**‘TEST OUT THE SCAFFOLDING’:
A QUALITATIVE COMPARISON OF LLB THRESHOLD LEARNING
OUTCOMES AND THE PLT COMPETENCY STANDARDS FOR
‘LAWYERS’ SKILLS’**

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ABSTRACT

Threshold Learning Outcomes (‘TLOs’) for the Australian bachelor of laws and National Competency Standards (‘NCS’) for post-graduate pre-admission practical legal training include learning objectives for lawyers’ skills as part of a legal education continuum. How do behavioural learning objectives for ‘lawyers’ skills’ specified in the TLOs and the NCS compare? This practitioner-initiated qualitative study borrowed from a ‘grounded theory’ approach to analyse the TLOs and NCS learning objectives for lawyers’ skills. The study produced insights that might inform PLT teachers’ scaffolding around graduates’ intellectual competencies as part of practical legal training in lawyers’ skills.

I INTRODUCTION

Masons, when they start upon a building,
Are careful to test out the scaffolding...¹

How do behavioural learning objectives for ‘lawyers’ skills’ compare between the Threshold Learning Outcomes for the Bachelor Of Laws degree (‘TLOs’) and the National Competency Standards for Practical Legal Training (‘NCS’)? What can PLT teachers assume about graduates’ intellectual competencies when specifying conditions for practical learning activities involving lawyers’ skills? These questions were used to guide a practitioner-initiated qualitative study of the TLOs² and NCS.³

Two events impelled the writer to undertake this study – participation in a Law Associate Deans Network workshop at Sydney University in July 2012, and attendance at the ‘Teaching-Research Nexus in Law: Opportunities and Challenges’ symposium in Adelaide, February 2013. The Sydney workshop involved a discussion around teaching and assessing lawyers’ skills within the context of the TLOs, and how this compared to teaching and assessment in PLT. The Adelaide symposium included presentations around research methodologies for legal education, including qualitative methodologies such as ‘narrative inquiry’ and ‘grounded theory’. During a session facilitated by Professor Tania Aspland, the topics of ‘grounded theory’ and ‘constructivist’ methodologies excited vigorous discussion. It appeared to this writer

¹ Seamus Heaney, 'Scaffolding' in *Death of Naturalist* (Faber & Faber, 2009).

² Sally Kift and Mark Israel, 'Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, 2010).

³ Australasian Professional Legal Education Council and Law Admissions Consultative Committee, *Competency Standards for Entry Level Lawyers* (2002) Australasian Professional Legal Education Council <http://www.aplec.asn.au/aplec/dsp_resources.cfm> at 10 September 2012.

there was tension between positivist and constructivist/generative approaches to research and teaching. In this context, Nehme's call for legal education research focused on discovery and development not just 'outputs', and for 'broader and more inclusive definitions of teaching and research', seems timely.⁴ This article is an account of PLT practitioner's first foray into qualitative methodology and methods and a 'worked example' of discovery research to contribute to teaching-research nexus discussion. Sections of the article focus on methodology and methods to provide transparency and shared experience of this kind of research.

Part I of this article provides background, outlines concepts of 'scaffolding' and 'behavioural learning objectives', and relates these concepts to the NCS and TLOs as part of a provisional theoretical framework. The provisional framework also involves interpretation of 'skill' and 'competency', the writer's personal background and assumptions, and 'borrowing' from a grounded theory methodology.

Part II describes methods used for the study, including use of computer-aided qualitative data analysis software ('CAQDAS'), data sources selected, and data analysis.

Part III describes results produced by the framework and methods described in Parts I and II. The description refers to elements and performance criteria in the NCS 'lawyers' skills' competency.

In Part IV results are analysed and discussed toward a theory of scaffolding from law school TLOs to commencement of practical legal training in 'lawyers' skills'

⁴ Marina Nehme, 'The Nexus Between Teaching And Research: Easier Said Than Done' (2012) 22(1/2) *Legal Education Review* 241, 258, 271.

competencies. Part V concludes with proposals to develop the theory and generate further insights through future research.

A candidate seeking admission to the Australian legal profession must successfully complete academic legal education and practical legal training requirements. Usually academic education must be completed before commencing practical legal training ('PLT').⁵ The Threshold Learning Outcomes for the Australian bachelor of laws degree ('TLOs') took effect in January 2012. The TLOs specify learning objectives for certain intellectual competencies that include 'lawyers' skills'. The National Competency Standards for Entry-Level Lawyers ('NCS') have operated in their present form since 2002,⁶ and specify learning objectives for 'lawyers' skills' in PLT.⁷ Together, foundational intellectual competencies taught at law school and practical competencies taught during PLT form part of a learning continuum leading to admission to the profession. There appears to be scant literature around the relationship between the TLOs and NCS from a PLT teaching point of view.⁸

⁵ It is acknowledged that a minority of practical legal trainees may have not completed law school before commencing PLT. For example, from a survey of PLT program websites it appears programs at Newcastle University and University of Technology Sydney allow concurrent study for a law degree and PLT. Queensland University of Technology allows concurrent study if no more than 2 law degree units await completion. The Australian National University and the combined Law Society of South Australia – University of Adelaide permit concurrent study, subject to consent. The College of Law (Australian and New Zealand) in Queensland, New South Wales, Victoria and Western Australia, Leo Cussen Institute, and University of Tasmania programs require proof of eligibility to graduate in a law degree at or near enrolment. The NCS includes a statement by the Law Admissions Consultative Committee that PLT should be undertaken either in the final year of a law degree, or after the degree, or both: above, n 3, 2.

⁶ The NCS are undergoing a review process.

⁷ "Lawyer's Skills" is the term used in the NCS, however the plural possessive form, "lawyers' skills", is adopted for this article.

⁸ One of the few Australian articles that touches on the transition from law school learning to PLT in a specific competency pre-dates the TLOs: Ian McCall, 'Preparing for Practice: Developing Students' Understanding of Risk Management' (2006) 16(1/2) *Legal Education Review* 165.

A Scaffolding

Here, the learning ‘continuum’⁹ of law school and PLT is treated as involving a ‘scaffolding process’ to enable lawyers ‘who have not yet reached the point of mastery’¹⁰ to ‘solve a problem, carry out a task or achieve a goal which would be beyond [her or his] unassisted efforts’.¹¹ Scaffolding might involve ‘active interventions’ through ‘structuring and coaching’.¹² Scaffolding involves multiple aspects, including ‘recruitment’, ‘reduction in degrees of freedom’, ‘direction maintenance’, ‘marking critical features’, ‘frustration control’ and ‘demonstration’.¹³ In this context, the TLOs and NCS (in conjunction with instructional and teaching objectives) reduce degrees of freedom by specifying behavioural learning objectives, limiting the scope of learning tasks so learners recognise when they accomplish ‘a “fit” with the task requirements’.¹⁴ Maharg, however, observed ‘scaffolding’ is typical of constructivist metaphors in educational spaces and reminds us ‘space as absence’ is also important;¹⁵ scaffolding should help transcend space, not pack it. Scaffolding

⁹ The TLO refers to law school and practical legal training as ‘phases of the legal education continuum’: Sally Kift and Mark Israel, above n 2, 9, 15, 23.

¹⁰ William M Sullivan et al, *Educating Lawyers - Preparation for the Profession of Law* (John Wiley & Sons, 2007) 35.

¹¹ David Wood, Jerome S Bruner and Gail Ross, ‘The role of tutoring in problem solving’ (1976) 17(2) *Journal Of Child Psychology And Psychiatry, And Allied Disciplines* 89, 90. The attributes of “scaffolding” were described by Lev Vygotsky, however first use of the term is credited to Wood, Bruner and Ross: Roy D Pea, ‘The social and technological dimensions of scaffolding and related theoretical concepts for learning, education, and human activity’ (2004) 13(3) *The Journal of the Learning Sciences* 423, 425.

¹² Karen Barton and Fiona Westwood, ‘Developing Professional Character - Trust, Values and Learning’ in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education - Emotion in Learning and Teaching the Law*, Emerging Legal Learning (Ashgate, 2011) 235, 244-245.

¹³ Wood et al, above n 11, 98.

¹⁴ Ibid.

¹⁵ Paul Maharg, ‘Space, Absence, Silence: The Intimate Dimensions of Legal Learning’ in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education - Emotion in Learning and Teaching the Law*, Emerging Legal Learning (Ashgate, 2011) 283, 288-289.

might involve tactical prompts through ‘defining features’,¹⁶ rather than comprehensive instructions.

As tangible sources of behavioural learning objectives, the TLOs and NCS also maintain focus for instructional designers, teachers and learners.

B Behavioural Learning Objectives

Here, the TLOs and the NCS are treated as ‘behavioural learning objectives’,¹⁷ involving descriptions of ‘desired learning behaviours’.¹⁸ Behavioural learning objectives are global statements of what a competency is about, and enable teachers and instructional designers to frame ‘instructional objectives’ and ‘teaching-learning objectives’. ‘Instructional objectives’ involve specifying work learners must perform, conditions for performance, and criteria for satisfactory performance. ‘Teaching-learning objectives’ provide detail for more specific tasks expressed through subject-verb-object statements; for example, ‘the lawyer made submissions competently’.¹⁹

Conditions for performance of current learning tasks might relate to behavioural learning objectives in prior learning. For example, conditions for performance of a PLT instructional objective might assume graduates possess foundational academic competencies specified by TLOs. This illustrates how TLOs and NCS might relate as part of a legal education continuum. Inadvertently specifying inappropriate conditions for instructional objectives based on incorrectly assumed prior learning might lead to frustration or failure. In this context, it is useful for law school and PLT teachers to develop mutual understandings about learning objectives of the TLOs and NCS.

¹⁶ Paul Maharg, *Transforming Legal Education - Learning and Teaching the Law in the Early Twenty-first Century* (Ashgate, 2007) 35.

¹⁷ Robert F Mager, *Preparing Instructional Objectives* (CEP Press, 1997).

¹⁸ Robert A Reiser, 'A history of instructional design and technology: Part II: A history of instructional design' (2001) 49(2) *Educational Technology Research and Development* 57, 59.

¹⁹ Adapted from APLEC, above n 3, 21.

Some describe learning objectives as a ‘pre-condition’ for ‘effective assessment’ without which teaching institutions lack cohesion and become ‘fragmented’.²⁰ Some argue learning objectives represent ‘institutional intentionality’ to help law schools ‘craft’ educational aims, processes and identity.²¹ Conversely, some criticise behavioural learning objectives for overly focusing on outcomes, not the ‘underlying process of how students become reflective and effective learners’.²² The debate is interesting, but beyond the scope of the present study.

Given the scope of objectives in the TLOs and NCS, and in the context of managing this sole practitioner-initiated study, it was decided to focus on how TLOs intersect with ‘lawyers’ skills’ specified in the NCS.

C National Competency Standards for Entry-Level Lawyers

In Australia, PLT might be completed via an approved course, supervised workplace training, or form of clerkship. In most jurisdictions, the NCS are incorporated by reference into practical legal training requirements.²³ The Australasian Professional Legal Education Council (‘APLEC’) is reviewing the NCS and amendments are expected.²⁴ This study focused on the current NCS.²⁵

²⁰ Gregory S Munro, 'How Do We Know If We Are Achieving Our Goals: Strategies for Assessing the Outcome of Curricular Innovation' (2002) 1 *J. Ass'n Legal Writing Directors* 229, 230.

²¹ William M Sullivan et al, above n 10, 181-2.

²² Julian Webb and Caroline Maughan (eds), *Teaching Lawyers' Skills* (Butterworths, 1996) 35.

²³ *Legal Practitioners Act 1981* (SA) s 14C; *Legal Practitioners Education and Admission Council Rules 2004* (SA) r 2; *Legal Profession Act 2004* (NSW) s 24(b)(i); *Legal Profession Act 2004* (Vic) s 2.3.2(1)(c); *Supreme Court Admission Rules 2004* (QLD) ss 7-7A; *Legal Profession Act 2006* (ACT) s 21(b)(i); *Legal Profession Act 2007* (QLD) s 30(1)(c); *Legal Profession Act 2007* (Tas) s 25(b)(i); *Legal Profession (Admission) Rules 2008* (Vic); *Legal Profession Act 2008* (NT) s 29(1)(c)(i); *Legal Profession Act 2008* (WA) s 21(2)(c).

²⁴ A review might be timely - a study exploring whether PLT provides relevant and valuable education found there were skills not emphasised in PLT that were considered important by PLT graduates: Maxine Evers, Bronwyn Olliffe and Robyn Pettit, 'Looking to the past to plan for the future: A decade of practical legal training' (2011) 45(1) *Law Teacher* 18.

APLEC and the Law Admissions Consultative Committee ('LACC') adopted the NCS to 'describe the observable performance of entry-level lawyers at the point of admission to practice'.²⁶ The NCS prescribe a candidate for admission to the legal profession must prove she or he has achieved competency in certain 'Skills', 'Practice Areas' and 'Values'. 'Skills' include: 'lawyers skills', 'problem-solving', 'work-management and business skills', and 'trust and office accounting'. 'Lawyers skills' elements include 'communicating effectively', 'interviewing clients', 'writing letters', 'drafting other documents', 'negotiating settlements and agreements', 'facilitating early resolution of disputes', and 'representing a client in court'.²⁷ For concision, this study focused only on NCS 'lawyers skills'.

The NCS stipulate PLT be 'post-graduate level of training' undertaken in or after the final year of a law degree, and involve programmed training and workplace experience.²⁸ The NCS are adopted in most Australian jurisdictions.²⁹

The structure of the NCS is analogous to the behavioural/instructional/teaching-learning objective approach described above. The NCS include a 'descriptor' for each competency, followed by 'elements' and 'performance criteria', and 'explanatory notes'. For example, the 'Lawyers Skills' descriptor states:

An entry level lawyer should be able to demonstrate oral communication skills, legal interviewing skills, advocacy skills, negotiation and dispute resolution skills, and letter writing and legal drafting skills.³⁰

²⁵ Anecdotally, the proposed changes allow for flexible teaching and learning approaches; a requirement to include mental health and wellbeing resources; reinforcement of fiduciary components in trust and office accounting; and further discussion regarding elective components. If so, the conclusions in this article should not be materially affected by the review.

²⁶ APLEC, above n 3, 1.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Above, n 23.

³⁰ APLEC, above n 3, 20.

The 'writing letters' element includes the following 'performance criteria':

The lawyer has competently...

Identified the need for, and purpose of, the letter.

Written the letter in simple, straightforward English which conveys its purpose clearly and can be easily understood by the person to whom it is sent.³¹

The 'explanatory note' states, in part:

This competency standard applies to "composite" skills which require a lawyer to synthesise several generic skills and apply them in a specific legal context. Lawyers must be able to exercise such skills effectively.³²

Analysis for this study includes the descriptor, elements, performance criteria, and explanatory notes for NCS 'lawyers skills' competencies.

D Threshold Learning Outcomes for Bachelor of Laws Degree

This section draws on the Bachelor of Laws Learning and Teaching Academic Standards Statement ('LTAS statement'),³³ together with Professor Sally Kift's keynote presentation at the 2011 APLEC conference.³⁴ Background details of roles and interactions of the Higher Education Quality and Regulatory Framework, Tertiary Education Quality and Standards Agency, Australian Learning and Teaching Council, Australian Qualifications Framework, Council of Australian Law Deans, Law Admissions Consultative Committee and other organisations and individuals are comprehensively outlined in the LTAS statement.^{35 36}

³¹ Ibid.

³² Ibid.

³³ Kift and Israel, above n 2.

³⁴ Sally Kift, 'Academic Standards: The national context and ramifications for legal education' (Paper presented at the Australasian Professional Legal Education Council (APLEC) Conference, University of Technology, Sydney, 12 November 2011).

³⁵ Kift and Israel, above n 2, 1-7.

³⁶ At this stage, searches unveil little Australian legal education literature around implementation of TLOs since commencement, save for Caroline Hart et al, 'The Real Deal: Using Authentic Assessment To Promote Student Engagement In The First And Second Years Of A Regional Law Program' (2011) 21 *Legal Education Review* 97; and Anna Huggins, Sally Kift and Rachael Field, 'Implementing The Self-Management Threshold Learning Outcome For Law: Some Intentional Design Strategies From The Current Curriculum Tool Box' (2011) 21 *Legal Education Review* 183.

The TLOs were drafted to satisfy Commonwealth regulatory requirements, together with those of the Council of Australian Law Deans, state admitting authorities, and law schools.³⁷ The TLOs represent 'what a graduate is expected to know, understand and be able to do as a result of learning'.³⁸ The TLOs are framed broadly as 'capabilities', and 'as minimum standards of performance, achievement or attainment at the bachelor qualification level'.³⁹ There are six TLOs: (1) 'Knowledge; (2) 'Ethics and Professional Responsibility'; (3) 'Thinking Skills'; (4) 'Research Skills'; (5) 'Communication and collaboration'; and (6) 'Self-management'.⁴⁰

TLOs do not directly align with NCS 'lawyers skills',⁴¹ save TLO 5 'Communication and collaboration' is a cognate of NCS 'communicating effectively'. This study explored how TLOs might house NCS 'lawyers skills' concepts.

The LTAS statement is a 'non-prescriptive' guide for interpretation of the TLOs and provides notes including 'background' and 'terminology'.⁴² Terminology sections provide reflection points for instructional design, teaching, and assessment.⁴³ TLOs are broadly consistent with behavioural learning objectives described above. The six TLOs, including terminology sections, were analysed in relation to NCS 'lawyers' skills' elements and performance criteria.

³⁷ Kift and Israel, above n 2, 9.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid, 10.

⁴¹ 'Communicating effectively', 'interviewing clients', 'writing letters', 'drafting other documents', 'negotiating settlements and agreements', 'facilitating early resolution of disputes', and 'representing a client in court'.

⁴² Kift and Israel, above n 2, 11.

⁴³ Ibid.

E Theoretical Framework and Methodology

A theoretical framework for qualitative research clarifies underlying assumptions before the study commenced, and avoids misunderstandings about what research results signify.⁴⁴ In that spirit, a brief discussion follows concerning key concepts of 'skill' and 'competency'. The writer's background and assumptions are summarised, together with a concept of 'theoretical sensitivity' in grounded theory.⁴⁵ Computer-aided qualitative data analysis software, and the rationale for using it, is explained.

1 'Skill' and 'Competency'

The terms 'skill' and 'competency' frequently appear within the TLOs and NCS. It is prudent to reflect on the terms' meanings and how they relate. 'Skill' is an 'expertness, practised ability, facility in an action; dexterity or tact'.⁴⁶ Skill can be compared to 'ability' - a 'capacity or power' or 'cleverness, talent; mental power'.⁴⁷ 'Competency' is an 'ability... the state of being competent' or 'an area in which a person is competent... a skill'.⁴⁸ To be 'competent' is to be 'properly qualified or skilled; adequately capable, satisfactory', or 'effective'.⁴⁹ This lexicological merry-go-round suggests 'skill' and 'competency' are *degrees of ability* to perform mental or physical actions. 'Skill' is a degree of expertness or experience; 'competence' is an adequate or satisfactory degree of ability.

⁴⁴ Maxwell observes that a framework should disclose 'key concepts' or factors, the assumptions about how they might be related, and to provide a 'tentative theory' of the circumstance being studied: Joseph Alex Maxwell, *Qualitative Research Design: An Interactive Approach*, Applied Social Research Methods Series (Sage, 3rd ed, 2012).

⁴⁵ Udo Kelle, "'Emergence" vs. "Forcing" of Empirical Data? A Crucial Problem of "Grounded Theory" Reconsidered' (2005) 6(2) *Forum: Qualitative Social Research* <<http://www.qualitative-research.net/index.php/fqs/article/view/467/1000>> at 3 August 2012 - as a synthesis of Glaser's 'emergence' and Strauss' explicit approaches to grounded theory.

⁴⁶ Judy Pearsall and Bill Trumble (eds), *The Oxford English Reference Dictionary* (Oxford University Press, 1996).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

The NCS 'competencies' are categories of physical or mental actions that must be performed 'competently' to satisfactorily complete PLT; however, the NCS does not define 'competent'. The term, 'competent practice', is discussed in the Review of Legal Education Report - Pre-Admission and Continuing Legal Education (the 'Campbell Report').⁵⁰ Drawing on Fitzgerald,⁵¹ Tobin,⁵² and Gold,⁵³ the Campbell Report adopts the following propositions:

[Competence is] the ability to perform a range of legal tasks, and solve a range of legal problems according to measurable standards within the framework of the rules of conduct and ethics of the legal profession...⁵⁴

Competence is not an absolute concept which exists apart from the legal work in question, the context of the public to be served or the particular needs of an individual client. In practice it is a minimum standard applied to a single context and a transaction at a time... The realistic conception of competence is both a minimum standard and a constantly shifting one...⁵⁵

The NCS eschews an absolute definition of 'competence'. Similarly, the LTAS statement does not include an absolute definition, referring instead to extrinsic documents. The LTAS statement expresses the TLOs as 'minimum standards of performance, achievement or attainment at the bachelor qualification level', consistent with the rationale of the Task Force on the Canadian Common Law Degree:

'...it is not reasonable to expect that law schools will graduate students ... fully capable of providing competent professional services...'; [however, law students should acquire] 'foundational competencies necessary for the practice of law'.⁵⁶

⁵⁰ Susan Campbell, 'Review of Legal Education Report - Pre-Admission and Continuing Legal Education' (Department of Justice (Victoria), 2006).

⁵¹ Maureen F Fitzgerald, 'Competence Revisited: A Summary of Research on Lawyer Competence' (1995) 13(2) *Journal of Professional Legal Education* 227.

⁵² Anthony G V Tobin, 'Criteria for the design of legal training programmes' (1987) 5 *Journal of Professional Legal Education* 55.

⁵³ Neil Gold, 'Reconceiving Professional Competence' (1992) 10(2) *Journal of Professional Legal Education* 135.

⁵⁴ Tobin, above n 52, in Campbell, above n 50, 34.

⁵⁵ Gold, above n 53, in Campbell, above n 50, 34.

⁵⁶ Kift and Israel, above n 2, 9.

The TLOs and NCS are framed as general descriptions of desired learning behaviours aimed at achieving ‘measurable’ outcomes (or ‘minimum standards’) capable of being reframed to accommodate changed circumstances. It is beyond the scope of this article to critically compare law school and PLT approaches to assessment criteria, although it would be interesting. This study focused on the behavioural learning objectives to discern how the 'lawyers skills' components of the TLOs and the NCS conceptually intersect, for scaffolding PLT lawyers’ skills.

2 Personal Background

The writer is a lawyer with several years practice experience in commercial litigation and business law and teaching PLT, a PhD candidate with a master’s degree in professional education and training, and has completed basic and advanced training with computer-aided qualitative data analysis software before this study. Research and coursework undertaken during the master degree and PhD research have developed the writer’s interest in qualitative research methodologies and constructivist approaches to education research.

3 Assumptions

The TLOs and NCS identify certain competencies. However, competency attributes might differ between TLOs and NCS and differences might be express or implied. There might be continuities and discontinuities between TLOs and NCS competencies. Identifying attributes, continuities and discontinuities should illuminate potential interruptions (if any) during the law school to PLT learning continuum, which might want scaffolding. Given practical and theoretical contexts in which the TLOs and NCS exist it would be unsurprising to discover interruptions. The TLOs and NCS are bound within a legal education continuum, however different authors

produced the learning objectives for different purposes. The TLOs would be academically focused, and the NCS would be practice focused. That difference in emphasis highlights the relevance of scaffolding to enable graduates to achieve NCS competencies.

4 *Grounded Theory Methodology*

Grounded theory⁵⁷ involves 'logically consistent data collection and analytic procedures' in which theory is developed from the data.⁵⁸ Glaser asserts that theory should 'emerge' from data without theoretical frameworks 'forcing' theory onto data.⁵⁹ Strauss and Corbin, however, argue frameworks assist researchers to manage research, aid identification of data categories, and help relate data in meaningful ways.⁶⁰ Kelle reconciles 'emergent' and 'explicit' approaches by 'theoretical sensitivity', in which a framework helps to identify relevant data as theory emerges from data.⁶¹ This study 'borrowed' from a theoretically sensitive approach to grounded theory, by pursuing 'logically consistent data collection and analytic procedures' to develop theory from the data. The study did not strictly adhere to all six characteristics Charmaz identifies as distinguishing grounded theory from other methods: 1) simultaneous data collection and analysis; 2) analytical codes derived

⁵⁷ Fruitless searches of Australian peer-reviewed legal education journals indicate grounded theory might be relatively untried in local legal education research.

⁵⁸ Kathy Charmaz, 'Grounded theory' in Jonathan A Smith, Rom Harre and Luk Van Langenhove (eds), *Rethinking Methods in Psychology* (Sage, 2003) 27.

⁵⁹ Bernard G Glaser, *Emergence vs Forcing: Basics of Grounded Theory Analysis* (Sociology Press, 1992); Bernard G Glaser, *Theoretical sensitivity: Advances in the methodology of grounded theory* (Sociology Press, 1978); Bernard G Glaser and Anselm L Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Aldine Publishing, 1967).

⁶⁰ Anselm L Strauss and Juliet M Corbin, *Basics of qualitative research* (Sage, 1990); Anselm L Strauss, *Creating sociological awareness: Collective images and symbolic representations* (Transaction Publishers, 1991); Anselm L Strauss, *Qualitative analysis for social scientists* (Cambridge University Press, 1987).

⁶¹ Udo Kelle, "'Emergence" vs. "Forcing" of Empirical Data? A Crucial Problem of "Grounded Theory" Reconsidered' (2005) 6(2) *Forum: Qualitative Social Research* <<http://www.qualitative-research.net/index.php/fqs/article/view/467/1000>> at 3 August 2012.

from data not preconceptions; 3) ‘development of middle-range theories to explain behaviour and processes’; 4) analytic memo-making; 5) theoretical sampling, not representational sampling; and 6) delayed literature review.⁶² For example, analytical codes were developed from the data; however the data were highly organised texts with definite concepts and these tended to define the codes.⁶³ Also, this study did not involve behaviours *per se* but focused on concepts that might influence behaviours.⁶⁴ ‘Sampling’ of data sources was unnecessary because there were just two documents setting out the TLOs and NCS. Charmaz’s six characteristics are useful for locating grounded theory as a methodology, however they are not determinative, and researchers ‘can learn how to use grounded theory guidelines and put them to use for diverse research objectives.’⁶⁵ This study is a form of literature review, itself a variety of qualitative research,⁶⁶ aimed at generating a theory and ‘theory matters... without it, education is hit and miss’.^{67,68} The approach used in this study, ‘borrowing’ from grounded theory guidelines included, involves ‘bricolage’ - a ‘cross-examination

⁶² Charmaz, above n 58, 28.

⁶³ TLO descriptors were coded as attributes. ‘Attribute’ coding (also known as ‘descriptive’ coding) is an established first cycle coding method and used as a ‘data management technique’: Johnny Saldaña, *The coding manual for qualitative researchers* (2009), 55.

⁶⁴ An emergent conceptual framework derived from parts of documents coded for attributes might share nomenclature with attributes. For example ‘Thinking Skills’ TLO is described as ‘Thinking Skills’ but also encompasses concepts about thinking skills. Those concepts may be coded separately for qualities or values.

⁶⁵ Kathy Charmaz, ‘Grounded Theory Methods in Social Justice Research’ in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (4th ed, 2011) 359, 360.

⁶⁶ S. Di Gregorio, ‘Using Nvivo for your literature review’ (Paper presented at the Strategies In Qualitative Research: Issues And Results From Analysis Using Qsr Nvivo And Nud*ist, Institute of Education, London, 29-30 September 2000) 2.

⁶⁷ Julian Webb, ‘Why Theory Matters’ in Julian Webb and Caroline Maughan (eds), *Teaching Lawyers’ Skills* (1996) 23.

⁶⁸ It is acknowledge that Webb’s emphasis on theory is not universally shared in professional practice research, see for example: Wilfred Carr, ‘Practice Without Theory? A Post-Modern Perspective On Educational Practice’ in Bill Green (ed), *Understanding and Researching Professional Practice* (2009) 55. Carr advocates a non-theoretical non-methodological action research derived from Aristotelian practical philosophy. For a related discussion in the legal education context see Judith Welch Wegner, ‘Reframing Legal Education’s “Wicked Problems”’ (2009) 61 *Rutgers Law Review* 867, 970.

of resources,’⁶⁹ aiming for coherence and innovation by experimenting with theories, methodologies, and methods, involving ‘construction and reconstruction, contextual diagnosis, negotiation and readjustment.’⁷⁰ Readers might ask, ‘is this the best possible methodology’ for the questions under study? The criterion, ‘best’, might depend on epistemological perspective. If ‘methodology’ in its widest sense connotes an arrangement of principles, theories and values informing the writer’s approach to research, taking into account the impetus for the research, the writer’s epistemological perspective (constructivist), and the guiding questions, then the methodology is well-adapted for this practitioner research.

In this study, the theoretical framework is guided by concepts of scaffolding and behavioural learning objectives outlined above. Analysis of data was also guided by the structure of the TLOs and NCS. Approaching data analysis this way helped to manage the study without forcing preconceived theory onto the data. The goal is to generate a theory about relation between intellectual competencies specified in the TLOs and practical competencies specified in the NCS regarding ‘lawyers skills’. Understanding this relation would assist in scaffolding and specifying conditions for performance for PLT instructional objectives. In other words, what prior relevant knowledge can be ascribed to law graduates commencing PLT learning tasks in the ‘lawyers skills’ competencies?

⁶⁹ Claude Lévi-Strauss, *The Savage Mind* (1968), 19.

⁷⁰ Joe L Kincheloe, Peter McLaren and Shirley R Steinberg, 'Pedagogy and Qualitative Research - Moving to the Bricolage' in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (4th ed, 2011) 163, 168.

II METHODS

A Computer-aided Qualitative Data Analysis Software

This study provided an opportunity to learn and trial commercial QSR-Nvivo10 computer-aided qualitative data analysis software ('CAQDAS'),⁷¹ made available to the writer under university licence.⁷² The writer attended four days of basic and advanced training to learn to use the software. The decision to use CAQDAS was motivated by prospective qualitative analysis of interview transcripts in related doctoral research; however, the software is also a powerful tool for reviewing research literature.⁷³ It is possible to import bibliographic sources and attached articles from a citation manager, conduct keyword searches on all sources and analyse the results. For example, assume you wish to search data sources such as case reports and commentary for the term, "privative clause". Search results include a list of all sources in which the term appears, including word frequency in each source. The list highlights search terms in extracts from each source, hyperlinked to source documents. The software produces tree diagrams with grouped and sorted contexts for a searched term. Tree diagrams are hyperlinked to locations in source documents where contexts appear. Nodes for coding and analysing data can be created or updated from search results. CAQDAS stores, organises, and aids analysis of data; it is used to produce and store memoranda, visualisations and reports. Software does not eliminate need for reasoned and reflective analysis;⁷⁴ however, software expedites location of

⁷¹ <http://qsrinternational.com/>.

⁷² Other software is available. Wikipedia provides a list:
<http://en.wikipedia.org/wiki/Computer_assisted_qualitative_data_analysis_software> accessed 17 March 2013.

⁷³ Jenine Beekhuyzen, 'Conducting a literature review: A puzzling task' (Paper presented at the AARE 2008 International Education Research Conference, Brisbane, Australia, 30 November - 4 December 2008); Jenine Beekhuyzen, 'Putting the pieces of the puzzle together: Using Nvivo for a literature review' (2007) *Qualitative Research* 18; Di Gregorio, above n 66.

⁷⁴ José Baltazar García-Horta and María Teresa Guerra-Ramos, 'The use of CAQDAS in educational

relevant material and facilitates analysis of voluminous data sources. Parts of data sources can be selected and 'coded'; for example, the statement, "the student must demonstrate the ability to write clearly", could be coded to 'nodes' categorised as "mandatory requirement" and "writing skill". Nodes are collection points to organise coding and can be sorted into 'parent' and 'child' nodes. For example, "writing letters" would be a child node of "lawyers' skills". Coding stripes, highlighted text, tree maps, graphs, cluster analysis and models are available to analyse and compare nodes. The software's memo function records observations, reflections, and 'to-dos', and assist with an account and writing up of the study.

B Data Sources

Two PDF documents were used as data sources. The LTAS statement provided data regarding the TLOs,⁷⁵ and the NCS provided data concerning PLT competency standards.⁷⁶ Parts of the source documents were extracted and imported into NVivo:

- All six 'threshold learning outcomes' including the 'background' and 'terminology' sections from Part 4.2 LTAS statement;⁷⁷ and
- Descriptors, elements, performance criteria, and explanatory note for 'lawyers' skills' from the NCS document.⁷⁸

Extracts were used to avoid duplicated search results and skewed data analysis that would result from searching extrinsic parts of the documents.⁷⁹

research: some advantages, limitations and potential risks' (2009) 32(2) *International Journal of Research & Method in Education* 151.

⁷⁵ Kift and Israel, above n 2, data source downloaded from <http://www.olt.gov.au/system/files/resources/altc_standards.LAW_.110211_rv2.pdf>, 10 September 2012.

⁷⁶ APLEC, above n 3, data source downloaded from <http://www.aplec.asn.au/aplec/dsp_resources.cfm>, 10 September 2012.

⁷⁷ Kift and Israel, above n 2, 12-23.

⁷⁸ APLEC, above n 3, 20-22.

To navigate data sources, concept maps provided ‘at-a-glance’ overviews of the TLOs and the NCS. Figure 1 models the NCS ‘lawyers’ skills’ competencies. Figure 2 models the ‘threshold learning outcomes’.

Figure 1

Figure 2

⁷⁹ For example, the LTAS Statement includes numerous references to extrinsic materials. Including these references would have resulted in duplication of terms in search results.

Nouns and verbs were extracted from the NCS ‘lawyers’ skills’ elements (plurals and nominalisations were reduced to base forms) to create keywords based on “things” and “doing”. Search stemming and synonym functions extend searching from keywords to other potentially relevant terms. Keyword searches were used to explore TLOs for behavioural learning objectives that might scaffold NCS ‘lawyers’ skills’ competencies. Modifying forms (e.g. adjectives and adverbs) were excluded to focus on actions rather than attributes. Further research including modifying forms would illuminate attributes or qualities of desired learning behaviours and extend the present study.

Keywords were stored in a spreadsheet to create a keyword matrix with NCS elements as column headings. The spreadsheet was imported into NVivo as a dataset, to automatically generate parent and child nodes, with column headings as ‘parents’ and keywords as ‘children’, as part of a ‘provisional coding’ approach.⁸⁰ Nodes are receptacles for organising information (e.g. coded sections of documents) and aid study of concepts emerging from data. Keywords were used to search TLOs - the first iteration confined to NCS ‘lawyers’ skills’ element headings to discern whether those elements appeared in the TLOs. Subsequent iterations worked through the keyword matrix as an ‘initial coding’ technique.⁸¹ All search results were used to code TLOs, and coding stored in relevant parent or child nodes. This process produced initial ‘broad brush’ coding results, where keywords and a number of words on either side of the keyword were selected. The initial results were viewed in text summaries, highlighted on the TLOs document with coding stripes and as word trees. Figure 3 is an example word tree around the keyword, “fact”. The size and relative proximity of

⁸⁰ Johnny Saldaña, *The coding manual for qualitative researchers* (2009), 120.

⁸¹ Ibid, 81.

surrounding words provide context to the keyword and inform further coding decisions. In this example the term, “identify”, frequently appears and suggests an emphasis on identification of facts as a behavioural objective. In the NCS ‘lawyers’ skills’ context, “fact” appears as ‘factual material’ to be organised when ‘representing a client in court’.⁸²

Figure 3

The keyword matrix fruitfully produced a dataset for generating nodes for an initial first-cycle searching and coding strategy. However, keyword searches might produce results where a keyword appears in multiple contexts with different meanings. A second-cycle ‘focused coding’ approach reviewed the context in which a term was used.⁸³ Coding was amended or deleted where it appeared to be out of context, or where a relevant item was missed. For example, “understand” in the NCS usually refers to client understanding; in TLOs “understand” most often refers to student understanding. Although the term “cross-cultural” appears in NCS and not TLOs, focused coding of TLOs illuminated words and phrases with meanings similar to “cross-cultural”. Discoveries like these were recorded in memoranda later used in writing up.

⁸² APLEC, above n 3, 21.

⁸³ Saldaña, above 80, 155.

Following three iterations of focused coding, charts were generated to illustrate proportions of the TLOs coded for parent and child nodes. These charts are illustrative, rather than representing statistically significant ‘results’. For example, Figure 4 compares NCS ‘lawyers’ skills’ parent node coding. Figure 4 shows ‘interviewing clients’ coding was more prevalent than ‘writing letters’ coding, consistent with the number of keywords generated for each NCS ‘lawyers’ skills’ element.

Figure 4

Figure 5 illustrates child node coding for NCS ‘interviewing clients’ in the TLOs. For example, coding for “context” and “understand” was more prevalent than “technique”.⁸⁴

⁸⁴ Recall that keyword searches used stemming and synonym functions. The terms used on these charts represent stemmed words and synonyms for those terms.

Figure 5

The charts informed a further review of coding to ensure terms were not under- or over-represented due to errors or omissions. Charts were used to identify distribution of NCS keyword concepts throughout TLOs.

The charts, together with memoranda, coding summaries, and the highlighted TLOs document were interlinked and exported as HTML files.⁸⁵ HTML files, a platform-neutral method to review the material, informed analysis of how TLOs might scaffold learning for law graduates commencing PLT in NCS ‘lawyers’ skills’.

D Coding with CAQDAS versus ‘Straightforward Reading’

Readers might ask whether the methods described above are unnecessarily complicated. It might be felt that a ‘straightforward reading’ reading of the TLOs and the NCS would be sufficient to produce results. This article is a shared narrative of practitioner research, impelled by discussions involving the teaching-research nexus in legal education and possible interstices between the TLOs and the NCS. It describes a first foray using these research methods. Detailed description of methods provides practical information for other practitioner researchers contemplating possible procedures. The methods described here are individually uncomplicated and

⁸⁵ HTML files can be supplied to make data and reports available for public viewing.

provide a systematic approach to reflective practice. This study focused on two documents whereas future studies could involve hundreds of data sources. In the legal education context, data sources for other studies could involve all relevant primary and secondary sources around a specific issue or topic. There are other advantages attaching to these methods - the project file organises and records the methods and results, can be shared for external scrutiny and verification, transferred into another project for further research, and be revisited to re-test prior conclusions or to re-analyse data for new conceptual and theoretical insights. Reading and ‘side-by-side’ comparison of data sources are essential early steps. Iterative readings and coding adopted for this study facilitate a rigorous ‘double-loop’ approach making ‘personal reasoning transparent in order for claims to be tested robustly’.⁸⁶

III RESULTS

Consistent with questions used to guide this study, NCS ‘lawyers’ skills’ elements and performance criteria structure the following description of results. Assuming law graduates achieve the bachelor of laws threshold learning outcomes, what foundational intellectual competencies might PLT teachers assume graduates possess in relation to NCS ‘lawyers’ skills’? The following sections provide each NCS lawyers’ skills element and performance criteria, with a summary of results produced by methods described in Part II. Coding keywords are shown in “double quotes”, to distinguish keywords from quotations. Results are analysed and discussed at Part IV.

A ‘*Communicating Effectively*’

NCS performance criteria for the ‘Communicating Effectively’ element are:

The lawyer has competently:

⁸⁶ Chris Argyris, *Reasons and Rationalizations - The Limits to Organizational Knowledge* (2006), 3.

- identified the purpose of a proposed communication, the most effective way of making it, an appropriate communication strategy, and the content of the proposed communication.
- presented thoughts, advice, and submissions in a logical, clear, succinct and persuasive manner, having regard to the circumstances and the person or forum to whom the communication is made.
- identified and appropriately dealt with verbal, non-verbal and cross-cultural aspects of the proposed communication.
- taken any follow-up action in accordance with good practice.⁸⁷

Of 22 keywords extracted from the above,⁸⁸ 13 found a home in TLOs at 49 references. The tree diagram at Figure 6 compares 13 keywords by number of references.

Figure 6

Reading Figure 6 from left to right, “communicate” involved the highest number of coding references, followed by “identify”, “practice”, “cross-cultural” and “persuade”. Fewer coding references were found for “present”, “strategy”, “advice”, “circumstance”, “manner”, “aspect”, “non-verbal”, and “verbal”.

TLO 5 ‘Communication and Collaboration’ (no surprise!) was the primary context for coding “communicate”, ‘Graduates of the Bachelor of Laws will be able to: (a)

⁸⁷ APLEC, above n 3, 20.

⁸⁸ The 22 keywords were: “act”; “advice”; “aspect”; “circumstance”; “communicate”; “content”; “cross-cultural”; “deal”; “follow-up”; “forum”; “identify”; “manner”; “non-verbal”; “person”; “persuade”; “practice”; “present”; “purpose”; “regard”; “strategy”; “submission”; and “verbal”.

communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences...’⁸⁹

The primary context for “identify” is TLO 3 ‘Thinking Skills’. For example, ‘identify and articulate legal issues’,⁹⁰ ‘find the key issues’, ‘discriminate between legal and non-legal issues’, and ‘identification... of factual and policy issues’.⁹¹

NCS ‘communicating effectively’ uses “practice” in context of ‘good practice’. TLO 2 ‘Ethics and Professional Responsibility’ refers to ‘professional judgement’, describing ‘professional practice as “judgement in action”’ involving appropriate application of ‘legal knowledge and skills’.⁹²

The TLOs do not expressly use “cross-cultural”. However, TLO 5 refers to ‘appropriate’ communication,⁹³ ‘ability to engage... with culturally diverse audiences’,⁹⁴ and TLO 1 ‘Knowledge’ refers to ‘broader contexts’ including cultural diversity.⁹⁵

TLO 5 expressly references the ability to “persuade” - ensuring ““effective” and “persuasive” communication’ involves suitable choices regarding ‘means or form of communication’.⁹⁶ All terms, “present”, “strategy”, “advice”, “circumstance”, “manner”, “aspect”, “verbal”, and “non-verbal” were coded at TLO 5.

Some keywords found no home in the TLOs, including “follow-up”, “forum”, and “strategy”.

⁸⁹ Kift and Israel, above n 2, 10.

⁹⁰ Ibid 17.

⁹¹ Ibid 18.

⁹² Ibid 16.

⁹³ Ibid 10.

⁹⁴ Ibid 21.

⁹⁵ Ibid 13.

⁹⁶ Ibid 21.

B 'Interviewing Clients'

Performance criteria for the 'Interviewing Clients' element are:

The lawyer has competently:

- prepared for the interview properly, having regard to relevant information available before the interview and the circumstances.
- conducted the interview using communication techniques appropriate to both the client and the context.
- ensured that the client and lawyer have both obtained all the information which they wanted from the interview in a timely, effective and efficient way, having regard to the circumstances.
- ensured that the lawyer and client left the interview with a common understanding of the lawyer's instructions (if any) and any future action that the lawyer or client is to take.
- made a record of the interview that satisfies the requirements of law and good practice.
- taken any follow-up action in a timely manner.⁹⁷

Of 20 NCS 'interviewing clients' keywords,⁹⁸ 13 occupied TLOs and produced 100 references. Figure 7 compares 13 keywords by number of coding references.

Figure 7

Reading Figure 7 from left to right, "practice" represents the highest number of coding references, followed by "circumstance", "understand", "context",

⁹⁷ APLEC, n 3, 20.

⁹⁸ The 20 keywords were: "act"; "circumstance"; "client"; "communicate"; "context"; "ensure"; "follow-up"; "information"; "instruction"; "interview"; "law"; "lawyer"; "practice"; "prepare"; "record"; "regard"; "satisfy"; "technique"; "understand"; and "use".

“communicate”, “use”, “lawyer”, “client”, “law”, “information”, “ensure”, “interview”, and “technique”.

Here, “practice” and “law” refers to ‘requirements of the law and good practice’ regarding interview notes and implies proper preparation, timeliness, effectiveness and efficiency. TLO 1 ‘Knowledge’ refers to ‘ethical practice’, and TLO 2 ‘Ethics and Professional Responsibility’ favours an ability to ‘respond... to ethical issues likely to arise in professional contexts’.⁹⁹ TLO 3 ‘Thinking Skills’ engages legal reasoning and regard for ‘precedent and practice’,¹⁰⁰ and TLO 6 ‘Self Management’ foreshadows graduates’ ability to manage their own learning and practice, with an awareness of the limits of their present knowledge.¹⁰¹

Coding for “circumstance”, “context” and “communication” overlapped substantially at TLO 5 ‘Communication and Collaboration’. In NCS ‘Client Interviewing’, “understand” relates to “lawyer” and “client” mutual understanding of client instructions and next steps. TLO 5 is most pertinent, envisaging ability to ‘listen to, engage with, and understand the needs’ of an audience, and to “ensure” ‘the audience... understands what the lawyer is communicating’.¹⁰²

The terms “use” and “technique” are tied together in NCS ‘client interviewing. TLO 4 ‘Research Skills’ includes use of legal sources to ‘locate relevant material’, and working with “information” includes ‘information literacy skills’, selection and use of information sources, and ability to ‘manage, organise and retrieve’ information.¹⁰³

TLO 5 promotes ‘active listening’ and ‘appropriate oral communication’ techniques

⁹⁹ Kift and Israel, above n 2, 10, 15.

¹⁰⁰ Ibid 18, 19.

¹⁰¹ Ibid 22, 23.

¹⁰² Ibid 21, 22.

¹⁰³ Ibid 20, 19.

transcending ‘mere transmission’ of “information”.¹⁰⁴ TLO 6 ‘Self Management’ includes ‘ability to perceive, use, understand, and manage emotions’.

“Interview” appears in the TLOs only as a context for appropriate ‘communication methods’.¹⁰⁵ Keywords not coded in this element included “follow-up”, “instruction” and “prepare”.

C ‘Writing Letters’

Performance criteria for the ‘Writing Letters’ element are:

The lawyer has competently:

- identified the need for, and purpose of, the letter.
- written the letter in simple, straightforward English which conveys its purpose clearly and can be easily understood by the person to whom it is sent.¹⁰⁶

Of 7 ‘Writing Letters’ keywords, 5 populated the TLOs to produce 8 references.¹⁰⁷

Figure 8 represents the relatively even distribution of references.

Figure 8

Reading the tree diagram from the left, “English”, “identify”, and “write” attached to two references, whereas “letter” and “understand” each coded to one reference.

¹⁰⁴ Ibid 21.

¹⁰⁵ Ibid.

¹⁰⁶ APLEC, above n 3, 20.

¹⁰⁷ The ‘Writing Letters’ keywords were: “convey”; “English”; “identify”; “letter”; “purpose”; “understand”; and “write”.

TLO 5 advocates the ‘knowledge and ability to work in plain English’ for an audience ‘at any level of education, literacy and English comprehension’ (this also coded for “understand”). “Write”, “letter” and “understand” also coded at TLO 5, with “letter” as an example of ‘traditional forms of communication’, and “write” as an ‘effective’, appropriate and persuasive’ communication method.¹⁰⁸

TLO 3 refers to the ability to ‘identify and articulate legal issues’.¹⁰⁹ TLO 4 contemplates ‘intellectual and practical skills needed to identify... relevant factual, legal and policy issues’.¹¹⁰ These references were coded as relevant to NCS ‘Writing Skills’ identifying ‘the need for, and purpose of’ a letter.

D ‘*Drafting Other Documents*’

Performance criteria for the ‘Drafting Other Documents’ element are:

The lawyer has competently:

- identified the need for, and purpose, of the document.
- devised an effective form and structure for the document having regard to the parties, the circumstances, good practice, principles of writing simple, straightforward English and the relevant law.
- drafted the document effectively having regard to the parties, the circumstances, good practice, principles of writing simple, straightforward English, and the relevant law.
- considered whether the document should be settled by counsel.
- taken every action required to make the document effective and enforceable in a timely manner and according to law (such as execution by the parties, stamping, delivery and registration).¹¹¹

Of 15 ‘Drafting Other Documents’ keywords,¹¹² 10 were coded to the TLOs and produced 42 references. Figure 9 represents the keywords compared by number of references.

¹⁰⁸ Kift and Israel, above n 2, 21.

¹⁰⁹ Ibid 17.

¹¹⁰ Ibid 19.

¹¹¹ APLEC, above n 3, 21.

Figure 9

Reading the tree diagram from left to right, “circumstance” was the most coded keyword, followed by “identify”, “consider”, “law”, “practice”, “form”, “purpose”, “draft”, “English”, and “party”.

Coding for “circumstance” also picked up the synonym, ‘context’ throughout the TLOs. For example, TLO 1 ‘Knowledge’, TLO 2 ‘Ethics and Professional Responsibility’ and TLO 5 ‘Communication and Collaboration’, refer to professional contexts,¹¹³ international and comparative contexts,¹¹⁴ ‘particular legal contexts’,¹¹⁵ and more broadly:

...social justice; gender-related issues; Indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability.¹¹⁶

The term, “party” was coded as a prospective audience in ‘contexts’ for effective communication at TLO 5.¹¹⁷

¹¹² The keywords were: “circumstance”, “consider”, “counsel”, “devise”, “draft”, “English”, “form”, “identify”, “law”, “party”, “practice”, “purpose”, “regard”, “settle”, and “structure”.

¹¹³ Kift and Israel, above n 2, 10.

¹¹⁴ Ibid, 13.

¹¹⁵ Ibid 21.

¹¹⁶ Ibid 13.

¹¹⁷ Ibid 21.

The NCS specifies the ability to “identify” the ‘need for, or purpose of’ drafting a document. This relates to ‘particular legal contexts’ mentioned above, the ability to ‘synthesise’ relevant issues (TLO 4),¹¹⁸ and identifying ‘key issues’ as a ‘precursor... to generate appropriate responses’ (TLO 3).¹¹⁹

The NCS criterion that lawyers “consider” whether a document ‘should be settled by counsel’ is analogous with reflection on appropriate action. TLO 2 aims for reflection on ethically appropriate responses, and understanding ‘consequences of professional decisions.’¹²⁰ TLO 3 calls for ‘critical analysis’, ‘reasoned’ choices and creative thinking.¹²¹

References to “practice” overlapped with those described above in NCS ‘Interviewing Clients’. References to “English” overlapped with those described in NCS ‘Writing Letters’. In the NCS, to “draft” documents ‘effectively, lawyers must attend to “form” and “structure” in documents. TLO 5 recognises ‘drafting’ as a ‘genre’ of ‘effective written communication’ that requires attention to ‘form’.¹²² TLO 3 indirectly captures “structure” through the ‘practice of examining a text, claim or argument and identifying hidden structures’,¹²³ which could scaffold intellectual understanding of “structure” in drafting.

E ‘Negotiating Settlements and Agreements’

Performance criteria for the ‘Negotiating Settlements and Agreements’ element are:

The lawyer has competently:

¹¹⁸ Ibid 10.

¹¹⁹ Ibid 18.

¹²⁰ Ibid 10, 16.

¹²¹ Ibid 17.

¹²² Ibid 21.

¹²³ Ibid 18.

- prepared the client’s case properly having regard to the circumstances and good practice.
- identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client.
- carried out the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.
- documented the negotiation and any resolution as required by law or good practice and explained it to the client in a way the client can easily understand.¹²⁴

Of 19 ‘Negotiating Settlements and Agreements’ keywords,¹²⁵ 12 were coded to TLOs to produce 50 references. Figure 10 displays keywords by number of coding references.

Figure 10

Reading the tree diagram from left to right - “circumstance” was the most coded keyword, followed by “practice”, “strategy”, “tactics”, “negotiate”, “regard”, “client”, “identity”, “understand”, “explain”, “adopt”, and “discuss”.

“Circumstance”, “practice”, “regard” appear in the NCS context as ‘regard to the circumstances and good practice’. Coding for these terms essentially duplicates coding discussed above for TLO 2, TLO 3 and TLO 5. Coding for “client”, “explain”,

¹²⁴ APLEC, above n 3, 21.

¹²⁵ The keywords were: “adopt”; “approval”; “case”; “circumstance”; “client”; “discuss”; “document”; “explain”; “identify”; “law”; “negotiate”; “obtain”; “practice”; “prepare”; “regard”; “resolve”; “strategy”; “tactics”; and “understand”.

“understand” and “discuss” was substantially at TLO 5 in the context of communicating effectively with clients.

The terms “strategy”, “tactics” and “negotiate” were indirectly represented in TLO 3 - ‘identify and evaluate the appropriateness of alternatives for resolution’, and ‘be familiar with a range of alternative dispute resolution processes, including negotiation’.¹²⁶ “Adopt” in the NCS context refers to ‘strategies and tactics adopted’. TLO 3 specifies the ability to ‘explain the basis for adopting a particular point of view’ relevant to the skill of explaining tactics and strategies to a client.

F *‘Facilitating Early Resolution of Disputes’*

Performance criteria for the ‘Facilitating Early Resolution of Disputes’ element are:

The lawyer has competently:

- identified the advantages and disadvantages of available dispute resolution options and explained them to the client.
- performed in the lawyer’s role in the dispute resolution process effectively, having regard to the circumstances.
- documented any resolution as required by law or good practice and explained it to the client in a way the client can easily understand.¹²⁷

Of 19 ‘Facilitating Early Resolution of Disputes’ keywords,¹²⁸ 16 were coded to TLOs and produced 84 references. Figure 11 represents keywords by number of coding references.

¹²⁶ Kift and Israel, above n 2, 17, 19.

¹²⁷ APLEC, above n 3, 21.

¹²⁸ The keywords were: “advantage”; “circumstance”; “client”; “disadvantage”; “dispute”; “document”; “explain”; “facilitate”; “identify”; “law”; “lawyer”; “option”; “perform”; “practice”; “process”; “regard”; “resolve”; “role”; and “understand”.

Figure 11

Reading the tree diagram from left to right, “circumstance” was most coded followed by “identify”, “explain”, “regard”, “resolve”, “dispute”, “law”, “option”, “lawyer”, “understand”, “role”, “process”, “client”, “practice”, “advantage”, and “disadvantage”. Coding for several terms overlap with items reported above. For example, “circumstance”, “explain”, “client”, and “understand” are represented in TLO 5. TLO 3 captures “identify”, “regard” and “option”. TLO 2 intersects with “practice”, “lawyer” and “role” in the context of exercising professional judgment. TLO 1 foreshadows ‘lawyers’ roles’ as including ‘representation, advocacy and negotiation’ and incorporates the term “law”.¹²⁹

“Dispute” and “resolve” were coded to TLO 3 - ‘find key issues (for example, unresolved disputes...)... articulate those issues clearly as a necessary precursor to ... generating appropriate responses’.¹³⁰ TLO 3 encompasses “process” as matter for thinking skills, to identify and apply legal rules and processes.¹³¹ “Advantage” and “disadvantage” also expressly connect to TLO 3 - ‘identification of strengths and

¹²⁹ Kift and Israel, above n 2, 14.

¹³⁰ Ibid 17-18.

¹³¹ Ibid 18.

weaknesses, advantages and disadvantages... in a text, claim, argument or response’.¹³²

G ‘Representing a Client in Court’

Performance criteria for the ‘Representing a Client in Court’ element are:

The lawyer has competently:

- observed the etiquette and procedures of the forum.
- organised and presented in an effective, strategic way:
 - factual material;
 - analysis of relevant legal issues; and
 - relevant decided cases.
- presented and tested evidence in accordance with the law and good practice.
- made submissions effectively and coherently in accordance with law and good practice.¹³³

Of 21 ‘Representing a Client in Court’ keywords,¹³⁴ 14 were coded to TLOs and produced 84 references. Figure 12 arranges keywords by number of coding references.

Figure 12

¹³² Ibid.

¹³³ APLEC, above n 3, 21.

¹³⁴ Keywords were: “advocacy”; “analyse”; “case”; “client”; “etiquette”; “evidence”; “fact”; “forum”; “issue”; “law”; “legal”; “make”; “observe”; “organise”; “practice”; “present”; “procedure”; “represent”; “strategy”; “submission”; and “test”.

Reading the tree diagram from left to right, the highest number of coding references were for “issue”, followed by “analyse”, “practice”, “present”, “relevant”, “law”, “legal”, “fact”, “make”, “advocacy”, “client”, “etiquette”, “organise” and “represent”.

The terms, “advocacy” and “represent” were coded to TLO 1 in context of ‘lawyer’s roles’,¹³⁵ and at TLO 5 “advocacy” provides an example context for ‘appropriate communication skills’.¹³⁶ In the NCS, “present” and “make” relate to submission of facts, analysis, cases and evidence. TLO 3 specifies the ability to ‘present and make a reasoned choice between alternative solutions... supported by evidence’, and ‘presenting a range of viable options from a set of facts and law’.¹³⁷ TLO 5 refers to ‘oral presentations’.¹³⁸ “Organise” was coded to TLO 4 - the ability ‘to manage, organise and retrieve information effectively’.¹³⁹ TLOs do not expressly refer to “etiquette”, however TLO 2 is indirectly relevant concerning the ‘professional responsibilities of lawyers’, ‘ethical issues likely to arise in professional contexts’, and ‘professional values’.¹⁴⁰ TLO 5 ‘appropriate communication skills’ in ‘formal and informal contexts’ is also relevant.¹⁴¹

The terms, “issue”, “analyse”, “practice”, “law” and “legal” were widespread. In the ‘representing a client’ context, “issue” was coded to TLO 2 - ‘ethical issues likely to arise in professional contexts’, TLO 3 - ‘identify and articulate legal issues’, and TLO 4 - ‘identify, research, evaluate and synthesise relevant factual, legal and policy

¹³⁵ Kift and Israel, above n 2, 14.

¹³⁶ Ibid 21.

¹³⁷ Ibid 17.

¹³⁸ Ibid 21.

¹³⁹ Ibid 19.

¹⁴⁰ Ibid 15, 16.

¹⁴¹ Ibid 21.

issues'.¹⁴² "Analyse" was coded to TLO 3 'cognitive skills',¹⁴³ and TLO 4 'intellectual and practical skills needed to research and analyse the law'.¹⁴⁴ "Practice" relates to TLO 1 - knowledge of 'principles and values of justice and ethical practice',¹⁴⁵ TLO 2 - 'judgement in action',¹⁴⁶ and TLO 3 - having regard to 'precedent and practice'.¹⁴⁷ TLO 1 'Knowledge' and TLO 3 'Thinking Skills' involve "law" and "legal" in the context of knowledge and cognitive skills required to identify and articulate legal issues and legal contexts.¹⁴⁸

IV ANALYSIS AND DISCUSSION

This study sought insights as to how behavioural learning outcomes for 'lawyers' skills' intersect between bachelor of laws threshold learning outcomes and PLT national competency standards. Those insights might inform PLT teachers' assumptions about law graduates' intellectual competencies, and scaffolding graduates might need when commencing PLT involving lawyers' skills. The TLOs contemplate law school and PLT as stages in a legal education continuum,¹⁴⁹ although PLT learning outcomes are expressly excluded from the TLOs' scope, because the TLOs are directed to 'academic' standards.¹⁵⁰ TLO 2 foreshadows PLT as necessary to support development of law graduates' abilities to respond to 'ethical issues in professional contexts'.¹⁵¹ TLO 6 contemplates the importance of graduates' self-

¹⁴² Ibid 10.

¹⁴³ Ibid 17.

¹⁴⁴ Ibid 19.

¹⁴⁵ Ibid 10.

¹⁴⁶ Ibid 16.

¹⁴⁷ Ibid 19.

¹⁴⁸ Ibid 10.

¹⁴⁹ Ibid 15, 23.

¹⁵⁰ Ibid 4.

¹⁵¹ Ibid 15.

management in undertaking PLT and is directed toward inculcating commitment to life-long learning.¹⁵² The NCS proposes that PLT ‘should build on knowledge and understanding of the law’ at a post-graduate level and should not commence before the final year of law school.¹⁵³ In this context, it is reasonable to assume the TLOs and NCS represent separate but complementary stages in the legal education continuum. The bachelor of laws stands for ‘comprehensive foundation in the sources of law and fundamental areas of legal knowledge, together with the development of other relevant knowledge, skills and dispositions’.¹⁵⁴ PLT is intended to train graduates to a ‘threshold level of competence’ in ‘skills, practice areas and values’.¹⁵⁵ In relation to PLT ‘lawyers’ skills’, threshold competence involves demonstrable skills in oral communication, legal interviewing, advocacy, negotiation and dispute resolution, letter writing and legal drafting.¹⁵⁶ PLT is a bridge between academic legal education and practice in the law profession; yet betwixt law school and PLT some scaffolding is likely necessary to help graduates ‘carry out a task or achieve a goal... beyond [graduates’] unassisted efforts’.¹⁵⁷

What insights from this study assist PLT teachers scaffolding graduate learning in lawyers’ skills? In brief, the six TLOs’ behavioural objectives do not directly relate to the seven NCS performance criteria for practical ‘lawyers’ skills’ in oral communication, legal interviewing, advocacy, negotiation and dispute resolution, letter writing and legal drafting. However, foundational intellectual competencies pervading TLOs do relate to NCS lawyers’ skills performance criteria. For example,

¹⁵² Ibid 23.

¹⁵³ APLEC, above n 3, 2.

¹⁵⁴ Kift and Israel, above n 2, 8.

¹⁵⁵ APLEC, above n 3, 1.

¹⁵⁶ Ibid 20.

¹⁵⁷ Wood, Bruner and Ross, above, n 11.

Figure 13 charts the ten most-coded NCS nodes by number of references in the TLO.¹⁵⁸

Figure 13

Of seven NCS ‘lawyers’ skills’ elements, 5 appear in this chart. The keywords include “practice” in the context of TLO 2 ‘professional judgement’; “issue”, “analyse”, and “identify” in the context of TLO 1 ‘knowledge’ and TLO 3 ‘thinking skills’; and “communicate” and “understand” in the context of TLO 5 ‘communication’. The keywords “circumstance” and “context” substantially overlap and relate to: appropriate responses to ethical issues in professional contexts (TLO 2); responses to legal issues and facts (TLO 3); recipients of communication (TLO 5); and less directly to research (TLO 4) and self-management (TLO 6).

Overall (taking all 50 nodes into account), TLO 5 ‘Communication and Collaboration’ was most densely coded, followed by TLO 3 ‘Thinking Skills’ and TLO 2 ‘Ethics and Professional Responsibility’. TLO 1 ‘Knowledge’, followed by TLO 4 ‘Research Skills’ and TLO 6 ‘Self Management’ were substantially less coded.

¹⁵⁸ No statistical significance asserted. The chart visualizes keywords distributed across parent and child nodes to aid comparisons. The remaining 40 nodes progressively reduce in number of coding references, however the relative distribution of coding across the TLOs is fairly consistent.

An extensive overlap between law school and PLT behavioural learning objectives is neither necessary nor desirable, if law school and PLT are treated as stages within the legal education learning continuum and educators adopt a taxonomic approach to learning objectives.¹⁵⁹ It is desirable to assess potential gaps in graduates' knowledge and skills to scaffold their learning in PLT. The absence of extensive overlap might be problematic if a scaffolded approach in teaching PLT lawyers' skills is ignored.¹⁶⁰ From the perspective of a PLT teacher meeting law graduates on the first day of training in PLT 'lawyers' skills', it would be reasonable to assume graduates possess foundational academic competencies in identifying and analysing facts, legal issues, ethical issues, in legal and non-legal contexts including social and cultural contexts relevant to audiences with whom lawyers communicate. PLT teachers can rectify 'insurmountable' gaps by scaffolding, where necessary, graduates' transformation of academic competencies into practical lawyers' skills.

Graduates' abilities to transform academic competencies into practical skills would depend on individual attributes and experiences, including scaffolding PLT teachers provide. For example, analysis of the TLOs suggests graduates possess foundational intellectual competencies to communicate clearly to audiences in different contexts, taking into account the legal and ethical issues peculiar to a context. Those competencies appear well-adapted to (deceptively brief) NCS 'Writing Letters' performance criteria – the need for and purpose of the letter must be identified, and the letter written in plain English so the recipient easily understands the letter and its purpose. Letter writing intersects with NCS 'Communicating Effectively', which

¹⁵⁹ For example, Benjamin S. Bloom, *Taxonomy of Educational Objectives, Handbook I: The Cognitive Domain*. (1956); Robert J Marzano and John S Kendall (eds), *The New Taxonomy of Educational Objectives* (2nd ed, 2007).

¹⁶⁰ It is important to bear in mind that scaffolding does not involve 'spoon feeding' learners: Sara Jeanne Hammer et al, 'Legal educators' perceptions of lifelong learning: conceptualisation and practice' (2012) 31(2) *International Journal of Lifelong Education* 187, 194-195.

requires writing to be logical, succinct and persuasive, taking into account audience and context. However, it is the writer's impression from several years PLT teaching experience that even very high-achieving law graduates can struggle at first with writing letters in different contexts.¹⁶¹ This impression is reinforced anecdotally in public and private comments by supervising lawyers and partners. NCS 'Drafting Other Documents' includes concepts of form, structure, enforceability, and processes. Letter writing, and drafting other documents such as pleadings, affidavits, written submissions, brief to counsel, statutory instruments and transactional documents, each have peculiar characteristics.¹⁶² The degree of scaffolding necessary to assist graduates in the transition from law school to PLT would depend on how law schools develop the TLOs into detailed learning objectives and teaching methods that incorporate practical activities such as letter writing or drafting other documents (in this example).¹⁶³ If instructional design for a law school semester unit involves few practical activities and focuses on formative and summative assessment through two assignments and a written examination, the scaffolding necessary to help graduates transubstantiate academic competency into practical skills might be substantial.¹⁶⁴ PLT teachers should anticipate some variation in the way law schools incorporate practical lawyers' skills into curriculum.

Understanding the TLOs and how they are implemented would help PLT teachers to scaffold PLT more effectively. Case studies tracing lawyers' skills through the legal

¹⁶¹ For example, activities involving an initial engagement letter, an advice to client regarding commercial or property agreements, letter to another lawyer proposing amendments to a contract, advice regarding terms of settlement.

¹⁶² In the writer's experience, practitioners develop personal theories and styles they tend to prefer over others. Matters of style are beyond the scope of this article, however it is a relevant topic for discussion in scholarship of teaching in PLT.

¹⁶³ It is recognised that some law schools do incorporate professional skills programs as part of the LLB curriculum.

¹⁶⁴ Also bearing in mind law school involves years of education compared to PLT's months.

education continuum from law school to PLT would be informative. It is submitted that further research should involve case studies of specific ways in which law schools develop TLOs into detailed instructional and teaching/learning objectives, together with teaching methods directed toward achieving outcomes, then track these through the PLT stage of the legal education continuum.

V CONCLUSION

This study explored intersections between the Bachelor of Laws threshold learning outcomes and Practical Legal Training national competency standards, to gain insights about what PLT teachers could assume regarding graduates' intellectual competencies when commencing practical learning activities in lawyers' skills. The study found the TLOs do not at first glance directly relate to NCS performance criteria for practical 'lawyers' skills'. Closer examination using coding technique disclosed the TLOs do intersect with NCS lawyers' skills performance criteria through foundational intellectual competencies involving communication skills, thinking skills and reflection on ethical issues in professional contexts. A goal of this study was to generate a 'theory' of relation between the bachelor of laws TLOs' intellectual competencies and NCS 'lawyers' skills' practical competencies. The rationale for generating the theory is that understanding the relation would assist in scaffolding and specifying conditions for performance for practical legal training in lawyers' skills. Assuming law graduates have achieved the bachelor of laws threshold learning outcomes, PLT teachers can expect graduates would possess intellectual communication, thinking and professional judgment skills on which to found scaffolding for practical lawyers' skills. Graduates cannot be assumed to have practical competency in lawyers' skills save that competency in 'effective communication' is likely to be higher than other skills at commencement of PLT.

Therefore, PLT teachers should actively reflect on the scaffolding graduates need to accomplish lawyers' skills learning tasks. Further research should test this theory. It is suggested necessary scaffolding would also depend on graduates' individual attributes and experiences, including work experience, and the way in which law schools interpret the TLOs into instructional and teaching objectives and teaching methods. PLT teachers can refer graduates to the foundational intellectual competencies acquired at law school, and explicitly demonstrate how those competencies 'pervade' learning in PLT, as part of a scaffolded approach.¹⁶⁵ Future qualitative research tracking graduates' journey through the legal education continuum with a focus on practical lawyers' skills should produce useful insights.

This article shares a practitioner's research experience involving methodology and methods borrowed from grounded theory to analyse documentary data sources. An initial learning curve involved a review of the methodology and related methods, and some training with the software used to facilitate, store and share the study. This first foray was confined to two documents and was used as a worked example of the methods. The findings in this study are relatively modest, however based on the experience the writer believes the methods adopted are not confined to qualitative research, and has adopted the methods and software to undertake literature review of several hundred documents for doctoral research. Scholars involved in doctrinal research, discourse analysis, and other approaches might benefit from these methods.

And yet this all comes down when the job's done / showing off walls of pure and solid stone.¹⁶⁶

¹⁶⁵ Michael Robertson, 'Providing ethics learning opportunities throughout the legal curriculum' (2009) 12(1) *Legal Ethics* 59, 63, provides an interesting example of a 'pervasive' approach.

¹⁶⁶ Heaney, above n 1.