021:1.

<sup>8</sup> Crocker 2018:18.

<sup>9</sup> WiLL is a legal writing intervention that was implemented in 2019 in a second-year LLB module at the UKZN School of Law. The details of this legal writing intervention are discussed in Crocker 2020:3 and Crocker 2021:1.

discussed in some detail. However, despite the benefits that emerge from this discussion, it must not be forgotten that peer tutors are senior law students, many of whom lack experience in teaching and will therefore require these skills to be developed or enhanced. The theoretical underpinnings of the importance of developing peer tutors, using participatory peer-tutor development and peer-tutor development sequencing, are thus explored before moving on to the practical application of these principles in the Teaching Legal Skills module (“TLS”) at the UKZN School of Law.

TLS, which is a final-year LLB elective module, employs the services of the students who participate in the module, as peer tutors. The module was first implemented by Prof. Lesley Greenbaum, who is an expert in the field of legal education and was employed as an associate professor at UKZN, Howard College until 2010.<sup>10</sup> As part of their course requirements for the TLS module, the senior student tutors participating in the module are tasked with facilitating tutorials on the substantive law content of two first-year LLB modules — Introduction to South African Law and Foundations of South African Law — as well as with improving the legal writing skills of these first-year law students. Thus, the TLS module serves, in part, as a legal writing intervention for first-year law students, as well as a vehicle to teach senior students how to teach within an academic environment. The article critically discusses the use of peer tutors in the TLS module — in the process identifying the challenges that emerged during the running of the programme.

The article concludes with a number of recommendations that could inform the design of a viable, cost-effective, energy-efficient future legal writing programme, and suggests possible ways of overcoming or avoiding the challenges identified.

## **2. Unpacking the concept of peer tutoring**

Peer tutors are defined by Colvin as “those of the same societal group or social standing educating one another when one peer has more expertise or knowledge”.<sup>11</sup> Colvin also points out that the services that peer tutors are able to provide are not only academic but also non-academic in nature, ranging from “providing support for other students by being counselors or

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<sup>10</sup> Greenbaum 2001.

<sup>11</sup> Colvin 2007:66.

advisors to being trainers where previous experience lends itself to helping others, to being expert instructors in a tutoring situation”.<sup>12</sup>

The process of peer tutoring is described by Trimbur as the system of teaching and learning that “replaces the hierarchical model of teachers and students with a collaborative model of co-learners engaged in the shared activity of intellectual work”.<sup>13</sup> He goes on to explain how the very nature of teaching and learning has evolved from the traditional mode of limited interaction between lecturer and learner to a more interactive learning environment, and suggests that collaboration in the classroom “redefines learning as an event produced by the social interaction of the learners — and not a body of information passed down from an expert to a novice”.<sup>14</sup>

This idea of using classroom peer collaboration to assist in the writing process sits firmly within a social constructivist teaching paradigm, where writing is viewed as a social process rather than as an individual activity. This theory is premised on the idea that writing is enhanced by social collaboration and negotiation.<sup>15</sup> The process of writing in collaboration with colleagues has particular relevance within the legal profession, where attorneys, junior and senior advocates, and legal advisors often work closely together to devise lines of argument to be included in court pleadings. As the title of this teaching framework suggests, constructivist teaching requires a focus on constructing knowledge through the sharing of ideas.<sup>16</sup> This has profound implications for educators who, when considering the constructive alignment of their modules during the design phase, must carefully select teaching techniques that will further this premise. In this regard, Quinot and Greenbaum argue that teaching and learning within a constructivist paradigm is a non-linear process that requires more than a simple transmission of information from the educator to the student.<sup>17</sup> They argue that:

Constructivism tells us that we learn by assimilating new experiences into our existing knowledge framework. The statement perhaps best captures the core of constructivism: “knowledge is not

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<sup>12</sup> Colvin 2007:167.

<sup>13</sup> Bruffee 1978, cited in Trimbur 1987:23.

<sup>14</sup> Trimbur 1987:23.

<sup>15</sup> Murray 2010:10–11.

<sup>16</sup> Clarence 2018:58.

<sup>17</sup> Quinot & Greenbaum 2015:36.

found, but made”. This implies that one cannot transmit discrete bits of information to another person, which that person can simply absorb, amounting to ostensible “learning”.<sup>18</sup>

Given this concept of learning being interactive, peer tutors become particularly important. Specifically with respect to peer assessment and feedback, Liu and Carless believe that “examining the work of peers offers meaningful opportunities for articulating discipline-specific knowledge, as well as criteria and standards. Once students are at ease with making their work public, we could create conditions under which social learning might be facilitated”.<sup>19</sup>

Thus, peer tutors who are assigned small groups of students are perfectly placed to facilitate this social engagement and to construct knowledge or develop writing skills within a collaborative learning environment.

### **3. The benefits of peer tutoring and mentoring in teaching persuasive legal writing**

The benefits of using senior law student peer tutors to teach persuasive legal writing to first-year law students are substantial,<sup>20</sup> with a number of parties potentially benefiting from their services, including the first-year law students receiving the tutoring, the peer tutors providing the service, and the School of Law itself.

#### **3.1 Benefits accruing to first-year law students**

Peer tutors are in the unique position of being able to provide practical academic help to first-year law students, and in so doing enable them to quickly acclimatise to the new university academic environment. For example, new students can gain self-confidence and the motivation to learn by having regular contact with senior peers who are well versed in legal discourse;<sup>21</sup> new students can be absorbed into a student community where symbiotic relationships are likely to be formed to ease study pressures; senior peer tutors can contextualise the learning materials and situate the lessons learnt within the real world so that students can visualise their

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<sup>18</sup> Fosnot (ed) 2005, Pelech & Pieper 2010, Von Glasersfeld in Larochelle, Bednarz & Garrison (eds) 1998, cited in Quinot & Greenbaum 2015:35.

<sup>19</sup> Liu & Carless 2006:281.

<sup>20</sup> See a discussion on persuasive legal writing in Crocker 2020:3.

<sup>21</sup> Lotkowski, Robbins & Noeth 2004, cited by Spark *et al.* 2017:79.

career path and form goals for their future; and peer tutors can provide practical advice on how to navigate institutional issues such as university transport services, accommodation, time management, study and test tips.<sup>22</sup>

A further benefit of using peer tutors to provide additional legal writing support is that the extra staffing resources that these tutors provide create opportunities for large law classes to be split into smaller, more manageable groups. While it would be impossible for one lecturer to dedicate the amount of time and energy necessary to run multiple small tutorial groups, a single lecturer could develop and manage a team of peer tutors who, in turn, could facilitate the small-group tutorials. Burke mentions six advantages associated with peer learning in small groups:<sup>23</sup>

1. Working in a group allows participants access to an increased knowledge base stemming from the greater diversity of “backgrounds and experiences” which is inherent in a group of participants.
2. Group activities allow for creative conversations to develop and to aid in problem solving.
3. Group discussion aids in comprehension and memory retention.
4. The collaboration inherent in group problem solving enables students to take ownership of the decisions reached in problem-solving activities and group discussions. This increases the overall motivation of the group as well as the satisfaction of group participants in the outcome of the group work.
5. Group work also gives students the space to develop their interpersonal skills when being exposed to the positive and negative aspects of working in a peer-learning situation. Participants who are part of a safe team-learning environment are able to receive candid feedback on their interactions with the group from their fellow peers, which encourages deep, active learning.
6. Strong interpersonal skills and the ability to work effectively in a team are traits that are valued in the workplace.

The implementation of small-group teaching methodologies is also an integral part of any legal writing programme. Thus, in addition to providing general academic guidance, peer tutors are

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<sup>22</sup> Karp 2011, Loots 2009 & Wilmer 2008, cited in Spark *et al.* 2017:79.

<sup>23</sup> Burke 2011:88.

specifically well placed to teach new law students how to write persuasively — as a lawyer should. This is because persuasive legal writing is a process that not only requires students to think critically, but also requires constant, guided writing practice, with continuous feedback on written drafts.<sup>24</sup> It is essential that a “conversation in writing” is established with novice legal writers by giving them an opportunity to respond to feedback comments, thereby creating a dynamic conversation around their writing. This process can be ongoing by introducing feedback on multiple drafts of written work so that students can get a chance to implement the suggestions for improvement given in feedback, and thereby begin the process of monitoring the meaning of their own writing. Peer tutors of small student groups are easily able to facilitate this process with a quick turnaround time for feedback on multiple drafts of legal writing and have free time to meet individually with students to provide oral feedback on written work effectively, thus continuing the conversation in feedback.

In addition to this, the importance of providing ongoing feedback on student legal writing is emphasised by Greenbaum, who states that students should be led through the composing, drafting and revising stages of legal writing until they begin to “develop their own valid professional and personal voices to ‘engage in the ongoing conversation of law’”.<sup>25</sup> Liu and Carless agree with this, maintaining that “there is evidence that peer feedback enhances student learning as students are actively engaged in articulating evolving understandings of subject matter”.<sup>26</sup>

This conversation in feedback also provides a social context for the material as students exchange ideas with their peer tutors in a flowing written conversation. In fact, Kress makes the point that all reading occurs within a social context, as everyone approaches a text according to their own background and social position and, as such, no text is ever absorbed passively.<sup>27</sup> Writing in a dynamic environment such as this, therefore, makes it easier for the student writers to apply their minds to a critical justification for their argument.<sup>28</sup>

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<sup>24</sup> Kok *et al.* 2003:119.

<sup>25</sup> Phelps 1986, cited by Greenbaum 2004:14.

<sup>26</sup> Falchikov 2001, cited by Liu & Carless 2006:281.

<sup>27</sup> Kress 1989:42.

<sup>28</sup> Bruffee 1984:642, cited in Murray 2010:11.

More specifically, with respect to using senior law student peer tutors to improve the legal writing skills of first-year law students, Murray mentions the benefits of using peer tutors within legal writing centres:

There are two main pedagogical benefits to the creation of a law school writing center. First, writing centers can offer an opportunity for an increase in the amount of individualized instruction that legal writing programs can offer. Second, writing tutors can serve as a non-judging audience, outside the traditional hierarchy in which writing in [a] law school takes place.<sup>29</sup>

Boughey also alludes to the benefits of having conversations in feedback in a non-judgmental environment as having a “critical friend” supporting the writing process.<sup>30</sup> At this point it must be noted, however, that new students’ ability to produce creative, persuasive legal writing can be adversely affected by more than just a lack of legal knowledge or good legal writing skills, and these students often benefit from non-academic advice. Personal challenges can pose very real blocks to students’ confidence and to their motivation to put in the time and effort required to improve their legal writing skills.<sup>31</sup> For this reason, peer tutors often find themselves in the position of peer mentors, offering non-academic as well as academic advice and support. Spark points out that students are often drawn to peer mentors and feel comfortable sharing their learning and personal challenges with them because of the unique attributes that these peer mentors possess, such as “approachability, relatability with a marginal age difference, contextual insight and understanding, an awareness of what it means to be in the student’s shoes, experience succeeding at university, and an appreciation for the value of student support”.<sup>32</sup> In this way, peer tutors operating within a structured mentoring programme are well placed to assist first-year students to become a member of the university community and to familiarise themselves with the academic framework and support services that the community offers.<sup>33</sup>

### 3.2 Benefits accruing to the peer tutors

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<sup>29</sup> Murray 2010:13.

<sup>30</sup> Brumfit 1980 and Resnick 1990, cited by Boughey 2012:54.

<sup>31</sup> See Crocker 2020:3.

<sup>32</sup> Loots 2009, Maitland & Lemmer 2011 and Walsh, Larsen & Parry 2009, cited by Spark *et al.* 2017:76.

<sup>33</sup> Nelson, Humphreys & Harper 2006, cited by Townsend *et al.* 2011:45.

It is not only the first-year law students who benefit from this tutoring and mentoring relationship. The peer tutors themselves derive benefit from their interactions with junior students. Peer tutors who are performing their tutoring duties as part of an official final-year LLB module will qualify with their LLB degree on the successful completion of this module, along with their other outstanding LLB modules. In addition to this, Greenbaum speaks of pedagogical alliances that form between peer tutors and their students, which “function to establish a strong mentoring network”<sup>34</sup> and which offer benefits to both parties. The first-year students benefit from receiving valuable practical academic and non-academic advice from their peer tutors, and the tutors gain valuable practical skills from their role as peer tutors.

In particular, with respect to the peer tutors’ role in providing formative assessment on their students’ written work, Liu and Carless maintain that “by commenting on the work of peers, students develop objectivity in relation to standards which can then be transferred to their own work”.<sup>35</sup>

The value of engaging in tutoring activities, to the peer tutors themselves, is illustrated by the reflective comments of peer tutors taking part in the final-year elective module — Teaching Legal Skills — at the UKZN School of Law over the last few years. Some of these comments were recorded in the module reports to the internal moderator and external examiner.<sup>36</sup> One such student’s comment, when reflecting on their year of tutoring and taking part in the TLS module, captured the reciprocal learning that takes place when involved in peer tutoring:

TLS as a module was by far, one of the most enjoyable and rewarding modules I have done in my years at university. The ability to help others and teach is a truly great and rewarding experience. Initially I went into the module with the misconception that it would only be the students I teach that would be learning but in every TLS seminar, without fail, I would learn something new about myself and the tutor I would like to be.<sup>37</sup>

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<sup>34</sup> Greenbaum 2004:20.

<sup>35</sup> Nicol & MacFarlane-Dick 2006, cited by Liu & Carless 2006:281.

<sup>36</sup> Ethical clearance for the publication of student reflections on the module was obtained as follows: firstly, this journal article will be included in the author’s PhD thesis for which ethical approval, with the reference number HSS/2018/017D, was obtained; secondly, although specific ethics approval to undertake each class evaluation was not obtained, it is the UKZN policy that ethical approval is not required for a module evaluation. This is in line with national practices regarding evaluations of programmes; thirdly, there is no legal obligation to obtain ethical approval for an evaluation as it does not fall within the ambit of ‘health research’ in terms of the National Health Act, 2003; and finally, ethical practices were nonetheless followed when undertaking the module evaluations as it was made clear that the evaluations were voluntary and that it was up to each individual student to decide if they wanted to participate, that they were anonymous and there would be no negative consequences for any person not participating.

<sup>37</sup> TLS lecturer report to external examiner 2019.

Many peer tutors remarked on the personal and social development skills, such as leadership, time management and the ability to discipline their peers, which they acquired during their time as tutors, both from their interaction with their fellow tutors and from their teaching experiences. One tutor commented:

TLS has also given me the opportunity to develop various skills. Some of the most important being leadership ... practical information (such as handling people academically, professionally, and personally), how to deal with difficult situations (from simply maintaining a person's interest in a topic to the complex task of how to discipline our kids in the most effective and practical manner), and most importantly time management. That is, teaching a tutorial can't be deferred, we have to be prepared with our lesson plans, slides and the knowledge of the work regardless of whatever else was happening that week. This also led to me learning how to prioritise better. For TLS, it is the relationship with my fellow tutors that I will miss the most. I loved that we were able to support each other both in and out of our Wednesday seminars, and develop close bonds with each other. I appreciated that each one was comfortable enough to be able to share their personal difficulties, which, as future lawyers we tend to hide due to fear as being seen as weak.<sup>38</sup>

Tutors also spoke of their communication skills that had been finely tuned during their time tutoring. A tutor commented:

With regards to TLS as a module ... I have dealt myself a really good hand by choosing TLS ... I have also improved my communication skills and public speaking significantly. I am able to think on my feet and I've also developed skills which I think I can extend to my work as a candidate attorney next.<sup>39</sup>

Many students spoke of their intellectual development, as well as the awareness that they had gained of values that are important to them:

Where do I even start? I am a better person now. I am more compassionate. I listen and focus better. I am more confident than I was in the beginning. Critical thinking and writing skills have improved incalculably. I actually have had to sit down and draft a set of values that have brought

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<sup>38</sup> TLS lecturer report to external examiner 2019.

<sup>39</sup> TLS lecturer report to external examiner 2019.

me to this point, I know myself better now. I manage time better and am more organised now. *Tjo*, I have grown so much because of this module. I want to go on and on but I will stop here.<sup>40</sup>

TLS students remarked on how the importance of behaving in a professional manner was highlighted during their tutoring experience:

Tutoring has provided me with an opportunity to develop intellectually, psychologically, and personally. Throughout this whole process I have developed the ability to get along with others by gaining skills of communication, mediation and negotiation. Even if I might not ultimately work in any of the fields I have tutored in, I will feel more comfortable about working in a professional setting as a result of my tutoring experience.<sup>41</sup>

Many tutors spoke of diversity and learning to appreciate differences in their students and fellow tutors:

Our class of 2016 is rooted in ethics, diverse personalities and different opinion; critically engages with material before it; is updated with the recent happenings in society and brings this to their work; are hardworking and enthusiastic and finally are some of the best people I have met through my degree and who have become my friends. Even though I was the tutor, I can see how much this experience has taught me. From learning how to deal with a class to learning how to deal with different individuals one-on-one, this experience has definitely developed my people skills. Meeting students from such diverse and different backgrounds has been so refreshing and these situations have made me aware of so many different opinions and the validity of these different opinions. More so, this experience has given me such great hope for the future of our country. I can see vast potential in so many of the students and know that the next generation is filled with leaders who will have insight, wisdom and who are hard workers.<sup>42</sup>

Tutors also mentioned that they had learnt invaluable life lessons from fellow tutors. One tutor commented thus:

They taught me that a true leader collaborates and makes a meaningful impact staying close to the realities of others; he does not dictate and position herself/himself far from those he leads. They taught me to think on my feet and to work under immense pressure. I hope to continue

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<sup>40</sup> TLS lecturer report to external examiner 2018.

<sup>41</sup> TLS lecturer report to external examiner 2017.

<sup>42</sup> TLS lecturer report to internal moderator 2016.

making an impact in their careers as I have encouraged them to keep in touch should they need advice in the future ... You also gave me a chance to make such an important and meaningful impact in other people's lives, something I thought I could effectively do only once I became an attorney. I intend to extend the same impact you have had on me to all those I shall meet in the future.<sup>43</sup>

Tutors mentioned that they had learnt how to accept constructive criticism gracefully and how to use it to grow as a tutor:

[The lecturer (Ms Crocker)] gave us weekly critiques of our lesson plans and other submissions, at first I honestly did not read them. [This was mainly] because I was afraid of criticism and being told that I had not done things correctly. But each semester we had to do presentations in front of our peers and stand in front of our students weekly, this exposed me to all kinds of criticism, some lovely and some not so pleasing. However, this taught me that criticism and comments on one's work are vital for a long and healthy career as they make you a better version of yourself. You get confirmation on the things you are really good at and help to bring awareness on the things you still need to work on. You become self-aware and are able to grow.<sup>44</sup>

TLS students also mentioned how their own legal writing skills had improved through teaching these skills to their classes:

I never thought that through teaching others, I would learn so much myself. Marking the [tutorial] prep of other students opened my eyes to what it's really like to be an examiner and I noticed such a change in my own work (test and exam answers) when I became more aware of structuring my answers in a way that would make sense to an examiner reading the answer for the first time, not knowing what my thought process was at the time of answering the question and having to make the structure of an answer very clear for an outsider to understand it on a first reading.<sup>45</sup>

### **3.3 Benefits accruing to the School of Law**

Aside from receiving the benefits that come from enhancing the learning experience of its learners mentioned above, the School of Law will also benefit financially from the practice of

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<sup>43</sup> TLS lecturer report to internal moderator 2016.

<sup>44</sup> TLS lecturer report to external examiner 2015.

<sup>45</sup> TLS lecturer report to external examiner 2014.

using peer tutors. Colvin points out that “when departmental faculties are asked to teach more and more students with no increase in funding for additional instructors, peers can provide support in overenrolled classes”.<sup>46</sup>

School of Law staff who make use of peer tutors can also be released from some of the more time-consuming lecturing duties such as answering general student queries or providing formative feedback on multiple drafts of students’ written work. This time can be used by lecturers in any number of productive ways, such as in developing innovative teaching techniques or in providing additional consultations for students in need of remedial interventions.

Senior law student peer tutors and mentors, armed with the legal writing skills that they have developed over three years in the LLB programme, are thus well placed to engage in the contextualised sharing of ideas with the first-year law students and begin the process of constructing knowledge around what it is “to think and write like a lawyer”. However, although the peer tutors may be senior law students with an impressive amount of legal knowledge, skills and values under their collective belts, it is still imperative that they be sufficiently developed to enable them to offer a relevant, efficient, and engaging peer-tutoring service to their students.

#### **4. Developing the skills of peer tutors to teach persuasive legal writing**

Trimbur makes that point that peer tutors frequently begin their tutoring experience feeling insecure about their ability to facilitate a collaborative learning environment in which their students’ persuasive legal writing skills could be improved.<sup>47</sup> These insecurities could stem from the fact that the tutors are not familiar with working within a small-class, co-operative learning environment. They themselves might have mainly experienced large classes in which information is disseminated by the lecturer to the student in a traditional vertical learning style, often with little or no student participation or engagement, and with assessments taking the form of tests and examinations that focus on rote learning.

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<sup>46</sup> Colvin 2007:166.

<sup>47</sup> Trimbur 1987:22.

Peer tutors might also feel conflicted about embracing the idea of knowledge construction within a cooperative learning environment, when they thrived and achieved excellent grades in a very different teaching environment. Despite an intellectual understanding of why collaborative learning is important to teach students how to think and write critically — like a lawyer — they may have internalised, and therefore feel loyalty towards a traditional teaching style, rather than a less familiar peer-learning experience.<sup>48</sup>

In addition to this, newly appointed peer tutors might be unsure of the form of guidance that they will be providing to their classes and need to understand the role that they will be playing as peer tutors. Colvin comments that, “[h]elping students become peer tutors involves much more than teaching them tutoring techniques — it also involves training them to understand the position they will occupy”.<sup>49</sup> This point has been confirmed in the reflections of the peer tutors above.

Therefore, if senior law students are to provide effective, professional legal writing peer-tutoring services, their knowledge and teaching abilities must be developed in a number of areas. For example, tutors must learn to create a collaborative learning environment by facilitating small-group discussions and activities; to provide eloquent, confident impromptu answers to legal questions; to encourage critical thinking; and to encourage class participation. In addition to these important skills, peer tutors must learn to provide a reliable assessment of student legal writing and establish peer-tutor conversations in feedback. In this respect, peer assessment should be more than simply awarding a grade on a student paper and should involve engagement on an intellectual level with the assessment process itself. This is an essential teaching skill that involves the close consideration of learning outcomes, marking criteria and standards of consistency across groups of students and among peer tutors. Liu and Carless maintain that:

This intellectual engagement with outcomes, criteria and standards is at the heart of student involvement in assessment and can lead to greater clarity about the nature of high quality performance. Engaging learners in thinking about achieving outcomes to certain agreed standards is a learning process and giving marks or grades is only part of that process.<sup>50</sup>

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<sup>48</sup> Trimbur 1987:23.

<sup>49</sup> Colvin 2007:175.

<sup>50</sup> Liu & Carless 2006:280.

## 4.1 Peer-tutor development strategies

The ongoing development of peer tutors is an essential part of the peer-tutoring process and careful attention needs to be paid to the tutor development strategies employed during this time. Clarence points out that the ability to provide effective collaborative learning strategies is no easy task:

[T]o provide these kinds of learning opportunities for students, tutors themselves need to be confident facilitators, able to step back and let students guide the discussions, and be able to fully value students' contributions to knowledge-making while also being able to correct misunderstandings and answer questions. This is no mean feat, especially if one considers that peer tutors are themselves students — usually postgraduate but in some cases also senior undergraduate students.<sup>51</sup>

Two models of peer tutor development — the “participatory peer-tutoring model” and the “peer-tutor developmental sequence” model will now be discussed.

### 4.1.1 The participatory peer-tutoring model

Developing the tutoring skills of senior law students using a participatory peer-tutoring development model calls for ongoing tutor training that models teaching and learning in a collaborative learning environment — that is, “participatory, peer-focused tutoring environments that will enable student-led, independent learning”.<sup>52</sup> Thus the tutor training itself must incorporate teaching techniques that support co-operative teaching and that fall within a social constructivist teaching framework. During their training, tutors must engage in the learning process with their lecturer and with their peers alike, in order to construct the relevant knowledge, in much the same way as they would be expected to conduct their own tutorials. As Clarence states: “[i]n other words, training should not be ‘done unto’ tutors, or come in the form of mini-lectures; rather, the knowledge should come from the tutors’ themselves, and consolidate and extend what already exists”.<sup>53</sup>

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<sup>51</sup> Underhill & McDonald 2010, cited by Clarence 2018:60.

<sup>52</sup> Bruffee 1984, cited by Clarence 2018:59.

<sup>53</sup> Clarence 2018:61.

This style of tutor development, in addition to enabling tutors to become effective group facilitators, has the benefit of enabling the peer tutor group to form strong collegial bonds. These bonds will enable the peer group to support each other in times of need by sharing materials, experiences and lessons learnt through the year.<sup>54</sup>

The value of learning through experience and modelling, in a scaffolded learning environment, is supported by the renowned Russian psychologist Vygotsky's theory of the Zone of Proximal Development, which can be expressed as "the distance between the actual development level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers",<sup>55</sup> and is reiterated by his thoughts on the role of imitation in learning:

[H]uman learning presupposes a specific social nature and a process by which children grow into the intellectual life of those around them. Children can imitate a variety of actions that go well beyond the limits of their own capabilities. Using imitation, children are capable of doing much more in collective activity or under the guidance of adults.<sup>56</sup>

However, it is argued that in addition to participatory peer-tutor development, training facilitators must simultaneously follow a developmental sequence, which will afford the peer tutors time to gradually develop into their newfound roles.

#### **4.1.2 The peer-tutor developmental sequence model**

Trimbur makes the valid point that inexperienced peer tutors might initially have difficulty in making sense of the dichotomy of the term "peer tutor". How can one be both a peer and a tutor? This apparent contradiction in terms might cause a newly appointed final-year law student tutor to question their commitment to the Law School in the face of their three-year allegiance to their peers. Trimbur thus advocates the gradual development of peer tutors, using a developmental sequence of tutor training that changes incrementally from co-learner mode to apprentice mode as tutors gain experience and confidence in their tutoring abilities.

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<sup>54</sup> Clarence 2018:62.

<sup>55</sup> Vygotsky 1978:86.

<sup>56</sup> Vygotsky 1978:88.

The co-learner mode “emphasize[s] collaboration and experiential learning” and views peer tutoring “as a semi-autonomous activity that contributes to the formation of a student culture that takes writing seriously”.<sup>57</sup> This mode will have two purposes: first, it will enable tutors to develop confidence in their ability to tutor as they collaborate with their students to improve their legal writing skills; and secondly, it will allow tutors to refocus their energy from an individualised, competitive way of learning to one that embraces collaboration with peers within the social constructivist paradigm. In the words of Trimbur:

They need, in effect, to relinquish some of their dependence on faculty authority and conventional measures of success ... and to experience instead the authority co-learners invest in each other as they forge a common language to solve the problems writers face ... The point of tutor training at this stage is to resocialize tutors as collaborative learners within student culture.<sup>58</sup>

Then, as tutors gain expertise from their collaborative teaching and learning experiences, the development strategy can evolve into apprentice mode, which will focus on constructing knowledge of the theory of teaching legal writing. In the process, tutors will be pulled “toward the professional community that generates and authorizes such knowledge”.<sup>59</sup>

Thus, peer tutor development will begin with the lecturer modelling a collaborative co-learner environment using teaching techniques commensurate with a social constructivist paradigm as part of a participatory peer-tutor development model. The lecturer will then gradually advance to include more theory of teaching, commensurate with a peer-tutor developmental sequence model, moving from co-learner mode to apprentice mode — thus enabling tutors to marry the concepts of peer and tutor.

The details of how these development models were applied in the Teaching Legal Skills module at the UKZN School of Law are discussed below.

## **5. The Teaching Legal Skills (TLS) module programme**

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<sup>57</sup> Trimbur 1987:26.

<sup>58</sup> Trimbur 1987:26–27.

<sup>59</sup> Trimbur 1987:27.

## 5.1 Structure of the module

The TLS module is a final-year LLB Public Interest Law elective module, which is offered at the UKZN School of Law, and was originally developed by Greenbaum in 1999. She explains the history of the TLS module as follows:

[A] tutor-training course, Teaching Legal Skills, was introduced at Natal University in 1999. Inspired and assisted by the ideas and visits of eminent legal writing expert, Professor Brook Baker, Director of the Legal Practice Programme at Northeastern University School of Law, in Boston, the course aimed to train tutors to critique writing, amongst other teaching functions. The impetus arose out of a need to increase teaching resources, and indirectly to build capacity. The design of the course was largely modelled on a similar course taught at Northeastern University. Materials from Georgetown University Law School also provided helpful guidelines for the tutor training. The aim of Teaching Legal Skills was to assist in and facilitate the teaching of legal writing to first year students.<sup>60</sup>

Since its inception, the module has retained a similar structure, although it has evolved in certain respects. The current structure of the TLS module is discussed in some detail below.

TLS is a 16-credit, year-long module which is only offered at the University of KwaZulu-Natal, Howard College Campus. The module is assessed entirely by means of continuous assessment and TLS students do not have to complete any formal tests or year-end examination. The primary duty of the students who participate in this module is to facilitate a 45-minute tutorial each week for the first-year Introduction to South African Law and Foundations of South African Law modules. The students are prepared for this by means of a weekly double-period seminar. The teaching philosophy adopted in the TLS module is a focus on values-based education with an emphasis on deep learning in general, and critical thinking in particular, in order to prepare the tutors for a goal-orientated, competitive, diverse workplace in which they will often be required to perform effectively in teams. Lovat explains the focus of values education as follows:

It is to ensure that the evidence of facts and figures, as well as of human interactions and conversations, is of the broadest and most challenging kind. Ultimately, its task is to push student

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<sup>60</sup> Greenbaum 2001:10.

learning towards self-reflectivity, that knowing of self that allows one to step out of the shadow of one's upbringing and cultural heritage, to challenge not only the preconceived beliefs and behaviours of this upbringing and heritage but, more painfully, one's own deep seated comfort zone of beliefs and behaviours. The task, in other words, is to transform.<sup>61</sup>

There is a stringent selection process for the TLS module. At the end of each year — on a voluntary basis — a group of students from the outgoing TLS class run an informal information and question-and-answer session for all third-year LLB students who might be interested in taking the module in their fourth year. Tutors who are involved in this presentation are urged to be as candid as possible about the heavy workload and extensive duties of students participating in the module. All interested students are then invited to make written application for the module. In their application, students must explain why they are interested in enrolling for this Public Interest Law module in particular, and list any previous teaching or leadership experience that they might have had. They are also required to write a short paragraph on the topic “Good tutors are born and not made” in order to demonstrate their writing skills and to attach a copy of their academic record.

When shortlisting and interviewing potential candidates, the qualities that are looked for are commitment, motivation and enthusiasm for teaching in general, as well as an ability to manage time. Also, very importantly, candidates must have a strong academic background, particularly in the topic areas that are to form part of the first-year law modules that they will be tutoring — Introduction to South African Law and Foundations of South African Law. Although the applicants are 4th-year law students, who will be tutoring at a first-year level, it is essential that they have a sound grounding in the substantive materials in order to become effective tutors.

During their training, it is made clear to the TLS peer tutors that, in addition to teaching substantive materials, they are also tasked with introducing the first-year students to the art of persuasive legal writing. In this respect then, one of their central responsibilities is to encourage students to engage on a deep, critical level with the subject and focus of their writing. This ability to engage deeply and critically with the legal materials informing written work, and with the writing process in general, is essential when forming logical, cogent written legal arguments.

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<sup>61</sup> Lovat 2006:4.

The specific outcomes of the module as communicated to the students in the module outline are:

*Teaching — [mark allocation 35%]*

Students participating in the TLS module will fulfil the role of peer tutor and mentor to a class of approximately 15 first-year Introduction to South African Law students in the first semester and approximately 15 first-year Foundations of South African Law students in the second semester. This involves the effective planning and teaching of a one-period tutorial each week.

*Feedback — [mark allocation 30%]*

Tutors must give detailed feedback on first-year written tutorial preparation both through written comments and in one-on-one conferences with their students.

*Participation — [mark allocation 20%]*

Tutors must prepare a role-play, lead a themed discussion on an issue of teaching and learning and participate in all discussions held during the TLS seminars. Readings are made available to the TLS class on each discussion theme prior to the discussion so that the discussion leader and the rest of the TLS students can participate in an informed manner in the discussion. Discussion leaders are also expected to do more reading around the topic so that they can provide further insights into discussion points raised on the day. Tutors are assessed according to the extent of their preparation and the depth of their contributions to the role-plays, themed discussions and general class participation.

*Reflective journal — [mark allocation 15%]*

The reflective journal that the tutors are required to submit on a weekly basis is intended as a personal, reflective document, recording their growth and observations as a tutor. It is not intended merely to be a record of the module, covering the substantive content of the materials. Thus, students must reflect on issues of teaching and learning, as well as on multicultural, gender and diversity issues that are noticed in their tutorial groups, in the TLS class and in the curriculum in general.

During TLS seminars, tutors receive guidance from the lecturer and engage in peer discussions and debates on all aspects of small-group tutorial facilitation, beginning with basic teaching

techniques and then moving on to values-based teaching topics. TLS students must submit a weekly online portfolio of documents demonstrating proficiency in the four outcome areas: teaching; feedback on students' written work; participation and preparation; and a reflective journal entry. A provisional mark is awarded in June and a final mark in November. (This method was chosen, as opposed to taking an average of the two semesters' marks, because it is important that the students view their proficiency in teaching as a work in progress. They must appreciate that their skills are dynamic and that through reflection and adaptation they can improve consistently throughout the year. This will ensure that the tutors reflect honestly on both the successes and failures that they experience).

## **5.2 The development of peer tutors in the TLS module**

The design of the TLS module allows for the simultaneous application of the participatory peer-tutor development and peer-tutor developmental sequence models discussed earlier. That is, both models are implemented from the commencement of the TLS module lectures. At the outset, tutors are told that they will be performing role-plays and leading themed discussions in the TLS class during the course of the semester. However, the first role-play of the module is modelled for the class by a top TLS student from the previous year, and a critique of this role-play is provided by the TLS lecturer. Likewise, the first themed discussion of the module is modelled by the TLS lecturer and the tutors are encouraged to take part in a discussion on selected teaching and learning concepts.

After watching and participating in the first role-play, the tutors are now in a position to run their first tutorial in the second week of the term, which focuses less on legal writing or substantive law concepts and more on getting to know the students in their tutorial class. There is also comprehensive academic support for the tutors — each tutorial has a detailed written tutor guide, and each week the first-year law module lecturer attends the TLS seminar briefly, to answer any questions that the tutors might have on the upcoming tutorial. During the TLS seminar immediately following the first tutorial, tutors are encouraged to collaborate with their fellow tutors by sharing details of their first encounters with the first-year students in a general discussion led by the lecturer. Then, after a few weeks, the peer tutors themselves begin to run the role-plays and lead the discussions, thereby modelling these tasks to the rest of the class. The small class size of the TLS module — limited to a maximum of 18 students — lends itself to a participatory class environment.

The introduction of a series of themed discussions, which are run throughout the year, is intended to model the use of discussion and debate to encourage critical thinking, which is essential to persuasive writing. Every week tutors participate in these discussions, which, although led by a fellow tutor, are mindfully guided by the TLS lecturer. In the process, they get to witness first-hand how a small-group discussion should be facilitated in order to maximise opportunities to encourage critical thinking with the class. It is imperative that the TLS lecturer makes a point of raising awareness of opportunities to teach critical thinking with the class, as and when these opportunities arise during the discussion. Themed discussions introduced during the year cover topics such as facilitating discussion on the first-year module's substantive legal materials, facilitating an effective tutorial using lesson plans and group work, the stages of group development, teaching professionalism, the lawyer as counsellor, creating significant learning experiences, and honing public speaking and team management skills. All the tutors are provided with pertinent readings on these discussion topics before taking part in the themed discussions so that comments made during these discussions are informed and insightful.

In addition to guiding the themed discussion to a certain extent, prior to the TLS seminar the lecturer meets with the tutor tasked with leading the discussion in order to engage in a conversation around the material upon which the discussion is based. During this consultation the lecturer interrogates the questions that the tutor intends posing during the upcoming themed discussion to spark debate, and further alerts the tutors to potential opportunities to encourage and model critical thinking during the class discussion.

The conversations that are started in these discussions are ongoing and dynamic, with tutors required to think further on the topic and to write up their thoughts in a reflective journal entry. These journal entries receive critical comment by the TLS lecturer, who poses follow-up questions to encourage deep learning and thoughtful responses from the tutors, effectively modelling the process of establishing a conversation in feedback.

The concept of giving effective written feedback and establishing a conversation in feedback is introduced early on in the first semester in a TLS feedback workshop. During this workshop, tutors are split into groups of three or four and asked to critique the feedback given by lecturers on previous first-year student legal writing. The workshop is designed to model both the

facilitation of group work activities as well as to demonstrate how to give detailed, directive feedback on written work to first-year students in an ongoing conversation in feedback. During this workshop, the importance of using participatory teaching methodologies when teaching legal writing is emphasised, as well as the need for students to become part of a practical legal writing experience. In an article detailing a previous legal writing intervention at the UKZN School of Law, I describe how students must be led “incrementally through the legal problem-solving process, allowing them to build their legal writing muscles gradually, until they [are] strong enough to produce well-rounded, persuasive pieces of writing on their own”.<sup>62</sup>

In addition to showing how conversations in feedback are established during the feedback workshop, feedback on the tutors’ own work is provided by the TLS lecturer on a weekly basis throughout the year. It takes the form of both written and oral feedback. During the first semester there is an emphasis on providing online detailed written feedback on reflective journals, lesson plans, visual aids and student feedback, as well as providing oral feedback on class participation, role-plays and themed discussions. Then, in accordance with a peer-tutor developmental sequence, the focus of the feedback shifts slightly in the second semester from lesson plans, student feedback and visual aids, to more critical written feedback on reflective journals. This encourages students to engage critically with their teaching and the application of teaching and learning strategies gleaned from module prescribed readings.

Thus, throughout the year the lecturer ensures that certain essential constructivist teaching principles — constructive alignment, peer participation and peer tutor conversations in feedback — are consistently modelled.

The peer tutors are therefore initially immersed in a co-learning mode, with a pedagogical alliance being created between the TLS lecturer and tutors in the TLS class, as well as between the tutors and their own students in the Introduction to South African Law tutorials, which they run. Thereafter, there is a gradual development in the sequence of tutor training, with the responsibility of modelling the relevant tasks moving from the lecturer to the peer tutors. As the first semester continues and tutors gain expertise in tutorial facilitation this, in turn, leads to a shift from co-learner mode to apprentice mode, with the gradual introduction of theory-based themed discussions in TLS lectures.

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<sup>62</sup> Crocker 2018:12.

Peer tutor development continues in the second semester, when TLS students move on to tutor students in the Foundations of South African Law module. During the second half of the year, TLS students are encouraged to show increased creativity when planning their tutorials and to experiment with innovative teaching techniques to draw in the diverse learning styles of their students. They are also expected to engage on a critical level with challenging activities during TLS seminars, such as participation in a mock TLS academic conference. Three TLS students (chosen at random) are selected to form part of the conference panel. These students are each given an article covering a challenging pedagogical concept to study. They are then required, in the style of an academic conference, to present key ideas that they have gleaned from these articles to the rest of the TLS class. The remaining TLS students, who represent the conference delegates, will then ask questions of each of the panelists to clarify points that were unclear during the presentations. Over the years, the annual TLS conference has proved to be a welcome departure from the usual TLS seminar format and an interesting, innovative way to continue tutor development and encourage deep learning.

## **6. Challenges encountered in the Teaching Legal Skills module**

The benefits of using peer tutors to facilitate learning in aspects of substantive law, as well as the acquisition of legal writing skills, mentioned in the general discussion above, mirror the strengths of the TLS module. These benefits are reiterated in the practical examples given by TLS students over the years, while reflecting on their learning experiences when peer tutoring in the TLS module.

However, despite these benefits, much has been written on the challenges of using peer tutors to improve the skills of first-year students, in particular the legal writing skills of these students. In fact, Trimbur remarks that there is often opposition as “faculty traditionalists” believe that “peer tutoring doesn't make much sense. If anything, peer tutoring looks like a case of the ‘blind leading the blind’”.<sup>63</sup>

Greenbaum also points out that using student tutors to provide feedback on first-year written work is not without its challenges. However, she maintains that a number of practices can be

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<sup>63</sup> Trimbur 1987:22.

incorporated into the development of these peer tutors in order to improve the efficacy of the feedback given by these students.<sup>64</sup> Thus, following an investigation carried out by Greenbaum in 2001, on whether the written feedback of senior LLB students taking part in the TLS module could help to improve first-year students' legal writing, it was concluded that these student tutors could indeed provide an effective, inexpensive marking service for the assessment of first-year written work. The investigation took the form of a fairly extensive review of the TLS tutor class of 2000 and the nature and quality of their feedback on first-year student writing. Greenbaum explains the study as follows:

In this study, eighteen pieces of writing: three different examples of first year law students' writing, on which six tutors had each written feedback comments, were analysed. The number, accuracy and type of comments were tabulated, and the tone and quality of the responses were evaluated against the theoretical frameworks reviewed above. A descriptive, qualitative interpretation of their commenting practice develops a detailed sense of their successes and deficiencies.<sup>65</sup>

On completion of the study, Greenbaum concluded that the empirical data collected verified that peer tutors are capable of providing valuable, intensive supplemental instruction on legal writing.<sup>66</sup> Liu and Carless agree with Greenbaum in respect of the effectiveness of using peer tutors as assessors to provide feedback on student work, stating that, “[w]hilst acknowledging that establishing the reliability of student judgements is an important issue, we feel that it is now well-recognized that students are reasonably reliable assessors”.<sup>67</sup>

The main challenges encountered in the current TLS module fall into two broad categories: first, challenges encountered by the peer tutors themselves in providing formative and summative feedback on student legal writing; and secondly, challenges encountered by the TLS lecturer in developing the ability of the peer tutors to provide effective feedback on students' written work. These challenges, and how they have been, or could be, addressed, are discussed in more detail below.

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<sup>64</sup> Greenbaum 2001:81–83.

<sup>65</sup> Greenbaum 2001:iii.

<sup>66</sup> Greenbaum 2001:iii.

<sup>67</sup> Liu & Carless 2006:282.

## **6.1 Challenges encountered by peer tutors in the provision of written formative and summative feedback on student legal writing**

A number of problems can surface when inexperienced markers are tasked with providing formative and summative feedback on students' written work. For example, new peer tutors might initially provide inappropriate amounts of feedback, be unable to articulate the reason for grammatical errors, or be inconsistent with their feedback comments or mark allocations. However, these pitfalls can be minimised with the introduction of practical training workshops, formal peer-tutor discussion groups and the dissemination of information on the practical application of educational theory. In this vein, the current TLS module has incorporated a feedback workshop and introduced specific themed discussion groups and theoretical readings to combat potential pitfalls.

### **6.1.1 Inappropriate amount of feedback**

New peer tutors are often found to provide inappropriate amounts of feedback — either correcting every grammatical and spelling error as they go along or not including enough detailed directive feedback to make the exercise meaningful. This can cause some students to lose motivation. Greenbaum notes that this “preoccupation with correcting every mistake detected as they read through the paper, is grounded in a traditional view of teacher as ‘arbiter of “right” answers’”.<sup>68</sup> She recommends that to overcome this, tutors must develop a theoretical knowledge of the feedback process to enable them to make informed choices about how to identify and provide a deeper analysis or diagnosis of many first-year legal writing problems. In this regard, Bean makes the point that a revision-orientated philosophy towards marking student work should be adopted, as opposed to an editing-orientated philosophy. Adopting a revision-orientated approach when providing feedback focuses on structure, argument and ideas rather than grammar and spelling, and has the goal of encouraging the student to produce work of increasing complexity and sophistication.<sup>69</sup> Giving revision-orientated feedback will thus also focus on the persuasiveness of the legal writing. Calleros maintains that the subtle art of writing persuasively employs a writing style that uses “strong, but not exaggerated, language” and “effective emphasis through sentence structure, specificity, and vivid, concrete

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<sup>68</sup> Greenbaum 2001:79.

<sup>69</sup> Bean 1996:68.

language.” Thus, peer tutors can be provided with explicit instruction not only on the identification of common language errors, but also on the development of a persuasive writing style.<sup>70</sup>

### 6.1.2 Insufficient knowledge of language errors

Many new peer tutors are able to identify that there is a language error in the student writing. However, in their feedback, they are unable to articulate why this particular error is recurring. It is often the case that second-language speakers produce similar language errors with the root of the error emanating from the student’s home language construction. Making tutors aware of those errors that might be common to second-language speakers would enable them to identify the errors more easily and to give more useful guidance on how to correct them.<sup>71</sup>

### 6.1.3 Inconsistency in marking

Inconsistency in marking is a common problem when a group of 18 or so tutors are individually applying their minds to the grading of legal writing, which can also be a subjective exercise. Consistency in marking refers not only to consistency in the feedback comments given (e.g. number of comments, tone, focus, endnotes), but also to consistency in the assessment grades awarded. Thus, before beginning the marking process, peer tutors must meet to discuss the importance of consistency in marking. The specific marking requirements of each assignment must be made explicit as well as the possible ambiguities or discrepancies that might arise while marking. Markers must be issued with a detailed marking rubric, as well as a detailed set of grading criteria to increase the consistency of the marking as much as possible. Greenbaum also suggests that a system of feedback peer reviews can be implemented among the peer tutors. The benefits of a peer-review system are twofold: first, the collaboration amongst the tutors encourages mindful engagement with the aims of the feedback being given as well as

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<sup>70</sup> Calleros 2014:376. Greenbaum suggests introducing this theoretical aspect of the tutor training by implementing Ramsfield’s ‘three-step system of training’. First, brainstorm with tutors to create a list of feedback comments that were helpful in their own studies as well as a list of those that were not. Then refine this list using theoretical readings. As tutors’ expertise develops, introduce commenting terminology in margin and endnotes. Secondly, develop the list started in step one by studying a ‘library of comments’. Thirdly, tutors comment on a ‘sample critique’, which is subjected to peer review, followed by discussion. Then tutors comment on further papers, which are reviewed and commented upon by the lecturer and peers. (See Greenbaum 2001:81, citing Ramsfield 2001).

<sup>71</sup> Greenbaum 2001:80.

engagement with the materials being marked; and secondly, it serves as a way of moderating the student tutors' feedback — thereby lightening the module lecturer's supervisory load.<sup>72</sup>

Greenbaum also recommends a system of peer-review checklists to enhance the consistency of peer-tutor marking by establishing a formalistic standard of marking. These checklists could require student markers to follow certain minimum criteria, such as the inclusion of a balanced endnote indicating the main aspects of the assessment that were performed well and those that need revision. Peer tutors could also be required to complete a self-check list after having marked a particular assessment, giving an indication of the number and type of feedback comments that they included in their feedback. This would enable their supervisor to monitor both the usefulness and style of the comments as well as develop the tutors' ability to self-assess.<sup>73</sup>

All of the aforementioned challenges are addressed in the current TLS module with the implementation of a feedback workshop, which is held during the first few weeks of the semester. During this workshop, particular attention is paid to the issues of spelling and grammar, and typical second-language errors. The feedback workshop adopts a constructivist teaching style, leaving space for peer-tutor discussion around their experiences regarding the provision of feedback on second-language speakers' work and, where relevant, with their own experiences in terms of receiving feedback during the course of their studies.

In addition, the feedback process is firmly embedded within the TLS module itself. TLS peer tutors are actively involved in providing feedback on students' written work on a weekly basis throughout the year, as well as in a continued conversation in feedback with the TLS lecturer on their own work. Every week feedback strategies are then discussed with the peer tutors and the TLS lecturer, to address any of the pitfalls of peer assessment mentioned above. This continual engagement with the feedback process is an important part of the peer-tutor development.<sup>74</sup>

## **6.2 Challenges encountered by the TLS lecturer in developing the ability of peer tutors to provide effective feedback on students' written work**

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<sup>72</sup> Greenbaum 2001:83.

<sup>73</sup> Greenbaum 2001:82.

<sup>74</sup> Boud 2000, cited in Liu & Carless 2006:288.

A significant positive aspect of the TLS module is the consistent provision of formative feedback on the peer tutors' submissions on a weekly basis. This immediate feedback allows the tutors to make incremental changes in order to correct errors and answer questions as and when they arise. This aids in the reflective process and provides the best service possible for their student classes. It also allows a meaningful conversation in feedback to take place, thus adding depth to the learning process. However, the main challenge faced by the TLS lecturer in providing this feedback is the sheer volume of work that is submitted on a weekly basis. Every week, each TLS tutor submits a lesson plan, visual aids, examples of written feedback given on their student work and a reflective journal entry. The current TLS module has incorporated a peer-review process to alleviate this intense workload by using the services of a master's student engaged in the School of Law Graduate Teaching Assistant programme<sup>75</sup> to provide formative feedback on selected TLS submissions throughout the year. This Graduate Teaching Assistant is carefully chosen from the ranks of top students, having participated in the TLS module the previous year and who is also participating in the programme.

## **7. Conclusion**

The benefits of using tutors to relieve the labour-intensive nature of legal writing programmes are substantial, as are the many other benefits of using peer tutors in a collaborative learning environment. The TLS peer tutors are a dedicated, motivated well-developed group who are perfectly placed to provide formative as well as summative feedback on first-year students' written work. Since the tutoring duties form part of the academic assessment for the module, these tutors are open to being coached on the theory and practice of providing effective written formative feedback on the first-year students' legal writing assignments and are prepared to spend long hours carrying out their duties. Horizontal peer-learning collaboration also allows for the social construction of knowledge by contextualising materials.

Although first-year law students are expected to assimilate a vast amount of substantive law knowledge during the first year of the LLB degree, as well as to master an array of critical thinking and analytical skills, it is possible for peer tutors to make a difference to these students'

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<sup>75</sup> A drawback of this Graduate Teaching Assistant programme is that it utilises School of Law funds to pay the students participating in the programme for services rendered. Every year it becomes more and more difficult for the School of Law to procure funds for this programme.

first-year learning experience. This peer tutor model has proved to be very successful in providing the additional capacity to run intensive legal writing support programmes at the UKZN School of Law, despite the limited expertise and resources available.

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## 6 CONCLUSION

### 6.1 Introduction

The poor legal writing skills exhibited by many law graduates entering the legal profession has been a matter of grave concern in both academic and professional practice circles for decades.<sup>1</sup> A vast amount of literature has analysed the reasons behind this problem and debated various approaches to teaching these skills.<sup>2</sup> However, although UKZN and many other universities are getting closer to resolving the problem, the question of how to teach persuasive legal writing with extremely limited staffing and financial resources remains as important today as it was 20 years ago.

Good legal writing is essential to the practice of being a good lawyer, and all law students need to become proficient in this important skill – making this an issue requiring the sincere attention of legal academics and law schools.<sup>3</sup> Many law students struggle to learn this skill because writing like a lawyer requires deep, critical thinking, as well as knowledge of the conventions of legal discourse.<sup>4</sup> In addition, law students at UKZN have a mere four years of tertiary study in which to master this skill while working through intensive substantive law modules, which prepare them for work as general legal practitioners.<sup>5</sup> Therefore, learning and teaching persuasive legal writing is a complex process, not only for the students but also at an institutional level. These complexities flow from *inter alia*, the heavy resources that may be required to address, for example, the high volumes of marking associated with a legal writing programme;<sup>6</sup> the need to appoint lecturers who are not only experienced teachers but are also

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<sup>1</sup> Sedutla ‘LLB Summit: Legal Education in Crisis?’ (2013) *De Rebus* 8; Bangeni & Greenbaum ‘An Analysis of the Textual Practices of Undergraduate and Postgraduate Novice Writers in Law’ (2013) 29(2) *Per Linguam* 76.

<sup>2</sup> For example, see Van Niekerk ‘The Four-year Undergraduate LLB: Where to From Here?’ (2013) *Obiter* 536; Swanepoel & Snyman-Van Deventer ‘The Need for a Legal-Writing Course in the South African LLB Curriculum’ (2012) *Obiter* 121–134 at 123; Rideout & Ramsfield ‘Legal Writing: A Revised View’ (1994) 69(1) *Washington Law Review* 69.

<sup>3</sup> Feerick ‘Writing Like a Lawyer’ (1994) 21(2) *Fordham Urban Law Journal* 381–388; Greenbaum ‘Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives’ (2004) 15(1) *Stellenbosch Law Review* 3 8; South African Qualifications Authority (SAQA) *Bachelor of Laws* available at <http://regqs.saqa.org.za/viewQualification.php?id= 22993> (accessed 2023-07-3).

<sup>4</sup> Candlin, Bhatia & Jensen ‘Developing Legal Writing Materials for English Second Language Learners: Problems and Perspectives’ (2002) *English for Specific Purposes* 312.

<sup>5</sup> This is in contrast to legal writing instruction in the United States, which forms part of a postgraduate degree, the Juris Doctor (JD) degree, which students undertake only once they have completed an undergraduate degree.

<sup>6</sup> Durako ‘A Snapshot of Legal Writing Programs at the Millennium’ (2000) 6(95) *The Journal of the Legal Writing Institute* 107–109.

themselves proficient in legal writing;<sup>7</sup> or the need to develop appropriate materials to underpin such a programme.<sup>8</sup>

In engaging with this issue, this thesis aimed to answer four fundamental research questions:

- (i) What ought to be the core elements underpinning the teaching of a legal writing programme?
- (ii) How can law lecturers motivate law students participating in a large-class legal writing programme to read deeply and think critically about the topics they are addressing?
- (iii) What are some of the strengths, weaknesses and lessons learned from the implementation of various iterations of legal writing programmes at the University of KwaZulu-Natal, Howard College School of Law, which can be used by other law schools to address the need to ensure that law graduates can meet the legal writing requirements of the legal profession?
- (iv) Is there a structured way in which peer tutors can be used to create a sustainable legal writing programme in resource-constrained environments?

This thesis used six journal articles to answer the research questions above and to make recommendations based on the findings. The journal articles document a thorough review of the literature. This revealed that there is a need to teach persuasive legal writing and that certain core elements will enhance the design of a successful legal writing programme. In conducting the literature review, an external factor – student motivation – emerged as an important theme when considering the success of a legal writing programme. This is closely linked to a shift towards a greater focus on critical thinking as being a significant element of good legal writing. These core elements, student motivation and the challenges associated with resource constraints are all examined through the lens of the strengths and weaknesses of four iterations of legal writing and tutoring programmes at UKZN.

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<sup>7</sup> Rideout & Ramsfield op cit note 2 at 48.

<sup>8</sup> Biggs 'Aligning Teaching for Constructing Learning' (2003) *The Higher Education Academy* available at [https://www.researchgate.net/profile/John\\_Biggs3/publication/255583992\\_Aligning\\_Teaching\\_for\\_Constructing\\_Learning/links/5406ffe70cf2bba34c1e8153.pdf](https://www.researchgate.net/profile/John_Biggs3/publication/255583992_Aligning_Teaching_for_Constructing_Learning/links/5406ffe70cf2bba34c1e8153.pdf) (accessed 2023-07-3).

The years spent at UKZN in implementing four versions of legal writing and tutoring programmes, sometimes with financial resources and sometimes without, sometimes with institutional support and sometimes without, make the conclusions and recommendations that follow very personal and practical. These culminate in a suggestion for a comprehensive, sustainable, structured plan to teach and tutor legal writing in South African law schools. This plan encompasses the overall ethos of a viable legal writing programme at UKZN; a detailed structure for its implementation; and teaching principles and methods that must be included to ensure the success of the programme.

## 6.2 Findings

### 6.2.1 *There is a need to teach persuasive legal writing*

The starting point of my findings was that the ability to write like a lawyer is an essential skill for legal professionals who must express themselves succinctly and persuasively every day. Thus, it is essential that students are taught persuasive legal writing. In the past, students were left to learn this skill on their own. However, legal writing is now an explicit LLB outcome set out in the SAQA rules.<sup>9</sup> The onus for teaching the foundational aspects of this important skill lies with the universities. This is a difficult skill to learn in only four years of the LLB, with all the formal conventions of legal writing and the heavy substantive law workload. Thus, most law students can be considered novices in legal writing, whether second-language speakers or not. The art of persuasive legal writing is more than just the sum of concise writing skills and the conventions of legal writing. To master this art, students must learn other associated complex skills, such as critical thinking, legal reasoning, and legal argumentation.<sup>10</sup>

In addition to this, learning how to write persuasively like a lawyer is a process, and the repetition inherent in honing the skill of transforming writer-based legal writing into reader-based legal prose can often be a difficult and emotional one. It makes sense then that legal

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<sup>9</sup> South African Qualifications Authority (SAQA) op cit note 3; Council on Higher Education 'Higher Education Qualifications Sub-Framework: Qualification standard for Bachelor of Laws (LLB)' (2015) 11.

<sup>10</sup> Council on Higher Education op cit note 9 at 7–9; Louw & Broodryk 'Teaching Legal Writing skills in the South African LLB Curriculum: The Role of the Writing Consultant' (2016) 27(3) *Stellenbosch Law Review* 536; Vinson 'Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge' (2005) 21 *Touro Law Review* 510.

writing, in particular persuasive legal writing, cannot easily be mastered by law students without formal instruction.<sup>11</sup> It must be taught in a dedicated law module.

### 6.2.2 *The literature and the UKZN experience have identified certain core elements of a successful persuasive legal writing course*

A thorough reading of the literature and practical experience in implementing and teaching four iterations of legal writing and tutoring programmes at UKZN revealed several core elements that I believe are essential to a successful legal writing course. These core elements indicate a move away from teaching only spelling and grammar to include a strong focus on teaching critical thinking and legal reasoning skills.<sup>12</sup>

#### (i) The nature of the skills to be taught

The first feature of a successful legal writing programme is that the nature of the skills to be taught must be clearly defined. The focus of such a programme must be the teaching of persuasive legal writing which, in turn, requires the teaching of critical thinking and legal reasoning skills – or thinking like a lawyer. These are inextricably linked because critical thinking, which teaches students to engage deeply with legal materials, underpins persuasive legal writing. Teaching legal writing must focus on teaching critical thinking and legal reasoning skills and must shift away from teaching spelling and grammar. The LLB legal writing programme must also focus on teaching and learning persuasive legal writing and not simply the drafting of those documents that are based on formal legal precedents.

It was a weakness of the first iteration of legal writing programmes offered to first-year LLB students at UKZN – the Concise Writing Programme – that the programme focused on improving basic English grammar in the context of legal writing. Although the large-group lectures in this programme were taught by experienced senior staff member from the English Department, the focus on English grammar did not allow students to engage with the

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<sup>11</sup> Snyman-Van Deventer & Swanepoel ‘Teaching South African Law Students (Legal) Writing Skills’ (2013) 24(3) *Stellenbosch Law Review* 515; Williams ‘On the Maturing of Legal Writers: Two Models of Growth and Development’ (1991) 1(1) *The Journal of the Legal Writing Institute* 9.

<sup>12</sup> Council on Higher Education op cit note 9 at 7–9; Vinson op cit note 10 at 510; Clarence, Albertus & Mwambene ‘Building an Evolving Method and Materials for Teaching Legal Writing in Large Classes’ (2014) 67(6) *Higher Education* 842.

programme materials meaningfully.<sup>13</sup> This experience, against the background of the pertinent literature, made it clear that teaching legal writing goes beyond teaching English grammar and spelling. It requires a paradigm shift towards thinking and writing like a lawyer. This weakness was addressed in later iterations of the UKZN legal writing programme (the ISC and WiLL programmes), the main strength of which were a focus on critical thinking. In particular, conceptualising the legal writing programme at UKZN as a *Write it Like a Lawyer* programme was useful as it reflected a shift from spelling and grammar to critical thinking as the core objective.<sup>14</sup>

Another strength of the WiLL programme was that a distinction was drawn in these programmes between legal writing that requires adherence to a formal legal precedent, such as a simple letter of demand or a notice of motion, and teaching persuasive legal writing that is used in, for example, legal judgements and opinions. The former often requires a simple application of facts to a set legal example which may not leave space for a creative, persuasive writing style. The latter allows the writer more leeway to be creative in the critical application of the law to a set of facts in order to persuade the reader of a particular point of view. In fact, the writer must often rely on this creative independence to ensure the persuasiveness of the piece for a target audience. This distinction was also made, given that much of the technical drafting information will be taught in various professional training modules as students progress through the LLB degree and articles of clerkship.

(ii) The placement of a legal writing course in the LLB curriculum

An important aspect to consider when implementing a legal writing course is where this course should be placed in the LLB curriculum. I believe that the basics of persuasive legal writing must be offered in first year. Although there are some academics who contend that legal writing should not be taught in any detail in first year, I strongly believe that it is vital that first-year students receive intensive training in legal writing.<sup>15</sup> It is imperative that students build a strong

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<sup>13</sup> Crocker 'Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School' (2018) 21(1) *Potchefstroom Electronic Law Journal*.

<sup>14</sup> See an in-depth discussion on the ISC legal writing programme in Crocker op cit note 13, and a comprehensive discussion on the WiLL legal writing programme in Crocker 'Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1' (2020) 41(4) *Obiter*.

<sup>15</sup> Laycock 'Why the First-Year Legal Writing Course Cannot Do Much About Bad Legal Writing' (1990) *Scribes Journal of Legal Writing* 85.

legal writing foundation as early as possible in the LLB degree, and therefore a structured LLB legal writing programme must begin in first year. A weakness of the WiLL legal writing programme at UKZN was that it was only offered at second-year level. The result was that students were only able to start building the foundation of their critical thinking and writing skills after a year of struggling to master these skills on their own – in some cases entrenching many bad writing habits in the process.

However, mastering both the basic and advanced aspects of persuasive legal writing is a difficult cognitive process for most first-year students who are being introduced to complex thinking and reasoning skills – in addition to acclimatising to a foreign legal discourse. This, coupled with their commitment to other demanding modules in their first year of legal study can be overwhelming and demotivating. Therefore, it is important that a first-year legal writing module is restricted to teaching and learning only the basics of critical thinking and legal writing. Although it is important that educators articulate the high standard that is expected of their students from inception of the programme, at this stage, students will benefit most from practising and mastering the basics of critical thinking and persuasive legal writing.

(iii) Teaching methodologies to be used in a legal writing course

It is vital that certain teaching methods be used when implementing a successful legal writing course.

- An ongoing process approach to teaching

Another core element of a successful legal writing programme is the necessity for ongoing practice of the skill in a supervised, scaffolded learning environment that is dedicated to teaching legal writing. There is general consensus among South African academics that critical thinking cannot be taught in a once-off legal writing module and that a legal writing programme should be offered in a staggered approach.<sup>16</sup> Thus, the programme should begin with a course dedicated to teaching the basics of legal writing in the first year of undergraduate study and thereafter continue to be offered in each following year of the LLB degree as an embedded

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<sup>16</sup> For example, see Snyman-Van Deventer & Swanepoel op cit note 11 at 527; Kok & Nienaber 'Legal Skills for First-year Law Students: Too Little Too Late?' (2005) *The Law Teacher* 1–29; Gottlieb & Greenbaum 'The Effect of Integration on Learning: An Analysis and Evaluation of a Legal Writing Project in a South African Law Faculty' (2018) 34(1) *Per Linguam* 57.

version in selected substantive law courses. The selection of appropriate substantive law courses to which a legal writing programme could be attached requires careful consideration and would be an interesting research topic to investigate in a follow-up to this thesis.

Learning and practising the complex skill of persuasive legal writing requires that it be taught as part of a multi-stage process. Teaching and learning using these techniques is time-consuming. A dedicated year-long programme in the first year, with further embedded instruction in the years to follow, will provide the time and space to practise new skills and inculcate a culture of redrafting through consultation. This is not a task that can be handed over to the profession to develop during articles. It is also important that the first-year dedicated programme be given sufficient credit-weighting to place it on an equal footing with other substantive law courses so as to encourage student motivation. There is no definitive answer in the literature on whether legal writing programmes are effective if run over a single semester or whether they are more effective as a first or second-year course. However, experience gained in the WiLL programme showed that a programme limited to a single semester is insufficient time to ingrain critical thinking techniques and good legal writing habits in the new students. It would have been more useful had it been introduced as a year-long module in first year. A strength of the ISC legal writing programme was that it was implemented as a first-year, year-long programme, giving the programme designer time to develop a writing theme and introduce the concept of multiple drafts and process writing.<sup>17</sup>

Although some legal academics have indicated a preference for a first-year legal writing course to be linked to a substantive law module in order to provide context, my experience at UKZN has shown that sufficient context can be provided in a dedicated first-year legal writing course without having to link to a substantive law module.<sup>18</sup> At this early stage, first-year students have not yet been acculturated in legal discourse and can therefore be easily confused by complex substantive law concepts and unnecessarily distracted by the upcoming assessment of their knowledge of these concepts. It is thus essential that the main focus of a first-year legal writing programme be on critical thinking and legal writing. Substantive law concepts should not be focused on in detail at this stage, except if they are necessary to provide meaning and contextualisation to legal writing course materials – thereby motivating students to engage

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<sup>17</sup> Crocker op cit note 13.

<sup>18</sup> Gottlieb & Greenbaum op cit note 16 at 57.

deeply. Thus, when designing and supervising a first-year writing programme, teaching methods and materials must be chosen specifically to supplement the programme so that student focus is on developing critical thinking skills and on understanding what it is to write persuasively in law. This means that choosing the programme themes and topics is a delicate balancing act. It is imperative that programme materials be very carefully chosen to contain just enough interesting legal detail to inspire students and to allow them to engage deeply with the issues raised, but not too many complex legal issues so as to confuse them unnecessarily.

It was a weakness of the ISC legal writing programme that it was fully integrated into a first-year substantive law module. This resulted in an impractical student workload, making the programme unsustainable. However, the design of the WiLL legal writing programme was a significant strength since it paid careful attention to the legal materials on which the writing exercises were based so as not to overburden students with complicated substantive law concepts. The course was also introduced as a substantial credit-bearing module, which was a good motivator for students.<sup>19</sup>

- Constructivist teaching methods

Teaching critical thinking also requires a commitment to constructivist values-based teaching methodologies, which focus on constructing knowledge by sharing ideas and diverse experiences. In other words, “knowledge is not found, but made”.<sup>20</sup> It has been shown that values-based contextual learning makes it easier for students to learn complex concepts as it enables them to relate to the materials.<sup>21</sup> Values-based learning requires students to reflect on their own cultural upbringing and social connections and to challenge preconceived ideas in order to transform. The context in South Africa is one of a transformative Constitution. Some authors have thus advocated that legal writing be situated within this context, where it draws on social issues requiring students to think out the social outcomes of their legal writing. This is controversial as not all legal writing can fit into this category. Nevertheless, social context and a constant reminder of the constitutional context are essential to all legal thinking in contemporary South Africa.

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<sup>19</sup> Crocker ‘Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2’ (2021) 42(1) *Obiter*.

<sup>20</sup> Quinot & Greenbaum ‘The Contours of a Pedagogy of Law in South Africa’ (2015) 26(1) *Stellenbosch Law Review* 29–62.

<sup>21</sup> Quinot (2012) *South African Law Journal* 421–422.

- A legal writing programme must be constructively aligned and designed and taught by a relative expert in the field

Teaching critical thinking to novice learners is a daunting task made even more difficult if the legal writing programme is not constructively aligned. If every aspect of the programme is not specifically designed with flow and logical linkage in mind, this will confuse students who are already grappling with new and difficult legal concepts. Learners also need to be given the intellectual space to focus on the tasks at hand, such as critical debate and persuasive argumentation. Therefore, it is essential that attention is paid to the constructive alignment of every aspect of a legal writing programme. This is important when designing any module but particularly so when teaching a complex skill such as critical thinking and persuasive legal writing. On reflection, a weakness of the assessment tasks chosen for the WiLL programme (case summary and newspaper article) was that students were not required to take these tasks further and apply them to a real-world problem. Instead, the tasks focussed on the building blocks (summary and synthesis) that are the precursors to an advanced critical thinking task, stopping short of requiring them to take the next step and apply these skills in order to solve a real-world problem and embark on a transformative journey. These tasks could be improved by, for example, requiring students to prepare two case summaries and then to compare, critique and ultimately apply these to a current, concrete problem.

It stands to reason that the complex task of teaching legal writing is made even more difficult if the educator has no experience in thinking and writing like a lawyer. Thus, another essential requirement is that the course be taught and tutored by law lecturers and senior law student peer tutors with sufficient experience and knowledge to explain legal writing conventions and to provide contextualising legal examples.<sup>22</sup> It was a weakness of the UKZN Concise Writing Programme that lectures were not delivered by a legal expert with advanced knowledge in legal writing and reasoning. This led to a decrease in student motivation to engage with programme materials.<sup>23</sup> This was rectified in later iterations of the UKZN legal writing programme (ISC, WiLL and TLS tutoring module), and it formed a significant strength of these programmes, where senior law lecturers delivered lectures and senior law student peer tutors ran the associated legal writing tutorials.

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<sup>22</sup> Rideout & Ramsfield op cit note 2 at 48.

<sup>23</sup> Crocker op cit note 13.

- Blended learning teaching techniques must be incorporated into the legal writing course

A final core element of a successful legal writing course, in which students are motivated to learn, is the use of blended learning teaching techniques to enhance understanding. This is helpful for all law students but particularly for first-year second-language students who can easily access online dictionaries and podcasts to immediately explain legal terminology as they read the materials.

A strength of the WiLL programme – although presented before Covid-19 – was that it used various blended learning techniques. For example, in-class online research was required, and an explanatory motivation podcast was presented to deepen the learning experience. These techniques allowed students to contextualise their learning while also providing them with practical computerised research skills.

*6.2.3 The literature and the UKZN experience have identified the importance of student motivation: without it, students struggle with the tedium of learning the art of legal writing*

If students engage deeply and critically with the legal writing programme materials (whether in their first year or any year of their LLB thereafter), they must be prepared to expend the necessary cognitive energy to come to gain an understanding of many new legal concepts. They must also be prepared to spend the necessary time to engage in constructivist exercises and practise the new skills. Lastly, they must be prepared for the sometimes emotionally draining experience of receiving constructive feedback and criticism on multiple drafts of their writing.

Accordingly, a teaching methodology that engages students is essential to elicit a commitment to deep learning. The LLB legal writing curriculum must be specifically designed to promote student motivation and to include teaching methodologies that engage students. Three key teaching elements can be used to promote student motivation: learner participation, conversations in feedback, and transformative contextualisation. All three teaching methods

encourage intrinsic motivation, which allows students to engage deeply with materials and think critically, so leading to persuasive legal writing.<sup>24</sup>

- (i) Academic writers agree that learner participation is essential to encourage student motivation and to allow the flow of ideas such that critical thinking can take place through the construction of knowledge.<sup>25</sup> Learner participation – engaging both vertically with educators and horizontally with peers – enables learners to think critically about diverse world views in order to formulate thoughtful, logical arguments.<sup>26</sup> This is an essential legal skill.
- (ii) Receiving formative feedback from a relative expert in the field, which forms part of an ongoing conversation in feedback, allows students to become part of a constructive learning process. These conversations in feedback are essential to encourage student motivation and critical thinking. Greenbaum suggests that students can be supported through this demanding process by receiving feedback on the various revisions until they begin to “develop their own valid personal and professional voices”.<sup>27</sup>

The literature shows that value can be added to teaching and learning in law by placing the learning materials in context in order to demystify legal discourse.<sup>28</sup> Using materials that reflect the world around us makes learning easier. Academics explain this by the fact that psychological development is socially embedded, and reading a text will always take place against the reader’s background and social position.<sup>29</sup> Stories are part of all of our cultures, so they can help students understand the need for coherence, as the stories themselves have structure. This will encourage deep, critical thinking and motivate them to produce critical written work. Some legal writers take this further by suggesting that legal educators have the responsibility of teaching their students to be actors of transformation and that materials that are socially and contextually valid can take students on a transformative journey.<sup>30</sup> This can be termed transformative contextualisation.

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<sup>24</sup> Crocker op cit note 14; Voke ‘Motivating Students to Learn’ 28 February 2002 *Student Engagement*; also see Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 2–3.

<sup>25</sup> Quinot & Greenbaum op cit note 20 at 36; Rideout & Ramsfield op cit note 2 at 69.

<sup>26</sup> Bean op cit note 24 at 7.

<sup>27</sup> Greenbaum op cit note 3 at 14.

<sup>28</sup> Kress *Linguistic Processes in Sociocultural Practice* (1985) 42; Williams op cit note 11 at 13; Quinot ‘Transformative Legal Education’ (2012) *The South African Law Journal* 421–422.

<sup>29</sup> Kress op cit note 28 at 42.

<sup>30</sup> Quinot op cit note 28 at 417.

It is unfortunate that the strengths of the ISC and WiLL legal writing programmes (such as the ongoing formative feedback given by senior experienced law school lecturers in the ISC programme) also made these programmes unsustainable because of insufficient staffing resources. For example, the responsibility given to a single lecturer in the WiLL programme to design, teach, consult and assess a five-week legal writing programme attended by 300 students was too onerous. This is because the structure of the programme, which featured constructivist teaching techniques, generated an extremely heavy teaching load for a lecturer. This module was also just one of many lecturing and research duties.<sup>31</sup> In the ISC programme, the large number of law teaching staff needed to teach and facilitate the small-group participatory exercises and to provide formative and summative feedback on multiple drafts of assignments (far exceeding the number of staff teaching on any other LLB module at the time) was only possible because of external funding. As soon as the external funding was used up, the programme became unsustainable.<sup>32</sup>

However, these resource constraints were solved by the TLS tutor training programme, which was a dedicated final-year elective LLB module providing a year-long intensive peer tutor training programme. This programme showed that the most significant strength of using peer tutors was to allow small-group teaching to take place with all the associated academic and mentoring benefits, but without any resource constraints.<sup>33</sup>

A weakness of the WiLL legal writing programme was that although the teaching methodologies mentioned above encourage intrinsic motivation, many students still did not attend class or were ill-prepared when they did attend. This lack of class attendance and preparation adversely affected class motivation and the depth of critical debate, and severely reduced opportunities for peer learning, which is an essential aspect of constructivist teaching and learning.

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<sup>31</sup> Crocker op cit note 14.

<sup>32</sup> Crocker op cit note 13.

<sup>33</sup> Crocker 'Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law' (2020) 45(2) *Journal for Juridical Science* 128–153.

#### 6.2.4 *The most cost-effective manner of addressing resource constraints in teaching legal writing: using senior law students as peer tutors*

The literature describes the challenges associated with implementing the key teaching methods identified above and also the various solutions to these challenges.<sup>34</sup> The overarching challenge to overcome when implementing a legal writing programme at UKZN was limited teaching resources due to large class sizes and a diverse student body. The heavy workload that is an inevitable part of teaching persuasive legal writing means that law staff involved in these programmes will find it difficult to juggle all their teaching and research responsibilities unless they are provided with support.<sup>35</sup>

The literature analysing the benefits and challenges of using peer tutors to facilitate small-group learning, as well as insights gained from the ISC and WiLL legal writing programmes, shows that senior law students have a wealth of legal writing experience and substantive law knowledge that they can impart to junior law students and they have been used successfully across the globe.<sup>36</sup> Peer tutors are also able to assist with the contextualisation of legal materials since they come from a similar background and social context to the students they are tutoring. In addition, peer tutors are able to mentor and motivate their junior counterparts since they are experiencing or have in the past experienced similar challenges with legal writing.<sup>37</sup> Senior law student peer tutors taking part in the TLS tutoring module could be considered relative experts in the legal field and were a cost-effective way of addressing staffing resource constraints since they undertook their duties as part of a formal LLB module which did not require any monetary outlay.<sup>38</sup>

However, the use of student peer tutors requires formalisation to ensure that tutors are accountable and equipped to help fellow students develop legal writing skills. The literature makes it clear that peer tutor development is essential for a number of reasons. These include:

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<sup>34</sup> For example, see Durako op cit note 6 at 107–109; Snowball & Sayigh ‘Using the Tutorial System to Improve the Quality of Feedback to Students in Large Class Teaching’ (2007) 21(2) *South African Journal of Higher Education* 321 at 333; Greenbaum *Teaching Legal Writing in a South African Context: An Evaluation of the Work of Student Tutors in Assisting with the Development of Legal Writing Skills in First Year Law Students at one South African Law School* (Unpublished Master’s thesis, University of Natal, 2001).

<sup>35</sup> Pedrick, Hines & Reppy ‘Should Permanent Faculty Teach First-year Legal Writing Debate’ (1982) 32(3) *Journal of Legal Education* 413–423 at 414.

<sup>36</sup> Gottlieb & Greenbaum op cit note 16 at 56; Cheslik ‘Teaching Assistants: A Study of Their Use in Law School Research and Writing Programs’ (1994) 44(3) *Journal of Legal Education* 411–412; Colvin ‘Peer Tutoring and Social Dynamics in Higher Education’ (2007) 15(2) *Mentoring & Tutoring* 166.

<sup>37</sup> Liu & Carless ‘Peer Feedback: The Learning Element of Peer Assessment’ (2006) 11(3) *Teaching in Higher Education* 279–290.

<sup>38</sup> Crocker op cit note 33 at 128–153.

instilling the necessary confidence needed to facilitate collaborative teaching and learning;<sup>39</sup> educating peer tutors on the necessity of embracing a constructivist teaching paradigm, which some tutors may be sceptical about if they excelled in their own studies without being taught in this paradigm; and clarifying the role that peer tutors must play in achieving the outcomes and standards set in the module.<sup>40</sup>

Peer tutors can be developed using, *inter alia*, two peer tutor development models. The first is the participatory peer-tutoring model, which uses ongoing student-led tutor training that models teaching and learning in a collaborative learning environment. The second is the peer tutor developmental-sequence model, which allows peer tutors to gradually change from co-learners with their students to apprentice teachers as their experience grows during the year.<sup>41</sup>

A weakness of the ISC programme was that the weekly training provided to the student peer tutors was insufficient. On review, it was determined that a more intensive tutor training schedule was required to address a range of issues, such as the lack of consistency in formative feedback and associated legal writing advice provided by the programme markers.<sup>42</sup> These issues were addressed in the fourth iteration of legal writing programmes offered to first-year LLB students at UKZN. This programme was facilitated by peer tutors taking part in the TLS module. The in-depth, practical small-group tutor training offered by the programme was a significant strength.<sup>43</sup>

At this stage, it must be pointed out that a weakness of the TLS module was that it serviced two streams of substantive law modules – a first-year LLB law module and a second-year LLB module – requiring a minimum of 30 students to sign up for the TLS module to make the tutoring programme viable. Since TLS was offered as an elective module at UKZN, this spread the pool of volunteers for the module too thin. A peer tutor development module that is offered as an elective module will be unsustainable if the number of students required to service the module is too large because student interest in this module varies from year to year. Many of

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<sup>39</sup> Lotkowski, Robbins & Noeth 2004, cited by Spark, De Klerk, Maleswena & Jones 'Paving the Road to Success: A Framework for Implementing the Success Tutoring Approach' (2017) 5(2) *Journal of Student Affairs in Africa* 79.

<sup>40</sup> Trimbur 'Peer Tutoring: A Contradiction in Terms?' (1987) 7(2) *The Writing Center Journal* 23; Murray 'Peer Tutoring and the Law School Writing Center: Theory and Practice' (2010) 17 *Legal Writing: The Journal of the Legal Writing Institute* 1–31.

<sup>41</sup> Crocker op cit note 33 at 128–153; Trimbur op cit note 40 at 26.

<sup>42</sup> Crocker op cit note 13.

<sup>43</sup> Crocker op cit note 33 at 128–153.

these students, who are in their final year of study, are considering entering professional practice and thus see more value in an elective module such as Clinical Law, which explicitly prepares them for legal practice. This is further exacerbated by the fact that from this pool of voluntary applications, only those student peer tutors who are academically excellent in legal writing can be chosen to participate in the module. Only an excellent level of expertise is acceptable for performing the duties of a peer tutor effectively, such as providing formative feedback on student written work. However, having to rely on voluntary student applications can adversely affect the quality of the peer tutoring programme because this makes it difficult to plan and execute the module. It was found that the optimum number of student peer tutors required to service a first-year module of 300 students at UKZN was about 20 tutors.

Another weakness of TLS was that designing, coordinating and teaching a peer tutor development module employing essential constructivist teaching techniques is very time-consuming for the law lecturer. Added to this, a module that is developing tutors to facilitate tutorials for a particular law module – whether that module focuses on substantive law or legal skills – must be closely aligned to that module. This would demand the administrative and academic support of the School of Law staff teaching on that module. This support, however, is not always consistent, and some lecturers may consider their cooperation in this regard to be purely voluntary, leaving gaps in the development of tutorial materials which they assume will be filled by the tutors themselves. In this situation, peer tutors who should be functioning purely as legal writing facilitators find themselves taking on the duties of material developers, which is not pedagogically sound.

### 6.3 *Conclusions*

Two of the most challenging aspects of teaching legal writing to law students are, first, eliciting institutional support for a shift away from a legal writing programme that focuses on teaching basic English writing skills to one that focuses on thinking like a lawyer. Secondly, motivating students to invest the time and energy required to engage deeply in a skills-based module.

The shift to teaching critical thinking and legal argumentation as a necessary precursor to writing like a lawyer requires the implementation of constructivist teaching methods, specially designed course materials and senior staff, who are experienced writers themselves, to design, teach and oversee the process. This will ensure that students are motivated to undertake the

laborious work needed to hone these skills. But this requires additional staffing resources – staff who can facilitate small-group activities, facilitate class discussions and provide formative and summative feedback on numerous drafts of student written work. This design concept is resource heavy for most South African law schools.

Teaching legal writing skills to undergraduate LLB students is possible even in a resource-constrained South African university if innovative approaches to teaching and student feedback are implemented. The UKZN example has shown that the use of peer tutors is one such innovation that can address resource constraints and the need to motivate students.

### *6.3.1 Elicit institutional support for a legal writing programme that focuses on teaching critical thinking as a precursor to critical writing*

It is essential that South African law schools do three things. First, understand the importance of teaching persuasive legal writing when preparing students for a legal career. Secondly, embrace the importance of teaching critical thinking as a precursor to teaching persuasive legal writing. Thirdly, support the implementation of a legal writing programme that will make this happen.

Since the teaching of persuasive legal writing skills is so important, contemporary legal curricula must expressly attempt to teach students to write like lawyers through a formal legal writing course included as a core LLB module. This will ensure that it receives the attention and resources that are necessary for the programme to run effectively.

The basics of persuasive legal writing should be offered at first-year level in a dedicated compulsory year-long legal writing course that is implemented in a layered approach. Teaching in the first semester must begin with tasks designed to interrogate what it is to think like a lawyer, for example, debating and discussing the concept of critical thinking and what it means with peers and relative experts. Students could then move on to legal research and reading like a lawyer, with tasks designed to illustrate how experienced persuasive legal writers have applied their critical thinking and logical argumentation skills to solve problems. For example, how oral arguments are constructed and how these differ from written arguments, the importance of knowing the target audience, formatting and style conventions, the difference between reader-based and writer-based writing, identifying the issue, and designing a

persuasive conclusion. Following this, in the second semester, these critical thinking and reading tasks continue but will be integrated with persuasive writing tasks. This is the application stage, which will mark the beginning of the persuasive writing process and entail multiple drafts which adhere to a common theme. All of these tasks must be accompanied by continual formative feedback, whether oral or in writing, provided by a relative expert in the field. These drafting exercises could then perhaps be included in the programme's assessment as a series of assignments that build on each other throughout the year to help with the constructive alignment of the module.

It is imperative that educators impress on students that legal writing is a multi-stage process that requires ongoing practice and critical thought and that they will receive ongoing training in legal writing throughout the LLB degree. Following on from their foundational training in first year, they must receive training in the advanced aspects of legal writing in years two to four of the degree. In these later years, the nuanced elements of persuasive legal writing skills can be taught and honed. This advanced training can form part of a legal writing tutorial programme embedded in selected substantive law courses. Linking these advanced legal writing tutorials to substantive law courses will also add motivational weight to the writing programme, encouraging students to take the tutorials seriously.

However, teaching critical thinking and persuasive legal writing is not an easy task. It is thus essential that there is institutional support for the use of senior law lecturers to teach persuasive legal writing – a relative expert in the field who is able to explain and contextualise the many legal writing conventions and analytical skills needed to write persuasively. Whether these teaching and learning sessions take place in small- or large-group settings, an expert in the field will be able to provide a more nuanced view of legal writing, which cannot be taught in a vacuum. So, an effective persuasive legal writing programme must be taught by a combination of law lecturers, legal professionals and senior law student peer tutors who are trained and experienced in writing persuasively.

It is also essential that there is institutional support for peer tutoring programmes in the final year of the LLB programme and in the law masters programmes. The selection of students to operate as peer tutors must be restricted to senior law students who are excellent in legal writing. Since participation is voluntary in a final-year peer tutor development module to service the first-year legal writing programme and given that participation in a masters peer

tutor development training programme is also voluntary, there must be institutional support to attract students to sign up for these programmes. This is a crucial aspect of the legal writing programme. For example, the Law School can help encourage students to participate in these programmes in various ways:

- Advertising and marketing these legal writing tutoring programmes as a prestigious opportunity that is reserved for only the best law students.<sup>44</sup>
- Marketing should focus on the many benefits that peer tutors gain from participating in a module such as this, as well as the benefit they will give back to junior law students. These benefits can include, for example, the network of legal associates they will build, which is not limited to fellow peer tutors but extends to all the students they tutor and mentor over the year.
- Potential candidates can be approached individually – headhunted – by senior law lecturers or administrative staff to encourage them to take up the offer.
- Students must be made aware that both the final year and Master’s programmes are credit-bearing and are based on a practical, small-group, inclusive teaching ethos.
- It must be emphasised that senior law student peer tutors have the full support of the Law School should any administrative, academic or discipline issues arise.
- Institutional support must also be provided for both the law lecturer and coordinator of the peer tutor training modules. These staff members must be assured that the completion of compulsory duties will be enforced for any staff members associated with the legal writing modules.

### 6.3.2 *Students must be intrinsically motivated to want to be persuasive legal writers*

It is notoriously difficult to inspire students to engage deeply in a legal writing skills course. Students often find it difficult to appreciate the importance of learning legal skills, which take so much practice and emotional effort to master. Therefore, a special effort must be made to motivate them to work through the difficulties that are inherent in learning this complex skill. For this reason, strategies must be found to address the intrinsic motivation of students to engage with the material and write like lawyers. The most successful constructivist teaching approaches implemented in the UKZN legal writing programmes were: participatory teaching

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<sup>44</sup> Cohen ‘Ensuring an Effective Instructor-taught Writing and Advocacy Program: How to Teach the Teachers’ (1978) 29(4) *Journal of Legal Education* 595.

and learning; facilitating ongoing conversations in feedback; and using contextually relevant materials.

Learner participation is essential to encourage critical thinking, which will inspire students to pay close, mindful attention to the legal materials and to take the time to think deeply about the arguments articulated. Conversations in feedback serve to not only motivate students to put in the hours of writing practice needed to improve this skill, but also to provide them with vital advice on persuasive writing techniques, such as logical flow, strong argumentation, mindful choice of persuasive wording, and clear articulation of facts from a relative expert in the field. It is also essential that contextually relevant materials be chosen to acculturate students into legal discourse. Enhancing their understanding of the big picture in this way will inspire students to engage in meaningful participation, question the status quo, and begin their transformative journey.

This transformative learning journey can be deepened during the advanced legal writing training from years two to four of the legal writing programme. Students can be made aware of transformative contextualisation, wherein the social relevance of materials used to hone their legal writing skills in the programme is emphasised. At this stage, students' critical thinking skills can be honed, and they can be encouraged to question the status quo and take critical cognisance of socially relevant issues.

Good use can also be made of the vast amount of online legal writing and research resources that are now available. This could be incorporated very successfully into a legal writing programme that aims to encourage motivation and critical thinking. Although an in-depth discussion of the use of online chat platforms such as Zoom and Microsoft Teams in a blended learning environment is beyond the scope of this thesis, it must be noted that blended learning resources can be used to good effect to supplement teaching and encourage critical thinking and student motivation. This is discussed to some extent in the Blended Learning article attached in the appendix to this thesis.<sup>45</sup>

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<sup>45</sup> Crocker 'Blended Learning: A New Approach to Legal Teaching in South African Law Schools' (2006) 1(2) *Journal for Juridical Science* 1.

6.3.3 *A legal writing programme cannot be taught using a conventional administrative design format and the most cost-effective manner of addressing resource constraints is through the use of senior law student peer tutors*

The LLB Legal Writing programme cannot be taught using a conventional administrative design format with one or two law lecturers running the lectures and tutorials. This is impossible, given the inevitable marking load that comes with the teaching methods required to motivate students to improve this skill. The issue of unsustainable marking loads is exacerbated when conversations in feedback are implemented. In light of this, for most South African institutions, the gold standard of using only senior law staff to teach legal writing is impossible, and so educators in this context must find a way of doing this work more cost-effectively.

A practical and feasible solution to this dilemma that is proposed in the literature is using student peer tutors to assist the lecturer.<sup>46</sup> Final-year law peer tutors are in the ideal position to introduce first-year law students gradually into legal discourse by working consistently and closely with these students in a small-group teaching environment. Likewise, master's law students are well placed to guide more senior law students through the legal writing process. However, senior law student peer tutors require intensive training and development. This will enable them to provide a viable tutoring and mentoring service, which will significantly reduce the heavy resource burden that comes with the implementation of motivational teaching techniques and constructivist teaching methodology. The selection of senior peer tutors must also follow a rigorous process whereby potential tutors are allowed to apply for the position by demonstrating their legal writing skills. Once short-listed, they should attend an interview where they are given a chance to display their interpersonal skills. The interview should involve the use of a panel<sup>47</sup> that is trained to look for a combination of traits in prospective tutors, such as dedication, patience and maturity.<sup>48</sup>

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<sup>46</sup> For example, see Snowball & Sayigh *op cit* note 34 at 333.

<sup>47</sup> This interview panel could include, for example, the legal writing programme lecturer, the related substantive law module lecturer, and senior law student peer tutors from previous years.

<sup>48</sup> Trakman 'Law Student Teachers: An Untapped Resource' (1979) 30(3) *Journal of Legal Education* 350; Cheslik *op cit* note 36 at 402–403.

#### 6.4 *Recommendations for a structured, sustainable legal writing programme at UKZN*

After an extensive review of the available literature on teaching legal writing skills, and after reflecting on the teaching of four iterations of legal writing programmes at UKZN, the following recommendations are made:

A structured four-year legal writing programme covering both the basic and advanced aspects of critical thinking and persuasive legal writing must be offered to LLB students at UKZN. The legal writing programme should be structured in two phases:

**Phase 1:** A compulsory credit-bearing, year-long, first-year LLB legal writing module dedicated to teaching basic critical thinking and persuasive legal writing skills. This module will be serviced by final-year law students registered for a peer tutor development module offered to selected final-year students.

**Phase 2:** A compulsory advanced legal writing tutorial programme spanning years two to four of the LLB degree and focusing on advanced persuasive legal writing skills. The tutorial programme must be closely aligned to selected substantive law modules in each of these years. These legal writing tutorials will be serviced by law master's students registered for a credit-bearing postgraduate peer tutor training programme, which will be offered to selected law master's students. Specific advanced legal writing skills that senior law students could be taught during tutorials could include how to enhance the persuasiveness of their legal writing by imbuing it with a personal writing style. They can also be encouraged to develop the art of legal writing by, for example, using vivid imagery to capture the reader's attention to make the story much more compelling. All of this must be done in the context of the conventions of legal writing and the substantive content of the module to which the tutorial is aligned.

This LLB Legal Writing programme, comprising a comprehensive first-year legal writing module followed by an embedded tutorial programme in years two, three and four, must be designed and facilitated by law lecturers and senior law student peer tutors to include constructivist, values-based teaching methods so as to allow for critical thinking and writing. This necessitates that each aspect of the programme be constructively aligned to ensure that the intended learning outcomes are achieved – from the materials selected, to the teaching techniques used and to the assessment methods chosen. This can be done, for example, by:

introducing students to relevant, interesting source materials specifically selected for their transformative content; choosing constructivist teaching techniques to enhance critical thinking and student motivation (such as the presentation of contextually relevant problems); and, finally, mirroring the ILOs in the assessment methods employed, such as by using a legal opinion blog to show the students' understanding of the issues discussed during class discussions, as well as their ability to justify their arguments in a transformative democracy.

Furthermore, teaching methods which aim to focus on critical thinking, in addition to focusing on student collaboration and class discussions, should be assignment-centred and problem-based so as to hold “students responsible for ‘formulating and justifying’ their sources orally or in writing”.<sup>49</sup>

Teaching techniques that foster intrinsic motivation in law students must also be used. For example, learner participation can be encouraged by piquing the students' natural curiosity with the use of practical, topical exercises. These exercises can be used to demonstrate a range of different problem-solving techniques, such as “brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation”.<sup>50</sup> Learner participation can occur both vertically in lecturer-led class debates and horizontally in tutor-led small-group discussions. Students can also explore legal writing through the analysis of cases to develop their higher-order thinking skills.<sup>51</sup>

Programme lecturers and legal writing peer tutors taking part in the programme must engage in ongoing conversations in feedback with students. These conversations may be in the form of informal oral feedback in class from the lecturer or in tutorials by the peer tutor, during which time students should be encouraged to explain their critical thinking process. They can also be in the form of written feedback on multiple drafts of persuasive writing exercises or assignments. Again, students must be encouraged to reply to written comments on their work to justify their critical thinking.

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<sup>49</sup> Bean op cit note 24 at 5.

<sup>50</sup> Feerick op cit note 3 at 381–388.

<sup>51</sup> Wegner ‘Better Writing, Better Thinking: Thinking Like a Lawyer’ (2004) 10 *The Journal of the Legal Writing Institute* 9–22.

Students also need to be provided with learning exercises that are context-embedded, and with practical examples to illustrate complex legal concepts which simulate real-world legal problems that the students would be able to relate to. A theme can be chosen for the first-year dedicated legal writing programme that is contextually relevant to the students' lives. This theme could be controversial to spark debate and allow the students to embark on a transformative journey. For example, the theme chosen in the WiLL programme was the right to dignity in South Africa. Similarly, in the legal writing tutorials embedded in substantive law modules from second year onwards, all legal writing materials must be taught using the context and themes of the substantive law module to which they are attached.

Students must be further motivated to attend lectures and to participate meaningfully during this time. This is relevant whether the students are attending class in person or online. This can be achieved by making attendance at lectures and tutorials compulsory – with serious consequences arising should students not attend. A remedy for the lack of learner preparation could be to make students accountable for their preparation by way of, for example, regular assessment quizzes run during class, or participation in other class activities that contribute to a class mark for the module.

There are a variety of blended learning techniques, such as online quizzes, surveys and games that can also be used to encourage class participation and class attendance. However, further research is needed on how blended learning using synchronous and asynchronous online resources can be used to supplement the teaching techniques discussed in this thesis, and this is, in fact, planned in the near future.

#### *6.4.1 Further recommendations for teaching the first year dedicated legal writing module*

Before beginning to teach first-year law students the skill of legal writing, it is vital to set the scene to maximise motivation and the opportunities for critical thinking. Thus, the concept of legal writing and its importance in the LLB degree and in professional practice must be placed in context. To do this, educators could explain, for example:

- *What it is to think like a lawyer and why this is so essential to legal writing.* Legal writing should not be viewed as a communication skill but rather as a product of critical thought.

- *Why the genre is written the way it is.* In other words, ensure that the students receive a mix of generic and disciplinary knowledge.
- *That excellent legal writing will be demanded throughout the LLB degree, and this will continue into professional practice.* Then explain why SAQA and, by extension, the profession demands this excellence and why mere proficiency in legal writing may not be sufficient to persuade an intended audience. The unintended consequences that may result from poor legal writing should also be pointed out.
- *That this first-year dedicated legal writing module is not the only chance that they will have to master this skill.* So, although the process of learning this complex skill could be both emotionally and intellectually difficult, the advanced and nuanced aspects will continue to be taught and reinforced throughout the LLB degree.
- *The concept of writer-based writing versus reader-based writing and that persuasive legal writing is a multi-stage process.* This will enable students to value the effort that they have to put into each phase of their writing until it eventually transforms into a good quality final draft. There should be emphasis that, to aid in this process, they will receive detailed formative feedback – written and oral – on their written work by a peer tutor acting in the role of a “critical friend” in ongoing conversations in feedback.

#### 6.4.2 *Further recommendations for final year and master’s law student peer tutor development*

- Final-year law students and master’s law students who excel in legal writing must be encouraged to participate in the LLB Legal Writing programme as part of a credit-bearing module. However, they must still go through a strict interview selection process to make the grade.
- Greenbaum, Bean and Calleros agree that a number of challenges may be encountered by peer tutors when providing feedback. Challenges may include inappropriate amount of feedback;<sup>52</sup> insufficient knowledge of language errors;<sup>53</sup> and inconsistency in feedback comments and in assessment grades awarded. However, these can be resolved by, for example: developing the tutors’ theoretical knowledge (such as Ramsfield’s “three-step system of training”); or encouraging a more revision-oriented philosophy towards marking and the development of a persuasive writing style so as to allow tutors to provide deeper,

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<sup>52</sup> Greenbaum op cit note 34 at 79.

<sup>53</sup> Ibid at 80.

more meaningful feedback; or implementing a system of feedback peer-tutor reviews and checklists.<sup>54</sup>

- School of Law staff associated with the legal writing programme must be compelled to provide support for peer tutors both academically and administratively. Academically, this must be done in the form of tutorial materials (questions and answers) delivered timeously to the peer tutors. Staff should also be required to make themselves available to answer any questions that tutors might have on specific context-related issues. This includes the need to develop a standardised set of peer-tutor development materials. Administratively, staff must be required to aid in, for example, student discipline issues or tutorial group or venue allocation challenges. Failure to provide adequate academic or administrative support must come with serious consequences for staff, and these duties should form part of the work performance appraisal system as part of the law staff teaching key performance area.
- Part of the master's students' peer tutoring duties must include providing formative feedback on final-year peer tutors' work that forms part of the final-year peer tutoring module. However, it is recommended that further research be done on the practical considerations of including master's students in the advanced legal writing tutorial programme.
- The master's student peer training programme could begin with a three-day training workshop for those master's students who did not participate in the final-year peer tutor development module. This would train the students about the module and the essential duties of a peer tutor. Thereafter, as part of the credit-bearing tutor training programme, master's student tutors must attend a weekly 45-minute seminar facilitated by a senior law lecturer to discuss challenges encountered and the progress that has been made. Part of the programme's assessment could include tutor participation during the weekly seminars, such as the presentation of a short, themed discussion on the issues of advanced legal writing.

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<sup>54</sup> Greenbaum op cit note 34 at 81, citing Ramsfield 'Legal Writing: A Revised View' (1994) *Washington Law Review*; Bean op cit note 24 at 68; Calleros *Legal Method and Writing* (2014) 376; Greenbaum op cit 82, 83; and Boud 2000, cited in Liu & Carless op cit note 37 at 288.

### 6.5 *Overall conclusion*

South African law schools are aware that there is an urgent need to teach law students persuasive legal writing and that this requires a shift towards teaching critical thinking and how to write like a lawyer. The real question is how this can be done at no cost to the law school, given the large classes of novice legal writers and with legal lecturers sometimes having overwhelming teaching loads and competing academic commitments. It may seem like an impossible task, but it is not if the legal writing programme is pedagogically well designed and administratively well structured.

The evidence and the experience suggest that the answer lies in training final year and master's law student peer tutors to assist in a legal writing programme that spans all four years of the LLB programme and which is dedicated to teaching critical thinking and writing using constructivist teaching techniques. A key element of the programme must be the motivation of all students involved in the programme – including the senior law student peer tutors. Thus, law students participating in the legal writing programme must be motivated to put in the time and effort that it takes to hone their persuasive legal writing skills, and senior law student peer tutors facilitating the programme must be motivated to provide a quality tutoring service free of charge. This can be achieved by attracting senior law students who excel in persuasive legal writing to participate in a credit-bearing tutor development programme that services junior law students throughout the LLB degree. This must all be done under the watchful eyes of experienced law lecturers who receive satisfactory institutional support for their endeavours.

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## Appendix One: Article on blended learning

Article published in a peer-reviewed journal:

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2006 *Journal for Juridical Science* 31(2): 1-25

*AD Crocker*

### Blended learning: A new approach to legal teaching in South African law schools

#### Summary

This article investigates the development of a sustainable strategy for the integration of online education technology and traditional teaching and learning methodologies in South African law faculties, in a so-called 'blended learning' approach to legal teaching. In developing a strategy, a number of issues were considered, including: accommodating an increasing and diverse student population; achieving SAQA exit-level outcomes; national and international trends in blended learning; and ensuring an appropriate level of computer skills for both lecturers and students. Vital to the development of a sustainable strategy is a comprehensive management plan which details clear objectives for the process of implementation. The achievement of the management plan objectives should be driven by a project management team, which will be responsible for conducting training and support in blended learning; developing online learning module materials; producing research into technological advancements in this field; co-operating with the law library; establishing a committed blended learning community; and finally establishing a system of blended learning module review. The overall objective of the strategy then, is to establish a sustainable model for the medium and long-term implementation of blended learning, ensuring that this mode of learning becomes accepted as an integral part of the system of legal education in the institution.

#### Opsomming

#### Gemengde geleerdheid: 'n Nuwe benadering tot regsonderwys in die Suid-Afrikaanse regs-skole

Hierdie artikel ondersoek die ontwikkeling van 'n handhawende strategie vir die integrasie van e-leer en tradisionele onderrig- en leermetodologieë in Suid-Afrikaanse regs-skole, in 'n sogenaamde gemengde ('blended') leer benadering tot regs-onderrig. 'n Aantal sake is oorweeg, insluitende: die inagneming van 'n toenemende diverse studentepopulasie; die inagneming van SAKO-uitrevelakuitkomst; nasionale en internasionale tendense in gemengde leer; en die versekering van 'n toepaslike vlak van rekenaarvaardighede vir beide dosente en studente. 'n Omvattende bestuursplan is nodig geag, insluitende duidelike doelstellings vir implementering. Hierdie doelstellings behoort bedryf te word deur 'n projekspan, wat verantwoordelik sal wees vir: die uitvoer van opleiding en ondersteuning; die ontwikkeling van onderrigmateriaal; navorsing oor tegnologiese ontwikkelings in die veld; samewerking met die biblioteek; die stigting van 'n toegewyde gemengde leergemeenskap; en laastens die stigting van 'n stelsel van gemengde leermodulehersiening. Die oorkoepelende doel van die strategie is om 'n handhawende model vir die medium- en langtermynimplementering van gemengde leer te ontwikkel, om te verseker dat hierdie leermodus aanvaar sal word as 'n integrale deel van die regs-onderrigstelsel in die betrokke instansie.

*AD Crocker, Lecturer, Faculty of Law, University of KwaZulu-Natal, Durban 4001.*

# **Blended Learning: A New Approach to Legal Teaching in South African Law Schools**

Mrs AD Crocker, Faculty of Law, University of KwaZulu-Natal

## **1. Introduction**

The focus of this article is the integration of online education technology and traditional teaching and learning methodologies in legal teaching. The result of this process of integration is called 'blended' learning, and the various issues that have to be considered for effective blended learning will be discussed, with specific reference to the Faculty of Law, University of KwaZulu-Natal. As Pillay and MacFarlane observed in 2001 already, 'If you're not online, you're heading for oblivion. For public and private education institutions, whether traditionally contact or distance, this is the clear message.'<sup>1</sup> This message is reiterated in the latest Education White Paper, which states: "ICTs [Information and communication technologies] have dramatically changed the learning and teaching process. This has opened up new learning opportunities and provided access to educational resources well beyond those traditionally available."<sup>2</sup>

The development of blended learning in law faculties must take place in the context of the comprehensive national higher education transformation policy, introduced in 1997.<sup>3</sup> A report by the Council on Higher Education (CHE) in November 2004<sup>4</sup> describes the challenges facing South African higher education as two-fold: firstly, there is a need to achieve social equity in order to overcome the legacy of Apartheid; and secondly, there is the imperative to engage with a competitive global market.<sup>5</sup>

Many universities, whether it be at an institutional level or on a departmental basis, are taking steps to meet these challenges either by offering distance-learning modules in an entirely online

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<sup>1</sup> Pillay & Macfarlane 2001: 14.

<sup>2</sup> White Paper on E-Education 2004: 1.

<sup>3</sup> Education White Paper 3 1997.

<sup>4</sup> Council on Higher Education (CHE) 2004: 2.

<sup>5</sup> This 2004 report by the Council on Higher Education (CHE) states that, in addition to social inequality, poverty, injustice and globalisation (of communications, of trade, of production, of culture), the transformation of higher education can be linked to the pressures of transnationalisation, marketisation and commodification.

environment<sup>6</sup>, or by combining traditional teaching methods with online learning techniques in a so-called 'blended learning' environment.

This article will focus on the use of blended learning in law modules. However, since many of the learning techniques used in a blended learning environment are closely associated with those used in distance learning, it is important to distinguish briefly between, and to define the terms 'distance learning' and 'blended learning'.

## **2. Distinguishing distance learning from blended learning**

Distance learning has been defined as, "...planned learning that normally occurs in a different place from teaching and as a result requires special techniques of course design, special instructional techniques, special methods of communication by electronic and other technology, as well as special organizational and administrative arrangements."<sup>7</sup>

Blended learning has been described by a recent study at the Institute of Computational Science in Zurich, Switzerland<sup>8</sup> as a "mix of old and new best practices in education". The study then explains blended learning as follows: "An instructor supports blended learning if he or she includes in the curriculum socially supported interaction (e.g. classroom instruction), self-controlled instruction (e.g. e-learning material), assessment feedback to students and instructor, and applies to all of them the same instructional strategy to define the targeted competence level."

Thus blended learning can be distinguished from distance learning in that in essence, blended learning draws on both traditional teaching methodologies and online learning technology to provide students with an integrated and efficient learning experience, whilst distance learning has no (or very limited) face-to-face student-lecturer interaction.

However, many learning techniques used in distance learning bear similarities to those used in blended learning. In distance learning, however, in addition to pedagogical considerations,

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<sup>6</sup> For example, the University of the Free State offers an online LLB degree, via a South African company called eDegree (Pty) Ltd, which specialises in the delivery of accredited modules in an online environment. All modules obtained via eDegree are accredited and facilitated by the academic institution. See <http://www.edegree.co.za> (cited 8/10/2005).

<sup>7</sup> Moore & Kearsley 1996: 2.

<sup>8</sup> For the full text of the study, see [http://www.et.ethz.ch/webseiten/et/pdf/icnee\\_proceedings.pdf](http://www.et.ethz.ch/webseiten/et/pdf/icnee_proceedings.pdf) (cited 8/10/2005).

lecturers may have practical considerations for using particular learning techniques. For example, students who are geographically separated and unable to make face-to-face contact with each other, or with a lecturer, may need to make use of a distance learning tool, like an online chat forum, to exchange ideas in a synchronous electronic environment.

A similar learning technique may be used in a blended learning environment, not out of necessity, but for convenience. For example, although students may have the means to travel into campus and meet other students face-to-face, they might find it more convenient to log in to an online chat forum from home, saving them time and the costs of transport to a campus venue. Similarly, a lecturer might find it convenient to take part in the discussion from the comfort of an office or home computer.<sup>9</sup>

Another learning technique which students may find useful in both a blended learning and a distance learning environment is the use of electronic hyperlinked study materials.<sup>10</sup> Disseminating the notes electronically saves on printing costs and, in the case of distance learning, on postage costs. However, more importantly, it allows students to engage in self-study at the pace and cognitive level that is best suited to the individual. For example, students that understand the meaning of a legal term may not want to follow a link to a further explanation, however a second-language student may find this information particularly useful.<sup>11</sup>

Thus many of the learning techniques that are used in a distance learning environment in order to facilitate communication over distance may be used by a lecturer teaching in a blended learning environment to supplement face-to-face teaching.

What shall be considered next are 5 issues that will influence appropriate strategies for the introduction of blended learning in university law modules.

### **3. Issues that affect the development of a blended learning strategy for South African law schools**

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<sup>9</sup> Crocker 2003: 40.

<sup>10</sup> These are electronic study materials in which words, phrases, paragraphs, digital images etc may be linked electronically to, for example, a text box containing text or pictures that explain or elaborate on a term; or to an internet site that can provide further insight to the study materials.

<sup>11</sup> Crocker 2003 41.

The process of developing a blended learning strategy is influenced by a number of issues, which include: the increase in the student population; the need for blended learning to accommodate student diversity; the LLB exit-level outcomes in terms of the National Qualifications Framework (NQF)<sup>12</sup>; national and international trends in online learning; and the necessity for relevant computer skills training for lecturers and students. Each of these issues shall be considered in turn.

### **3.1 How the increase in the student population affects learning**

Over the last ten years student populations nationally have become larger and increasingly diverse.<sup>13</sup> These changes have also been reflected in the composition of the student population at the University of KwaZulu-Natal. The number of students registering for legal modules has increased significantly from 2000 to 2005,<sup>14</sup> and this trend is also reflected nationally.<sup>15</sup> This national increase mirrors an international trend, with, for example, law schools in the United Kingdom also experiencing increases in class size, which has necessitated a corresponding decrease in the amount of small group interactive tutorial sessions held at these schools.<sup>16</sup>

These continually increasing student numbers are detrimental to teaching and learning. For example, the difficulties involved in preparing for and administering a large class gives the lecturer less time to attend to individual students, and this decrease in contact time can result in a decrease in students' motivation and performance. Also, teaching large groups of students in a lecture room environment makes it difficult for individual student participation, resulting in a passive learning experience for the majority of students. The increase in student numbers also causes an increase in demand for limited resources, such as library facilities, making it more difficult for students to research independently.

Properly implemented, blended learning can address these shortcomings, as will be discussed below.

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<sup>12</sup> In terms of the National Qualifications Framework established by the South Qualifications Authority Act 58 of 1995.

<sup>13</sup> Council on Higher Education (CHE) 2004: 96.

<sup>14</sup> From 133 registered first year law students in the 2000 academic year, to 266 registered in 2005.

<sup>15</sup> Council on Higher Education (CHE) 2004: 234. This report by the CHE in November 2004 states that, nationally, student enrolments have grown from 473 000 in 1993 to 675 128 in 2002.

<sup>16</sup> Paliwala 1999: 5.

### 3.2 Using blended learning to accommodate student diversity

Together with the increase in the student population, the diversity of students at South African law faculties has escalated in recent years. This can be attributed in part to the system of planned expansion of higher education, a policy objective of the 1997 Education White Paper, which had the aim of attracting an increasingly diverse body of students.<sup>17</sup> In addition, one of the main aims of the 2002 New Academic Policy for Programmes and Qualifications in Higher Education<sup>18</sup> was to facilitate a ‘broadened social base of learners by supporting a lower common admissions requirement and by facilitating the recognition of prior learning.’ The implementation of this policy at the UKZN Law Faculty has resulted in the law student population at the Howard College campus displaying a wide diversity in cultural and socio-economic backgrounds, home languages<sup>19</sup> and prior academic achievement. In these changing circumstances it is therefore imperative to re-evaluate the effectiveness of traditional lectures and, with these class dynamics in mind, to develop appropriate teaching and learning<sup>20</sup> methodologies.<sup>21</sup>

The strategic integration of online educational technologies into traditional teaching methods will play a vital role to assist this diverse group of students to cope with the demands of the law syllabus. For example, online lecture notes can contain hypertext links that are colour-coded according to the level of explanation provided. Students can then choose whether to click on these links and receive a more in-depth explanation of the legal material, or to simply read the text as it stands.

There are also numerous other challenges facing university students, which include: the pressures that second-language students experience in learning new subject-matter in an unfamiliar environment (such as reading all lecture material in a foreign language); the

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<sup>17</sup> Education White Paper 3 1997.

<sup>18</sup> Council on Higher Education (CHE) 2002: 1–20.

<sup>19</sup> Greenbaum 2003: The results of this survey show that out of a sample of 259 undergraduate LLB students, 195 students (71.4 per cent) have English as their home language, 45 respondents (16 per cent) have isiZulu as their first language and the remaining students (12.6 per cent) have either Afrikaans, isiXhosa, Sesotho or Xitshonga as their mother tongues.

<sup>20</sup> Council on Higher Education (CHE) 2004: 94 This policy document describes the term ‘teaching and learning’ as, *inter alia*: ‘all those frameworks and arrangements – at both levels – that support curriculum development for knowledge currency and contextual relevance;...’.

<sup>21</sup> Grantham 1999: 3.

reluctance to approach a lecturer of a different culture if students are unfamiliar with any customs that may need to be followed; and a perceived power imbalance may exist between students and lecturers who are of a different culture or gender affecting confidence levels.<sup>22</sup>

Blended learning approaches may be used to address these challenges in a number of ways. For example, the problem of lack of communication skills experienced by students studying in their second language<sup>23</sup> can be addressed creatively using online learning technology. Bronstein and Hersch<sup>24</sup> advocate a team-teaching approach to this dilemma, whereby a language specialist, who understands the language needs of second-language students, is partnered with the subject lecturer, who can then concentrate on teaching the subject matter of the module.

However, where the lecturer-student contact time is already intensive, Hersch's approach will be difficult to implement, especially as, due to the diverse student population, the language abilities of students vary greatly.

Instead of a team-teaching approach, online learning technology could be used to address this problem, by, for instance, creating a system of online hyperlinks explaining complex language construction in context. Those students who require extra instruction in the English language could then follow these links in their own time, without having to attend additional face-to-face lectures. The language specialist could also be consulted on relevant material and exercises to be included in online tutorials for students to complete in their own time.

Also, second-language students, who may feel threatened in face-to-face discussion groups because they are not articulate in the English language, would be able to participate in online class discussions or debates to a greater extent, as they will have time to critically consider their answers and formulate a thoughtful response, perhaps using dictionaries, before posting them. The lines of communication are kept open since the anonymous environment of the e-mail messaging system renders cultural differences null and void. Thus students who lack the confidence to approach an unfamiliar lecturer of another culture, may feel more comfortable using e-mail to communicate.

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<sup>22</sup> Hewlett 1996: 24–26.

<sup>23</sup> Bronstein & Hersch 1991: 159–160.

<sup>24</sup> Bronstein & Hersch 1991: 163.

Online learning technology also lends itself to multi-mode teaching techniques, thereby catering for a wide range of learning styles. A system of ‘anchored hypertext’<sup>25</sup> (proposed by Jones<sup>26</sup>) can accommodate both holistic and serialistic learning styles by giving both users a certain amount of freedom to explore surrounding information, whilst being tied to an original concept or key concepts, which were chosen at the outset of the learning session.

What will be considered next is the SAQA LLB exit-level outcomes, and how blended learning strategies can be used to achieve these outcomes.

### **3.3 Using blended learning technology to achieve the SAQA LLB exit-level outcomes**

The Higher Education Act, 101 of 1997 requires universities to register their qualifications on the National Qualifications Framework (NQF), which aims to open up learning pathways for all South Africans, depending on their previous formal education, training or work experience. The South African Qualifications Authority Act<sup>27</sup> established the South African Qualifications Authority (SAQA) with a mandate to oversee the development and implementation of an NQF. SAQA thus developed a set of key concepts for higher education qualifications to be registered on the NQF.<sup>28</sup> In terms of SAQA, 10 exit-level outcomes for the LLB degree are required. In summary, these outcomes are:

1. The student<sup>29</sup> must have the ability to understand and analyse fundamental concepts;
2. The student must have the skill to do effective legal research;
3. The student must have the ability to critically evaluate information from a legal perspective;
4. The student must have the ability to communicate effectively;
5. The student must have the ability to solve all kinds of legal problems;
6. The student must be able to work effectively in a group;

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<sup>25</sup> This is a system whereby every hyperlink provided in the text is visibly connected to an original or central source. In this way students are able to follow links freely, according to their own particular learning style, without the frustration of becoming lost in cyberspace, since they can return to the point of origin at any time. The original reason for the exploration is thus kept uppermost in the students’ minds.

<sup>26</sup> Jones & Scully 1996: 14.

<sup>27</sup> South African Qualifications Authority Act 58/1995.

<sup>28</sup> Council on Higher Education (CHE) 2004: 96 These concepts are described in this report as follows: ‘Academic programmes were defined as ‘a planned combination of learning outcomes with a defined purpose or purposes’. They must provide qualifying students with ‘applied competence’ (the ability to put learning outcomes into practice); must open up access routes to additional education and training; and must promote lifelong learning by providing both specific and ‘critical cross-field outcomes’ (generic skills).

<sup>29</sup> The terminology used in the Act is ‘learner’, but the term ‘student’ is used throughout this paper to distinguish our focus on university students as opposed to school pupils.

7. The student must be computer literate;
8. The student must be able to effectively manage his legal professional activities;
9. The student must have the ability to contribute to the promotion of a just society; and
10. The student must acquire the ability to solve legal problems responsibly in a social context.

These exit-level outcomes focus on three broad aspects, namely knowledge, skills and values<sup>30</sup>, and blended learning modules must be developed to accommodate all of these outcomes. For example: a knowledge outcome, such as the acquisition of knowledge of current legal issues, may be encouraged by enabling students to access up-to-date information contained in online databases; a skills outcome, such as the acquisition of computer skills, will be a natural by-product of continually working, receiving instruction and communicating in an online environment; and a values outcome, such as the ability to critically assess and compare the relevance of certain legislation against the backdrop of public sentiment can be facilitated by the increased opportunities for communication afforded by on-line chat rooms and e-mail as well as access to vast newspaper databases.

In order to develop a unique blended learning model, the experiences of selected national and international tertiary institutions in integrating traditional and online learning methods will be considered.

### **3.4 National and international trends in online learning**

This section will begin by discussing online learning trends that are beginning to emerge in South African tertiary institutions. Although many South African institutions are making use of innovative blended learning teaching technology, in this paper the principles that are discussed below are drawn from 5 institutions<sup>31</sup> which have been chosen because their innovative teaching techniques provide a useful platform for our discussion. Finally, by way of contrast, the blended learning activities of selected foreign tertiary institutions will be considered in some detail.

#### **3.4.1 National trends**

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<sup>30</sup> See LLB exit-level outcomes at <http://regqs.sqa.org.za/viewQualification.php?id=22993> (cited 8/10/2005).

<sup>31</sup> The Durban Institute of Technology; The University of the Free State; Tshwane University of Technology; Stellenbosch University and The University of Pretoria.

Interesting trends in the implementation of online education can be seen in institutions that make use of online learning technology in a blended learning environment. Many universities are now actively investigating these trends at other higher education institutions, so as to find suitable models for sustainable online education. The most important of these trends are: the development of flexible, sustainable online learning programmes; developing an e-learning management team; and conducting training in blended learning and online technology for staff and students.

**(a) The development of flexible, sustainable online learning programmes**

The need for a flexible learning programme to increase access to education for a diverse student population, as well as the national drive towards higher education transformation, are strong motivating factors for South African tertiary institutions to develop online learning programmes.<sup>32</sup> This was a primary factor motivating the Centre for Higher Education Development (CHED) at the Durban University of Technology (DUT) to develop an enhanced teaching environment.

The two main models for the implementation of blended learning are *staff development* (training lecturers in the fundamentals of online module development to enable them to design their own modules independently) and *production* (creating a blended module production unit to design modules for lecturers).

For example, the University of Pretoria<sup>33</sup> makes use of the *production* model for the implementation of blended learning modules. A team, comprising a project leader, project manager, lecturer, instructional designer, educational consultant, information specialist and graphic designer in the Department of Telematic Learning and Education Innovation is responsible for designing and developing new online modules.

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<sup>32</sup> Peté 2001: 3. The Durban Institute of Technology (DUT) was formed in 2002 by the merger of Technikon Natal and ML Sultan Technikon (although at the time of implementing its blended learning strategy the merger was pending) and today supports a large culturally and linguistically diverse student population.

<sup>33</sup> The University of Pretoria has approximately 1047 modules delivered online, which use the WebCT module management system. See [www.up.ac.za/telematic/websupp.htm](http://www.up.ac.za/telematic/websupp.htm) (cited 8/10/2005).

Individual lecturers are thus only responsible for facilitating and maintaining their own online modules and are required to attend a one-day basic module on web-supported teaching and learning in order to acquire the necessary skills. Optional advanced training modules, however, are also offered, which then allow lecturers to take full responsibility for the design and maintenance of their modules.

However, an institution with limited staffing resources and finances, which aims to create a sustainable online module development strategy must focus on staff development rather than the creation of a blended module production unit.<sup>34</sup> In this way, although it might initially be time-consuming, staff could take ownership of their own modules and be empowered to make design changes and carry out essential maintenance when needed. Ultimately all staff members are expected to be responsible for the design, development and maintenance of their own blended learning modules, because as the number of staff members participating in blended learning modules increases, the centralised control of these modules will become cumbersome and ultimately impossible.<sup>35</sup>

Another example of how the staff development model can be implemented is the Tshwane University of Technology's Department of Telematic Education, which has recently implemented a strategy called the 'Partners at Work Programme'. The programme takes 13 partners (one academic from each of the 11 Faculties and 2 from the satellite campuses)<sup>36</sup> who are released from their lecturing duties for one year, in order to design and develop a web-based classroom.<sup>37</sup> The University supplies all the necessary hardware and software for the programme, including laptops, and ADSL lines at home. The partners meet weekly, and by the end of the programme will have completed four phases: the design and development of the virtual classroom; implementation of the online module; participation in formal research projects, including a national conference paper and a scientific article; and participation in professional development, including online facilitation and technical skills workshops. The University Library presents a number of training sessions on the programme and covers issues such as journal databases, interlibrary facilities, and intellectual property.

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<sup>34</sup> Peté 2001: 9–10.

<sup>35</sup> Both DUT and Free State University have followed the staff development model and provide training and support for staff who are largely responsible for putting their own modules online.

<sup>36</sup> The Dean from each faculty is asked to nominate one lecturer from the Faculty to take part in the programme. All faculties were included so as to provide as much exposure as possible to the use of technology.

<sup>37</sup> The online classrooms comprise, *inter alia*, notes, resources, self assessment questions, animations, multimedia, and video clips.

Several universities have also begun to formulate online learning (also called 'e-learning') implementation and management policies to regulate the online learning programmes. For example, the University of the Free State currently has an online policy document for WebCT<sup>38</sup> and e-learning (the terms of which are in the process of negotiation), which stipulates that within the next few years, the University plans to have an online presence<sup>39</sup> for every module taught.

The University of Stellenbosch<sup>40</sup> also has a detailed, uniform, top-down approach to implementing online technology across every discipline, in terms of which specific target goals are to be met with specified time periods. In order to facilitate this implementation, lecturers were given funds to develop 'minimum electronic presence'<sup>41</sup> for their module.

#### **(b) Developing an e-learning management team**

The e-learning policies developed by various institutions may also define a number of online learning user roles in terms of which detailed responsibilities regarding the creation, administration, maintenance, and use of online modules are clearly spelt out. This can be coordinated and managed by an e-learning management team. For example the University of the Free State has established an e-learning team that is responsible for the following blended learning related activities: management of the e-learning team, lab and project, project co-ordination, instructional design advice, training and WebCT administration.<sup>42</sup>

The Department of Telematic Education at the Tshwane University of Technology has also established an e-learning team in the form of five instructional designers who work with the partners on the 'Partners at Work Programme' (discussed in (a) above) as well as with various lecturing staff who are not partners on the programme, but who show an interest in making use of the educational technologies provided by the University. This team is essentially responsible for instructional design, project management, research, training, and marketing and liaison.<sup>43</sup>

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<sup>38</sup> WebCt is a module management software programme.

<sup>39</sup> Currently the focus is on each module having a calendar and module guide online.

<sup>40</sup> Crocker 2003: 45.

<sup>41</sup> This entails each lecturer making their module information and outlines as well as e-mail and bulletin board facilities available online.

<sup>42</sup> In this respect, five user roles are defined, namely: administrator, helpdesk, course designer, teaching assistants, and students.

<sup>43</sup> Crocker 2003: 42.

**(c) Conducting training in blended learning and online technology for staff and students**

Teaching and learning in a blended learning environment is often a new experience for lecturers and students alike. It is therefore essential that both staff and students who will be participating in blended learning modules receive preliminary, as well as ongoing training in the technical and pedagogical issues that are relevant to teaching and learning in such an environment. Many South African tertiary institutions have thus developed staff and students training programmes to cater for these needs.

For example, staff training for blended learning modules at the DUT focuses on the following 4 main areas: *technical skills*; *sound teaching practices*<sup>44</sup>; *research*; and *mutual support systems*.<sup>45</sup>

- *Technical skills* training is implemented through staff development workshops where lecturers are trained to design and implement their own virtual classrooms on the World Wide Web. These workshops focus on low-end technology, to make it more feasible for academic staff to develop, maintain and ultimately upgrade their own modules.<sup>46</sup>
- To ensure *sound teaching practices* participants are encouraged to examine their current teaching strategies and to adapt them to maximise online interaction (student-student and student-lecturer) and collaboration, so as to prevent students getting lost in cyberspace and to ensure that effective learning takes place.
- Continual *research* into the implementation of the new blended learning teaching and learning methods, and the success or challenges encountered in the process, is essential to ensure that high teaching standards are maintained, ensuring that the statutory LLB exit-level outcomes are achieved.<sup>47</sup> In this way blended learning modules can be formally evaluated and subjected to a certain degree of peer review.

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<sup>44</sup> Also termed 'pedagogical principles'.

<sup>45</sup> Peté 2001: 6–7.

<sup>46</sup> Peté 2001: 11–12.

<sup>47</sup> See LLB exit-level outcomes at <http://regqs.sqa.org.za/viewQualification.php?id=22993>.

The DUT research plan uses reflective and participatory action research methods<sup>48</sup>, in terms of which lecturers plan, act, observe, reflect and formally report on their progress to fellow participants, using online journals. After receiving feedback from the other members of the group, these journal entries are written up into action research papers. At the end of the year (or cycle) participants present these papers and demonstrate their blended learning modules to new members, after which the papers are published on CHED's open web site. Thus, new staff members receive ongoing research assistance from more experienced blended learning practitioners.

- At DUT, the *mutual support system* for blended learning practitioners is called The Pioneers Online Project. This project seeks to create a safe environment within which members of the blended learning community can learn, experiment and share successes and challenges with their fellow participants. Once these staff members have developed and implemented a module online, and are confident of their skills in this regard, they are able to provide support, and act as mentors for those staff members who are beginning the process.<sup>49</sup>

At the Free State University assistance and training<sup>50</sup> are provided for all module lecturers, University wide, in the form of: training materials that can be accessed online; and the personal assistance of an online learning administrator and instructional designer.

The University also supports an e-learning interest group for all lecturers involved in or interested in e-learning. Various issues are discussed that might be relevant to teaching in a blended learning environment, such as: online technology; and pedagogy and instructional design for an online environment.

Stellenbosch University, according to Mary Nel<sup>51</sup>, a law lecturer at the University of Stellenbosch, offers regular WebCT training modules at either a 'beginner' or 'advanced' level, through a centralised Uni-Ed department. These modules are run as group, face-to-face

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<sup>48</sup> Peté 2001: 11.

<sup>49</sup> Mari Peté writes that: '[T]here was a strong emphasis on collaboration and support systems for and amongst the pioneers' and that '[t]his cascading staff development project's emphasis was on gradually building capacity, namely lecturer expertise, communication and support systems, an infrastructure and resources.' Peté 2001: 12.

<sup>50</sup> Training is provided on *inter alia*: WebCT; pedagogy for online learning; and the Web design programme Dreamweaver.

<sup>51</sup> Crocker 2003: 45.

sessions, which involve hands-on, practical training during the session and further assistance thereafter if needed. In addition, the Uni-Ed department offers full trouble-shooting support to lecturers who have encountered a particular problem or require further information to run the online component of their modules effectively.

The University of Pretoria, on the other hand provides limited training for lecturers initially, since it employs the production model of online learning implementation (discussed in (a) above) but then offers an advanced training programme for those lecturers wishing to move away from this model and take control of their blended learning modules. The University also provides training sessions for student assistants from various academic departments who are appointed to maintain academic web sites and update online modules.<sup>52</sup>

Many of these national trends are reflected in the blended learning practices of a number of international higher education institutions.

### **3.4.2 International Trends**

Recommendations emanating from a Report of the National Committee of Inquiry into Higher Education (hereinafter referred to as the Dearing Report),<sup>53</sup> which are pertinent to this study are summarised below. In addition, specific examples of how certain foreign institutions are using online technology, to varying degrees, in their module delivery methods, are set out below.

#### **(a) Recommendations of the Dearing Report (1997)**

The Dearing Report was a report submitted by the National Committee to the Secretaries of State for Education and Employment, Wales, Scotland and Northern Ireland in July 1997. It includes recommendations on how the purposes, shape, structure, size and funding of higher education, including support for students, should develop to meet the needs of the United Kingdom over the following 20 years, to 2020.

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<sup>52</sup> See [www.up.ac.za/telematic/websupp.htm](http://www.up.ac.za/telematic/websupp.htm) (cited 8/10/2005).

<sup>53</sup> Dearing 1997. See <http://www.leeds.ac.uk/educol/ncihe> (cited 10/03/06).

Chapter 13 of the Dearing Report, dealing with Communications and Information Technology (C&IT), emphasizes the importance of technology in higher education in the United Kingdom. The report outcomes state that the innovative use of online technology will improve the flexibility and effectiveness of higher education, as well as maintain the quality of higher education, despite financial constraints and increasing student numbers. In addition higher education institutions will need to provide students with a permanent network linkage to their learning environments since the majority of students have come to expect this from the institution at which they are studying.<sup>54</sup> This section of the report concludes as follows:

While the effective adoption of C&IT in higher education requires appropriate technology, adequate resources and staff development, success depends on the effective management of change. The development and implementation of an integrated C&IT strategy will be one of the main challenges facing managers of higher education institutions.<sup>55</sup>

Many of these recommendations are reflected in the online teaching methodologies currently used in the blended learning activities at a number of foreign higher education institutions, which will now be considered.

**(b) IOLIS<sup>56</sup>: University of Warwick, United Kingdom**

*Iolis* courseware is a CD ROM produced by the Law Courseware Consortium at Warwick University, with the support of all law schools in the United Kingdom (UK), with over 80 law professors nationwide who contribute as authors. It is a highly developed learning resource which has been designed to be used in conjunction with traditional teaching and learning strategies.

The creators of the *Iolis* CD-ROM courseware emphasise that this online learning technology should not be used to replace traditional face-to-face teaching methods, but to augment these methods. In this way, the benefits<sup>57</sup> of this innovative technology can be utilised to their full

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<sup>54</sup> Dearing 1997: 39.

<sup>55</sup> Dearing 1997: 43.

<sup>56</sup> The term 'IOLIS' is not an acronym for anything – it is a word invented by the creators of the IOLIS CD ROM at Warwick University.

<sup>57</sup> For example online communication tools, such as e-mail and bulletin boards, that facilitate collaborative learning.

extent, without in any way detracting from the numerous advantages<sup>58</sup> of personalised lecturer-student contact.

*Iolis* contains multimedia learning materials covering the UK LLB degree modules, which are updated twice yearly.<sup>59</sup> Paliwala<sup>60</sup> describes the courseware as containing:

90 workbooks containing over 200 hours of hypermedia information and interactive exercises; a hypertext resource book with the full text of nearly 2000 relevant legal items (cases, statutes and articles), a legal dictionary and a legal bibliography; a scrapbook (notes) facility which enables students to save text to a file and add their own notes; and a comment facility for lecturers to engage students in discussion.’

The *Iolis* comprehensive resource database and system of workbooks would appear to be the ideal law learning tool, but the time, cost and technical expertise required to create an *Iolis* equivalent for South Africa will make it difficult to implement in the short to medium term. Many of the *Iolis* features can, however, be incorporated in the design of online law modules which can currently be created on local module management systems.<sup>61</sup>

### (c) **Glasgow Graduate School of Law (GGSL) : Diploma in Legal Practice**

Maharg and Paliwala<sup>62</sup> describe an experiment in resource-based learning undertaken at the GGSL in which an online resource-base was created that was not given to the students overtly but which they were required to discover themselves. This was an attempt to simulate legal practice where students need to construct the problem before they can begin to solve it.

In this project, students were divided into ‘firms’ of four students each (46 firms in all), each with a virtual office using Microsoft Outlook: they could e-mail each other, use task organisers or to-do lists, consult project resource pages or their own document directories, calendars, Frequently Asked Questions lists and discussion forums. Half the students represented the

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<sup>58</sup> For example small group tutorial discussion sessions, which encourage critical, analytical thought.

<sup>59</sup> Grantham 1999: 4.

<sup>60</sup> Paliwala 1999: 7.

<sup>61</sup> Such as the OLS module management system offered at the University of KwaZulu-Natal, Howard College campus from 2004, or the WebCT module management system (see [www.webct.com](http://www.webct.com)).

<sup>62</sup> Paliwala 1999:7.

claimant (an employee injured at work), while the other half were the insurer's solicitors. Twenty-three different scenarios were used, all based on a similar set of facts, but with important variables.

The resources that were given to the students up front were the initial documents, useful Web sites and the discussion forum. In addition, tutors played the part of various personae who lived in a fictional town called Ardcalloch. If requested correctly they would provide information (such as specialist reports, photographs of the workplace where the accident took place and the machines involved) by e-mail with attachments. The town was represented by a zoomable map, photographs and a business directory giving access to firm and institution Web sites.

An introductory lecture and a feedback lecture supported the process but the emphasis of the project was on independent, collaborative work. The legal issues to be researched included the identification of significant facts, liability, quantum and contributory negligence. One of the main skills outcomes of the project was for the students to develop a professional voice in legal communications.

**(d) University of Sydney, Australia<sup>63</sup>**

The Law Faculty, University of Sydney, introduced WebCT as a teaching tool in 2003, and it is now compulsory for every module that is taught in the University to have a WebCT site. The University has a 'Major Projects Group' that manages the use of WebCT University-wide. This team is responsible for training lecturers and support staff for the entire university. The WebCT training consists of a 10-hour introduction to the software, and access to a help desk, which provides support thereafter.

A WebCT teaching assistant, who is employed in an administrative capacity, is dedicated to providing in-house technical and online learning support for lecturers and students in the Law Faculty. Teaching duties of the assistant include the holding of compulsory introductory lectures at the beginning of each semester for undergraduate and postgraduate students so as to familiarise new WebCT users with the software. The teaching assistant attends all new training

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<sup>63</sup> Crocker 2003: 50.

sessions related to online learning, and thereafter offers specialised, individualised support for the Law Faculty staff.

### **3.5 The necessity for relevant computer skills training for lecturers and students**

Many academic staff and students lack basic and advanced computer skills.<sup>64</sup> As the online learning component of blended learning requires a basic level of computer competency in order to operate the technology, these skills must first be acquired in order to participate in blended learning modules in a meaningful way.<sup>65</sup> In addition, lecturers must acquire more advanced computer skills to enable them to develop, implement and maintain a module using online technology.

To ensure the seamless integration of online learning into the blended learning model, students and lecturers should have easy access to an information database, providing step-by-step guidance on operating the online technology, and with tutorial exercises to practice the various online features. This information should be free of any technical jargon so as not to place a further burden on the participants.

Taking into account the 5 factors discussed above, the next step is to develop a strategy for the integration of online learning technology into traditional law modules in order to create an effective blended learning approach.

## **4. A strategy to implement a system of blended learning in South African law faculties**

The objective of the strategy is to develop a sustainable programme for the incremental introduction of Internet-based technology into law modules. This strategy should be implemented, in a manner that is both practical and sustainable, by means of a carefully thought-out management plan. Before considering a management plan in detail, an overview of the blended learning strategy will be given.

### **4.1. Overview of the blended learning strategy**

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<sup>64</sup> Crocker: 2003: 107–127, 142–148.

<sup>65</sup> Students who lack computer skills may find it difficult to focus on the actual subject matter of the module, thereby negating any benefit that blended learning may offer.

Before implementing a blended learning strategy the process must be carefully planned. A suggested methodology is to implement the blended learning strategy in the form of a series of cycles, with each cycle taking one year to complete. Each year-long 'cycle', begins in the first semester of the year and is implemented on an action research approach (i.e. 'plan – act – observe'): first, the lecturers who are participating in the process formulate a *plan* for the implementation of their individual blended learning modules. This plan should take into account each of the 5 issues outlined in 3 above. Second, the lecturers *act* on this plan and *observe* the effects, documenting the successes and failures in an online journal, which other members of the group can read and reflect on. There should be continuous reflection on the progress of the new blended learning modules at lecturers' forums held throughout the academic year. The first cycle culminates in a final lecturers' forum at the end of the year. The new group of lecturers, who are to participate in the second cycle, must then be invited to share in the thoughts and experiences of the first group. In this way the second group of lecturers participating in the process benefit from the first group's experiences.

The second cycle will then begin in the first semester of the following year, with the new group of lecturers formulating a blended learning plan to put into action along the lines discussed above. The group of lecturers from the previous cycle then formulate a revised plan to continue the action research process. In the second cycle the first group of lecturers act as mentors for the new group of lecturers, and provide support and advice when needed.

The management of the blended learning strategy plan will now be considered in some detail.

#### **4.2. Managing the blended learning strategy**

The implementation of this strategy should be under the direction of a blended learning project manager.

The initial development, administration and implementation of the project can be handled by the project manager alone, however, as the number of participants (staff and students) increase, so the administrative, technical and teaching duties will increase. At this stage it will then become necessary to create a blended learning implementation team to provide staff with

instructional design and development and to co-ordinate the integration of technology into the curriculum.<sup>66</sup>

Ultimately this team should ideally comprise three staff members, each with complementary competencies. A proposed composition of the team would be:

- A *project manager*, who would have sufficient technological expertise to fulfil the function of an instructional designer, and who must also have a fair amount of legal teaching experience. This person would be responsible for the overall control of the blended learning project, including guidance to staff members on online design, and would have the additional duties of training staff and students in the necessary software and blended learning skills. The instructional designer would also ensure that he or she remains up to date with advancements in online learning technology;
- A *computer technician* to provide specialised, ongoing technical support for lecturers, such as computer upgrades; the implementation of advanced online facilities customised for individual modules, and the initial design and implementation of multimedia presentations; and
- An *administrative assistant* to deal with all administrative tasks, and queries by staff and students, and whose duties will include the registration of online modules with the institution's Information Technology Division each semester, late registrations, and the printing and distribution of blended learning module materials for students and staff.

The duties of the blended learning team will be:<sup>67</sup>

1. Determining an appropriate *staff development model*;
2. Conducting various blended learning and computer skills *training modules for lecturers*, with appropriate online and blended learning module materials;
3. Conducting *training* in online technology for *students*, with appropriate online learning materials;
4. Providing *ongoing blended learning and software support*;
5. Establishing a committed blended learning *community*;
6. Establishing a system of blended learning *module review and evaluation* and overseeing the implementation of *appropriate changes*.

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<sup>66</sup> Lazenby 2000: Chapter 4.

<sup>67</sup> Laurillard 1993: 244–253.

Each of these 6 duties will now be discussed in more detail:

#### **4.2.1. Determining an appropriate staff development model**

When considering the sustainability of a blended learning strategy, a choice must be made between two possible models of blended learning module development. These are, the centralised production-unit model, and the individualised staff-controlled model.

The essential difference between these 2 models is the centralised control of all blended learning modules by dedicated blended learning specialists<sup>68</sup> (the production unit model), in contrast with the control of blended learning modules by individual staff members (the individualised staff-controlled model).

Both models have their merits and shortcomings. The *production unit model* has many advantages. For example, this model presupposes that the design, implementation and maintenance of all technical aspects of blended learning modules will be undertaken by the same blended learning team, experienced in the creation of online learning modules. This uniform approach will ensure the efficient production of a professional, user-friendly end-product.<sup>69</sup>

The centralised control of all modules would also make it a relatively simple task to put systems in place to monitor the pedagogical quality of the modules in a holistic manner, making it easier to adhere to strict quality control regulations.

In addition, many lecturers, who are not skilled in technology and online design would need to acquire these skills before attempting to design their own blended learning module. However time constraints caused by full lecture loads and other faculty commitments could make this impractical, and an instructional design team could lighten the load of these lecturers by handling all technical and design aspects of the blended learning module.<sup>70</sup>

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<sup>68</sup> These specialists should not have onerous teaching duties and their sole responsibility should be to control the blended learning function.

<sup>69</sup> Crocker 2003:42.

<sup>70</sup> Crocker 2003:42.

However, one of the disadvantages of the production unit model, is that institutional financial constraints may make the implementation of the production unit model impracticable. This is because the model requires a fairly intensive capital outlay in order to employ a team of experienced technicians, instructional designers, who will be responsible for the technical design, implementation and sustained maintenance of the blended learning modules. Another disadvantage of this model is that lecturers may feel a lack of control over their module, and if the blended learning design team is not run with the utmost efficiency this could cause serious delays with the initial setting-up of blended learning modules, as well as with the ongoing maintenance of the modules.<sup>71</sup>

On the other hand, presuming that faculty staff are willing to spend the requisite time and energy, the individualised *staff-controlled model* would empower lecturers to take ownership of their own modules and to be responsible for the efficient design, implementation and maintenance of the module. The ongoing technical training that staff would require to implement this model would vastly increase the technical skills of faculty staff and would negate the need for a specialised instructional design team dedicated to the creation and maintenance of faculty blended learning modules. Instead, this team could be used to provide technical and pedagogical training and ongoing technical support and trouble-shooting for faculty staff members.<sup>72</sup>

Perhaps a compromise between the two models could be reached. The initial set-up and implementation of the blended learning models could be undertaken by the blended learning instructional design team but, with ongoing training in various technical and pedagogical aspects of blended learning, these responsibilities could gradually be taken on by the lecturers. In time the lecturers would then become wholly responsible for any further design changes and maintenance of their blended learning modules.

#### **4.2.2. Blended learning and computer skills training modules for lecturers**

A comprehensive staff training and development programme on blended learning theory and practice, and relevant computer skills, are essential for an effective blended learning strategy.<sup>73</sup>

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<sup>71</sup> Peté 2001:14.

<sup>72</sup> Peté 2001:15.

<sup>73</sup> Burridge, Hinett, Paliwala & Varnava (eds) 2002: 81, 99.

This strategy should provide for an ongoing series of staff development workshops, focusing on the specific university's online module management courseware<sup>74</sup>, and training in those computer skills necessary to support the blended learning function.<sup>75</sup> These training programmes should be customised for individual staff members in the relevant academic department, taking into account the specific requirements of that discipline.<sup>76</sup>

The project manager will also be responsible for monitoring the latest innovations in blended learning theory and practice, and ensuring that these innovations are integrating into the blended learning modules of the institution. This research will then be presented to relevant staff members in the form of seminars, workshops and published papers. For example, Lazenby<sup>77</sup> describes how to experiment with new online learning technologies, using innovative ways of employing them in the teaching, learning and research processes.

Also, appropriate blended learning module materials should be made available both in hard copy and online to provide guidance on topics covered in the training sessions. From time to time additional material should also be available to staff, advising them of recent innovations in online teaching and learning. It is also the function of the project team to create and produce dedicated training materials where these are not available from other sources.

#### **4.2.3. Computer skills training modules for students**

Before commencing study on blended learning modules, students should attend workshops to familiarise them with the specialised knowledge required to work in a blended learning environment. However, because of the inevitable range of prior information technology experience amongst students, Peter Clinch<sup>78</sup> recommends carrying out an information technology skills audit amongst students. Students will then be streamed according to their

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<sup>74</sup> Various online module management systems are available, of which WebCT and Blackboard are well known commercial systems. However, many institutions are developing their own systems using open source materials. For example the University of KwaZulu-Natal has developed a module management system, using an open-source based system called the Open Learning System (OLS), which is provided free of charge to students and staff.

<sup>75</sup> Peté 2001: 11.

<sup>76</sup> Palmer, Crocker & Kidd 2003: Part B, 87–160.

<sup>77</sup> Lazenby 2000: Chapter 4.

<sup>78</sup> Clinch 1999: 11.

computer and online proficiencies. Appropriate materials should be made available both in hard copy and online to provide guidance on topics covered in these workshops.

The pre-module student workshop should cover the following:

- *Basic computer skills*: (e.g. computer terminology and navigation; Windows Operating Systems, computer file management and basic word-processing)<sup>79</sup>
- *Basic online software and Internet skills*: (e.g. module management programmes like WebCT or OLS: E-mail programmes like GroupWise or Outlook Express; and various other Internet tools such as bulletin boards and chat rooms)
- *Time management and self-discipline*: Since the online learning environment presupposes a level of sustained application by students in order to achieve the desired outcomes, training on time management and self-discipline should be included in the module. This will refer students to a year-planner included in the module design so as to guide the students in maintaining regular study patterns<sup>80</sup>;
- *Skills to evaluate educational resources*: Students must be trained on how to evaluate resources on the Internet. For example, Professor Barnes of the University of Toledo<sup>81</sup> suggests that when considering the educational value of a resource on the Internet, one should take a number of factors into account, such as the source (e.g. by looking at the address), the author, the organisation of the site and the content of the site. Other important factors, which could form part of an evaluation checklist, include the credibility, accuracy, reasonableness and support of an online resource.<sup>82</sup>

#### **4.2.4. Providing ongoing blended learning and software support**

The blended learning project team must ensure that blended learning and software support is available to students and staff at all times. Whenever possible, initial support should be personal and hands-on, allowing the lecturer to attend to the query whilst under the supervision of a team member. As the implementation of the blended learning strategy progresses, personal support by members of the project team should be continued. The need for individualised

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<sup>79</sup> Palmer, Crocker & Kidd 2003: Part B, 87–136.

<sup>80</sup> Palmer, Crocker & Kidd 2003: Part D, 249–259.

<sup>81</sup> Barnes 2003: <http://writingcenter.utoledo.edu> (cited 8/10/2005).

<sup>82</sup> Ryan, Scott, Freeman & Patel 2000: 96, also see the WWW Virtual Library site, [www.vuw.ac.nz/~agsmith/evaln/evaln.htm](http://www.vuw.ac.nz/~agsmith/evaln/evaln.htm) (cited 8/10/2005).

support should, however, decrease as lecturers and students become more competent in the required skills.<sup>83</sup>

The reporting and rectifying of technical computer problems should be co-ordinated by the computer technician who is a member of the project team. In addition to liaising with the university's information technology department to resolve more complicated technical problems, the team's computer technician must also develop simple online or printed guides for distribution to staff and students for the self-rectification of common technical problems. (e.g. the installation of software upgrades).

#### **4.2.5. Establishing a committed blended learning community**

An important objective of the blended learning project is to develop a community of staff members committed to technological innovation in legal education and creating a sustainable environment for blended learning at the institution. One way of nurturing this community is to establish a support forum, at which lecturers involved in the blended learning project meet periodically to share experiences, insights and innovations. At DUT, the success of the Pioneers Online Project can be attributed, in part, to the strong community spirit among the participants in the project, which is nurtured throughout the programme. In the Pioneers Programme, lecturers enter the programme as strangers with little or no knowledge of online technology, and leave as members of a close blended learning community.<sup>84</sup>

This committed community will extend to the law librarians, with whom the blended learning project manager will work closely in order to keep up-to-date with electronic information databases and software currently subscribed to by the Law School. This information will be regularly disseminated to the Law School staff, along with appropriate training on the use of this technology so that, where relevant, it can be implemented into blended learning modules or used in research. In addition, the project manager will continually keep the law librarians informed of new developments he comes across that the librarians may consider incorporating into the law library systems.

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<sup>83</sup> Crocker 2003: 12.

<sup>84</sup> Peté 2001: 11.

#### 4.2.6. Establishing a system of blended learning *module review and evaluation*

A system must be implemented to ensure a continual process of evaluating and reviewing blended learning modules.<sup>85</sup>

To assist in this objective, online evaluation forms for the evaluation of lecturers and modules should be included on the module Web site. These evaluation forms can be completed by both students who attend the relevant modules, as well as by other lecturers for peer review purposes. The technical online aspects of the blended learning module (i.e. the Website itself) should also be regularly evaluated by users (lecturers and students) and by technical support staff, to ensure a process of continual technical innovation and improvement. King<sup>86</sup> recommends that the following types of questions be included for Web site evaluation:

- Is the Web site easy to use?
- Is the content on the Web site relevant to the module topics and outcomes?
- Are related links included on the Web site relevant to the module topics and outcomes and do they assist in research?
- Is the Web site comprehensive?
- Does the Web site foster student interaction?
- Does the Web site facilitate feedback on submitted work?
- Does the content and do related links on the Web site promote critical thinking skills?
- Does the Web site encourage reflection?
- Does the Web site provide self-assessment tools?

Once the blended learning module has been reviewed and evaluated, appropriate solutions to the problem areas identified must be discussed for implementation. Input must be sought from lecturers, students and the technical support staff, under the guidance of the project manager to then decide on an implementation plan for the suggested solution. At the beginning of each new cycle,<sup>87</sup> the plan decided upon will then be implemented.

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<sup>85</sup> Lazenby 2000: Chapter 4.

<sup>86</sup> King 1998: 4.

<sup>87</sup> The length of a cycle will depend on the type of module offered: thus one cycle could be a month, a quarter, a semester or even a full academic year.

If this process of evaluation and review is carried out meticulously and regularly on completion of each module, it will enable lecturers to monitor the effectiveness of the technology used in the module, as well as holistically, when used in combination with the traditional face-to-face sections of the module. More importantly it will assist with blended learning module quality control to ensure that students are benefiting from learning in an interesting, challenging online environment that is both pedagogically and technically sound.

## 5. Conclusion

The introduction of blended learning<sup>88</sup> in South African law faculties is imperative to maintain the highest quality of tertiary education possible. On a micro level, blended learning modules, which are enhanced by online technology, can help achieve educational equity by individualising cognitive aspects of study materials. On a macro level the introduction of online technology, bringing with it a host of educational advancements, will facilitate a move to engage in a competitive global market.

The success of implementing a blended learning approach to legal teaching in South African law faculties, however, will depend on a carefully designed strategy to ensure that a number of crucial issues are addressed. These issues – accommodating an increasing and diverse student population; achieving SAQA exit-level outcomes; ensuring an appropriate level of computer skills; and taking trends in blended learning into account – require the development of a detailed implementation strategy.

Thus the objective of the implementation strategy will be to develop a sustainable programme for the incremental introduction of Internet-based technology into law modules. If the strategy is to be implemented in a manner that is both practical and sustainable, it must be driven by a project management team according to a comprehensive management plan. The team should consist of at least a project manager who is also an instructional designer, a computer support technician and an administrative assistant. Essential elements of the management plan should include an extensive staff training and development programme; the provision of student workshops; and finally a system of ensuring appropriate module review and evaluation.

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<sup>88</sup> For a detailed discussion on the advantages offered by blended learning as a ‘mix of old and new best practices in education’, see [http://www.et.ethz.ch/webseiten/et/pdf/icnee\\_proceedings.pdf](http://www.et.ethz.ch/webseiten/et/pdf/icnee_proceedings.pdf) (cited 8/10/2005).

The overall objective then, is to achieve a sustainable model for the medium and long-term implementation of blended learning, ensuring that this mode of learning becomes accepted as an integral part of the system of legal education in the institution.

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