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The *Legal Education Review* is an independent, refereed journal. Its objectives are (1) to encourage and disseminate within Australia and internationally high quality research into legal education and (2) to inform and stimulate discussion, debate and experimentation on topics related to legal education The *Review* was established in 1989 with the support of a grant from the Law Foundation of NSW. The editors of the *Review* are appointed by the Australasian Law Teachers Association (ALTA). Membership of ALTA includes a subscription to the *Legal Education Review* in electronic format. ALTA members may also purchase a hard copy of the *Review* for $A15 + postage and handling. For enquiries about ALTA contact: admin@alta.edu.au.

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Foreword

This volume of the Legal Education Review, Volume 23, is my first as Editor-in-Chief, and I am very proud of the collection of legal education articles that we have gathered together for your edification, reflection and enjoyment. The volume consists of two issues, a General Issue and a Special Issue. The Special Issue includes six engaging — and at times confronting — articles about the past, present and future of ‘critical legal education’ in Australia. The articles examine various consequences of the rising influence of corporatism, neoliberalism and the market narrative upon the teaching of law. The Special Issue commences with a separate Foreword written by our guest editors, Mary Heath and Peter Burdon, and I refer you to that Foreword for more information about the articles included in the Special Issue. I would like to take this opportunity to thank Mary and Peter for their hard work and insightful advice in selecting and editing the six articles in the Special Issue.

The General Issue is made up of nine articles that explore a variety of legal education topics. The first four articles are united by their emphasis upon culture: cultural context, cultural awareness and cultural competency. In ‘Teaching Legal Ethics and Professionalism in a South Pacific Context’, Carolyn Penfold considers the importance of cultural context to the teaching of legal ethics. Legal ethics has recently become a compulsory subject at the University of the South Pacific (USP). Carolyn explains how it was tempting to model the new legal ethics subject on those taught in Australia, but that her experience teaching legal ethics at USP together with research into the legal profession in Vanuatu and the Solomon Islands lead her to identify a number of additional features which had to be taken into account to make the subject appropriate to the South Pacific context. Carolyn describes these additional features in detail, and concludes by offering suggestions for improving the ethical and professional training of South Pacific lawyers.

Thalia Anthony and Melanie Schwartz, in ‘Invoking Cultural Awareness through Teaching Indigenous Issues in Criminal Law and Procedure’, argue that a critical, contextual approach is the most appropriate way to teach students criminal law. Thalia and Melanie describe a method for incorporating Indigenous issues into a criminal law subject to improve students’ understanding of cultural diversity, the interaction between culture and the legal system, and the differential impact of the law on different cultural groups, all without compromising the core requirements of the Priestley 11.
The third of our four articles about legal education and culture is ‘Incorporating Indigenous Cultural Competency through the Broader Law Curriculum’ by Asmi Wood, who emphasises the importance of teaching Indigenous cultural competency (ICC) to all law students. Asmi explains the concept of ICC, describes and evaluates the approach to development of ICC taken at the Australian National University’s College of Law, and identifies some useful lessons for other law schools and institutions seeking to inculcate ICC.

Finally, Magdalene D’Silva, in ‘A New Legal Ethics Education Paradigm: Culture and Values in International Arbitration’, makes a case for rethinking mandatory legal ethics education in the English law degree by considering legal ethics education in other common law jurisdictions and the fundamental role played by legal culture, values and ethics in international commercial arbitration. According to Magdalene, traditional undergraduate and postgraduate legal ethics education is often focused on the regulation of lawyer conduct, legal practice and legal services. However, the role played by lawyers in international arbitration illustrates the need for a heightened sensitivity to cross-cultural values.

Each of the next three articles emphasises vocational aspects of legal education. In ‘Equipping Students for the Real World: Using a Scaffolded Experiential Approach to Teach the Skill of Legal Drafting’, Francina Cantatore and Tammy Johnson insist that a good legal education must equip law students with the skills needed to meet the challenges they will face as practising lawyers, and that well-developed legal drafting skills are essential for effective legal practice. Using a consumer lending transaction as an example, Francina and Tammy identify the difficulties associated with achieving a balance in legal drafting between protecting a client’s legal interests and clearly and concisely conveying the appropriate message to the intended audience. They show how the use of both scaffolded and experiential learning approaches to teaching legal skills can be an effective way for students to develop the skill of legal drafting using plain language.

Next, Madeleine Fraser, Joanna MacKenzie, David Weisbrot and Wesley Tan, in ‘Transition from Legal Education to Practice: Extra-Curricular Competitions Offer the Missing Link’, explore the possibility that extra-curricular legal competitions such as mooting and client interviews, conducted within a university setting, provide law students with the opportunity to develop and refine their practical legal skills. They report on a survey of law students conducted at Macquarie University and their finding that the students who participated in a legal competition reported a significantly higher improvement in their perceived skills.

Eileen Johnson, Amy Timmer, Dawn Chandler and Charles Toy, in ‘Matched vs Episodic Mentoring: An Exploration of the
Processes and Outcomes for Law School Students Engaged in Professional Mentoring’, report on the results of a qualitative study of the experiences of law students participating in one of two types of mentoring program: traditional matched-pair mentoring and episodic mentoring. The results of the study indicate that both forms of mentoring result in similar outcomes, but the strengths and challenges experienced by participants in each program differ, and the authors conclude that episodic mentoring is a viable and useful way for law schools to provide systematic mentoring to law students.

The last two articles in the General Issue focus upon digital natives and e-learning. In ‘Reading Law: Motivating Digital Natives to Do the Reading’, Liesel Spencer begins with the observation that many students today come to class without having read the material allocated as preparatory reading for that class. Liesel considers whether and why reading is important for the ‘digital native’ generation of law students; questions whether it is the job of the law academic to motivate law students to do their reading; identifies the reasons for student non-compliance with set reading; and explains how law teachers can reconcile intergenerational differences using specific motivational strategies to initiate and sustain a ‘virtuous circle’ of reading behaviour.

Finally, Stephen Colbran in ‘e-Learning in Australian Law Schools’ describes the ways in which technology and social change are disrupting the traditional modes of delivery, pedagogy and educational business models of Australian law schools. Stephen reports on the findings of a survey of the use by Australian law schools of blended learning incorporating distance education and e-learning both as supplements to and replacements for face-to-face instruction. He concludes that e-learning is pervasive in Australian law schools, but that more systematic law school policies, support and program-wide practices are warranted.

This volume of the Legal Education Review would not have been possible without the efforts of many people, most of whom selflessly volunteered their time and expertise without thought of reward or recognition. Thanks are especially due to the members of the 2013 LER Editorial Committee for their hard work in bringing this volume together: Associate Editor Anne Hewitt, Executive Editor Michelle Sanson, and Consulting Editors Sonya Willis, Wendy Larcombe, Allan Chay, Donna Buckingham, Anne Hewitt, Matthew Ball, and (joining us this year) Kate Galloway. Our hardworking Administrator Alysia Saker managed submissions, liaised with authors and referees, assisted the editors, paid bills, issued invoices and generally ensured that the editorial process moved steadily towards its intended but not necessarily inevitable conclusion, the publication of this volume.
Our typesetter Maureen Platt and our proofer Trischa Mann at Inkshed Press ensured that the articles included in this volume were presented and printed to our usual high standards. Helen Anderson, ALTA Treasurer, managed the LER finances, the ALTA Executive Committee provided ongoing financial support and encouragement, and Palgrave MacMillan generously sponsored the journal for the third time in three years.

All of the articles in the *Legal Education Review* are double-blind refereed. Our referees spend many hours reading and providing insightful feedback on our articles, and their efforts are genuinely appreciated both by the editors and by the authors. We are also grateful for the support of our Editorial Advisory Board, the members of which often serve as referees and provide overall guidance on the direction of the journal. The long list of illustrious scholars and practitioners on our Advisory Board has this year been expanded to include Terry Hutchinson (QUT) and Des Butler (QUT).

The LER has recently issued a call for submissions to Volume 24 of the journal, to be published in 2014. Issue 1 will be a General Issue containing articles on current issues in legal education from all jurisdictions. Issue 2 will be a Special Issue entitled ‘Ethics and Professionalism in Legal Academia — Practising, Preaching and Participating’, and will contain articles about the diverse relationships legal academics have with the concepts of ethics and professionalism. Topics of interest include (1) the professional and ethical obligations, responsibilities and expectations that influence our teaching and research; (2) the meaning of ‘professionalism’ for the modern legal profession, and the extent to which law schools can or should be involved in its teaching; (3) the ways in which legal academics can develop in our students the theoretical and professional skills required for ethical practice; (4) the ways in which the teaching of ethics and legal professionalism is affected by the regulatory environment in higher education; and (5) ethical and professional dilemmas facing legal academics and how these affect our teaching and research. The deadline for submissions is 30 April 2014. Please refer to the *Legal Education Review* website for more details: www.ler.edu.au.

Given the nature of some of the articles included in this year’s volume, it seems appropriate to emphasise that the views and opinions expressed in these articles are those of the authors, not necessarily those of the editors of the *Legal Education Review* or the Australasian Law Teachers Association or its members.

Professor Nick James
Editor-in-Chief
Most law schools teach courses with names such as ‘Lawyers, Justice and Ethics’, ‘Law, Lawyers and Society’, ‘Ethics and Professional Conduct’, or ‘The Legal Profession’. Whatever name they go by, these courses increasingly cover many aspects of both legal professionalism and legal ethics. The push to do so in Australia can be seen in a 2008 Discipline Based Initiative on Learning and Teaching which set as a goal: ‘develop effective means to inculcate in Australian law students the values of professionalism, ethics, and service.’ It can be seen further in the inclusion of ‘Ethics and Professional Responsibility’ in the Threshold Learning Outcomes for Law, and the more recent development of an ALTC Good Practice Guide on this topic.

In Australia, National Uniform Admission Rules also call for the study of ‘Ethics and Professional Responsibility,’ although the fuller description of the requirement is still almost entirely rules based, and many state admission bodies still require only the study of ‘professional conduct,’ without any mention of ethics training.

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3 Sally Kift, Mark Israel and Rachael Field, ‘Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement’ (Australian Learning and Teaching Council, 2010).
4 Maxine Evers, Leanne Houston and Paul Redmond, ‘Good Practice Guide (Bachelor of Laws): Ethics and Professional Responsibility (Threshold Earning Outcome 2)’ (Australian Learning and Teaching Council, 2011).
6 Davis, above n 1.
Nonetheless, there are moves toward requiring the study of ethics in addition to professional practice, and the competency standards of the National Uniform Admission Rules do now require that ‘an entry level lawyer should act ethically and demonstrate professional responsibility ...’.\(^7\) Between academic institutions and admitting bodies, the need to teach ethics along with professional responsibility is increasingly being recognised and acted upon.\(^8\)

In most South Pacific countries there are no equivalent admission requirements for lawyers. However, the Law School of the University of the South Pacific (USP) introduced Legal Ethics as a compulsory course in the Bachelor of Laws degree in 2005.\(^9\) The course is described as follows:

**Legal Ethics** — Any person studying for a professional degree should have some knowledge of the ethical principles upon which the practice of all professions is based. Students of law in particular require an understanding not only of the organisation, nature, structure, practice and operation of the legal profession, but also an appreciation of the ethics which impact upon their work as lawyers and their relationship with the community. The duties imposed on the lawyer can be seen as being grounded in ethics. These duties, to the court and to the client, will be considered in this course.\(^10\)

It was hoped that the introduction of Legal Ethics as a course within the undergraduate LLB degree would ‘increase public confidence in the profession, make for better lawyers and contribute to the legal education of those studying the law.’\(^11\)

The USP’s Professional Diploma in Legal Practice also includes an Ethics module, described as follows:

**Ethics & Professionalism & Work Skills** — In this module trainees will learn about:

- the rules of professional responsibility;
- their duties as individual lawyers to evaluate the appropriateness of their conduct in all professional situations;

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\(^7\) Law Admissions Consultative Committee, above n 5, 22 (italics added).

\(^8\) Ethics and professionalism often overlap but may also be distinguished. For example not returning calls, skipping appointments, or keeping files in disarray, may all be unprofessional while not unethical. Courtesy, organisation, attention to timing, and thorough record keeping may not generally appear to be as important as ‘ethics’, but where the aim is to increase trust in, respect for, and use of a particular system, and such practice is often not modelled even by senior practitioners or judicial officers, it may need to be more explicitly taught.

\(^9\) Email from Peter MacFarlane to the author, 12 April 2012. Professor Peter MacFarlane is a former Head of the USP School of Law who introduced Legal Ethics at USP and has taught the course numerous times.


• how they can apply rules of professional conduct in various professional contexts;
• their professional responsibilities in specific professional [settings].

By making the study of legal ethics and professionalism compulsory in all undergraduate and postgraduate legal qualifications, USP signals its belief that these are necessary topics in the training of South Pacific lawyers. However, teaching such topics in the South Pacific creates major challenges, and the effectiveness of such teaching will depend to a great extent on a recognition and understanding of the context of the South Pacific legal environment.

The course descriptions (above), so similar to those used in Australia, assume the teaching of legal ethics and professionalism for a state based, common law legal system. This paper does not suggest that this system is to be preferred over other systems, and does not suggest that the legal ethics and professionalism which enhance state based common law legal systems are superior to those supporting traditional systems. It does not discuss the broader issues surrounding legal pluralism, cultural relativism, or neo-colonialism. Rather, accepting that USP teaches legal ethics and professional responsibility in a curriculum which focuses predominantly on state based common law, this paper examines some of the difficulties of doing so in the South Pacific, and makes suggestions for overcoming those difficulties.

The Law School of the University of the South Pacific is located in Port Vila, Vanuatu, over 1000 kilometres from the main administrative hub of USP, and from the remainder of the Faculty of Arts and Law in Suva, Fiji. The Law School draws its students from a dozen different South Pacific countries, each of which has its own internal diversity of cultures, and thus students have a multitude of disparate background languages, different levels of facility with English, and marked differences in educational levels and life experiences. In addition, law students may study online for the whole of their law degree, and never physically attend a class or come face to face with their teachers.

This would raise challenges for teaching any topic, but it is complicated for law teaching by the fact that each South Pacific country also has its own legal system(s). Each country has some element of English or American common law, initially introduced by colonisers but adopted locally upon independence. In addition,

14 There have been suggestions that campus based attendance be required at least for part of the degree but this is not presently the case.
15 Tonga has adopted such a system despite not having been formally colonised.

other rules or practices, or other laws or legal systems, will apply as their Constitutions protect and preserve different aspects of non-
'state' law. In many South Pacific countries custom is still applied in traditional settings, in ways which may ignore, support, or conflict with the ‘common law system’. In Melanesia, ‘law’ is not traditionally differentiated from the rest of custom, so the traditional styles of living, working, interacting and resolving disputes all form part of the ‘way of knowing’.16

Across the South Pacific, lawyers may be expected to work within and between a number of these systems, owing responsibilities to the state law and legal system while needing also to live within and interact with traditional or custom systems. These challenges face anyone teaching law in the South Pacific, and the difficulties are compounded for the teaching of legal ethics and professionalism, where the context makes these topics both particularly important and particularly difficult.

This paper is based on the author’s experience teaching a range of courses including Legal Ethics at the Law School of USP in 2010 and 2011, and ongoing research conducted in the Solomon Islands and Vanuatu since 2010.17 The research project aims to identify legal educational needs in the South Pacific. As part of the project, interviews have been conducted with more than 60 lawyers and others working closely with lawyers to ascertain the knowledge, skills and attributes required for legal work in Vanuatu and the Solomon Islands; to identify the opportunities available to acquire those; and to identify unmet needs requiring further or alternative education or training. The initial phase of this project, with a more detailed contextual background and discussion of methodology, was reported in a previous volume of this journal.18

While the overall research project includes all aspects of legal education, this paper focuses mainly on the importance and challenges of teaching legal ethics and professionalism for the Melanesian countries of Vanuatu and the Solomon Islands. It highlights factors which need to be taken into account in teaching such a course in the South Pacific, and makes suggestions for overcoming some of the

16 “If law was ever a special discipline in Melanesia … it would in our view fall to be described generally as knowledge or wisdom. Law, in our view does not exist as a phenomenon which controls society, but as part of cognitive knowledge of a community.” Bernard Narokobi, *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, 1989) 25.

17 Ethics approval for this research was initially sought from the USP Faculty of Arts and Law in 2011 in accordance with USP protocols. More recently ethics approval has been granted by ANU’s Humanities & Social Sciences Delegated Ethics Review committee — Protocol: 2012/263.

18 For more information on this research see Carolyn Penfold,‘Contextualising Program Outcomes for Pacific Island Law Graduates’ (2012) 22 *Legal Education Review* 51.
difficulties encountered. Much of this will be relevant to other South Pacific countries also, and to other developing countries.

II THE IMPORTANCE OF TEACHING LEGAL ETHICS AND PROFESSIONALISM IN THE SOUTH PACIFIC

Teaching legal ethics and professional practice in the South Pacific is particularly important as the region works to bed down relatively recently introduced, and still developing, state legal systems. Recent events such as the breakdown of law and order during the ‘tensions’ in the Solomon Islands, and the latest coup in Fiji, which led to the abrogation of the Constitution, demonstrate the still precarious position in much of the region of state laws and legal systems, their lack of authority, and the fine line between a functioning state legal order on the one hand, and instability and (state) lawlessness on the other.

In Vanuatu and the Solomon Islands the state systems of law operate under poorly understood, and often poorly functioning, Westminster-style governments. Concepts such as ‘rule of law’ cannot be assumed to be understood, or effective. National sovereignty, a concept imported by the colonisers, continues to create tensions in both countries. Central national parliaments govern multiple communities spread over vast distances which, until recently, were autonomous. ‘Nation-building’ is still underway.

In 2002 the Pacific Islands Forum Secretariat, in a survey of governance issues, found the region was characterised by

weak legislatures with a prevailing weak culture of accountability and transparency and lack of clarity in the independence of parliament, weak regulatory frameworks... with few sanctions against non-compliance, weak judiciaries that are generally understaffed ... and the courts often have a considerable backlog of cases.

In 2009 the picture was not greatly different. At this stage the Pacific Islands Forum Secretariat claimed that

the Pacific regional security environment has become increasingly complex and diverse ... The region has had to contend with ... internal conflicts and crises ... governance challenges [and] limited legal and law enforcement resources and capacity ... Instances of violent conflict, civil unrest, and political crises have had serious consequences for internal

20 Narokobi, above n 16, 76.
stability and sustainable development in a number of Pacific Island countries.²²

There is a need and an opportunity for assistance at the regional level to support national institutions in the law and justice sector and the security sector, and in broader governance and accountability mechanisms.²³ Overseas countries and organisations pour huge amounts of money into the South Pacific.²⁴ On the basis that good governance and a strong legal system are prerequisites to positive and lasting change and development, the law and justice sector is a particular focus for aid. The Regional Assistance Mission to the Solomon Islands (RAMSI), and the Vanuatu Legal Sector Strengthening Project (VLSSP) are just two examples of overseas funding being put into attempts to strengthen governance and legal systems. The VLSSP ran from 2000 to 2011, with the purpose of supporting ‘a stable and responsive government in Vanuatu by building sustainable administrative and legal capacity ...’²⁵ and has now been replaced by the Vanuatu Law and Justice Partnership, 2012.²⁶ RAMSI in the Solomon Islands has been running since 2003, and currently has 19 long-term advisers supporting Solomon Islands to build up its judicial, legal, and correctional systems and capacity, through the transfer of legal knowledge skills as well as

²³ Ibid.
²⁶ ‘Strong and stable law and justice institutions contribute to a fair and peaceful society...For 10 years, Australia has worked with Vanuatu to build more effective legal institutions and improved police services. The Governments of Vanuatu and Australia established the Vanuatu Law and Justice Partnership in 2012 to strengthen the sector as a whole and build the capacity of agencies in the formal justice sector.’ AusAID, Effective Governance (5 April 2012) <http://www.ausaid.gov.au/countries/pacific/vanuatu/Pages/effective-governance.aspx>.
core public service skills. Nonetheless, the needs in these areas remain considerable.

The introduction and maintenance of programs such as RAMSI and VLSSP (among many others) reflect the view of more developed neighbours and of the international aid community that the factors necessary to allow development include good governance, security, and strong legal systems. However, these concerns are not external only, as demonstrated by regional bodies and individual countries themselves frequently seeking outside assistance to strengthen their capacity in such areas. An obvious need in legal capacity building is local legal practitioners, trained not only in law but in the legal ethics and professionalism required to support and enhance the state based common law system.

This need is reflected in responses to a study undertaken in Vanuatu and Solomon Islands with more than 60 lawyers and those working closely with lawyers. Participants were asked about their work, the knowledge and skills needed for that work, gaps between the knowledge and skills they had and those required for their work, and opportunities they had to fill those gaps. Data collected covered the whole gamut of legal knowledge and skills, but in terms of ethics and professionalism, responses showed a keen interest in improving the legal system and the behaviour of those working within it. In fact, when asked to rank a number of desired learning outcomes for law graduates in the South Pacific, ‘ethics and professional responsibility’ was identified as the learning outcome of greatest importance.

In addition, when asked the open-ended question, ‘What is the most important thing for a South Pacific lawyer to know, to understand, or to be able to do?’ many respondents, both lawyers and non-lawyers, mentioned ethics and professionalism. A number of respondents replied simply that most important was ‘legal ethics’, ‘ethics and integrity’, ‘ethics and attitudes’; or ‘to be ethical’. Others fleshed out the idea, referring to acting ethically for one’s clients: ‘lack of concern about what happens to clients influences their whole approach to work’; lawyers should ‘exercise duties with fairness, be trustworthy, be trusted to represent someone’; and ‘ethics need emphasis, this is one of the biggest issues … They take instructions and take the money even when (the matter) is not going anywhere. They overstretch their ability to adequately represent — they take too many clients.’

28 Penfold, above n 18.
29 Unless otherwise referenced, all comments in the text are drawn from interview transcripts.
More commonly, however, respondents mentioned the need for professional and ethical practice for the good of the broader community: ‘there are lots of gaps in South Pacific law, lots of grey, and lawyers use and abuse those gaps — lawyers should strive to improve the laws of the country, not just use the gaps for themselves and their clients’; ‘understanding what professional responsibility involves — everything else flows from that; how you can use your knowledge and skill for change for the better — try through work to help create good governance, and good governance brings social security’; and ‘we are all working for justice, only if we all work for justice is it fair to citizens; [we need] better understanding of ethical considerations’.

Those working in or with the legal profession clearly recognise the importance of legal ethics and professionalism, and the context increases its importance. Where legal systems are firmly entrenched, poor practice on the part of individual legal practitioners may be unfortunate; but where a legal system is not well entrenched, has limited reach, and is still seen by many as foreign (as discussed below), poor professional and ethical behaviour among lawyers may have greater consequences. In addition, while many of the comments above appear to accuse individual lawyers, the broader system within which they learn and work does little to support their ethical and professional development. It is thus all the more important that legal practitioners are well educated in this area.

III THE DIFFICULTY OF TEACHING PROFESSIONALISM AND LEGAL ETHICS IN THE SOUTH PACIFIC

Law school courses in legal ethics and professionalism tend to include, at a minimum, rules regulating individual lawyers and the profession generally. These rules may be drawn from legislation, delegated legislation, case law, rulings of disciplinary bodies and so forth.

In addition, courses may include some or all of:
• concepts of professional responsibility beyond the rules (for example the history of professions and corresponding responsibilities which pertain to professions rather than trades, ideals of duty, and service to others and to the community);
• awareness of ethical issues and the need to behave in the ‘right’ way as a lawyer; and
• applied ethics, including recognition and examination of the role of individual’s values, morals, and standards in ethical decision making, ability to choose between possibilities, to anticipate and evaluate outcomes, and to reflect upon the choices made.30

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30 Davis, above n 1.
The above are likely to be relevant to all lawyers, and a wealth of material is available in regard to those aspects of legal ethics likely to be common across jurisdictions.\textsuperscript{31} However, it is more difficult to find resources which assist teachers to contextualise the ethical and professional needs of lawyers in the South Pacific environment. Governance literature focused on Melanesia often includes discussion of ethics, particularly in the context of corruption,\textsuperscript{32} but material relating to legal ethics in the South Pacific is scarce. As a result, the USP legal ethics course uses Australian text or case books, which assume that lawyers work in a formal, stable, orderly environment with clear rules, functioning law societies, and empowered judiciaries. Understandably, such materials make no attempt to contextualise ethics to the Melanesian or South Pacific contexts, and this article is thus intended to help to fill that gap.

In Solomon Islands and Vanuatu at least, and possibly more broadly in the South Pacific and other developing countries, particular contextual factors, specific to these jurisdictions, must be looked at to determine both what needs to be taught, and how it might be taught. These factors include:

- the primacy of kin or wantok (‘one-talk’) relationships as the base ordering of the society;
- the ‘foreignness’ of the state legal system, and of concepts of professional and ethical practice as understood in countries such as Australia;
- the lack of effective disciplinary procedures for challenging un ethical and unprofessional behaviour; and
- the lack of appropriate workplace supervision and mentoring in legal ethics and professionalism.

Although all overlap to some extent, they will initially be addressed individually.

\section{A Wantok and Kin Relationships}

Pacific Island societies have traditionally been strongly based upon clan and kinship systems, and in Melanesian countries these remain an important basis of the social structure.\textsuperscript{33} In the Solomon Islands and Vanuatu the wantok system is particularly strong. Wantok (the Bislama and Pidgin term from the English ‘one talk’) is not simply a grouping of same language speakers. In fact at the term’s

\textsuperscript{31} See for example Maxine Evers, Leanne Houston and Paul Redmond, above n 4, and the bibliography of resources collected therein.


\textsuperscript{33} Narokobi, above n 16, ch 2.
broadest, wantoks may not even speak the same language, but may be more loosely aligned, as for example from the same island, the same country, or even simply ‘Melanesian’.  

Wantokism refers to the mutual duties and responsibilities which exist between wantoks, and which can be extremely demanding. Wantoks must help one another by providing food, shelter and cash, and must share the advantages and benefits they acquire. To deny one’s wantok is a grave matter which generates social repercussions and may threaten a wantok’s place within the community.

In developed countries, looking after one’s family or community is seen in a positive light, but is encouraged only so far as it may be done within the strictures of the law. When one looks after one’s family with public goods or with an employer’s money, it becomes illegal and frowned upon. In Melanesia, however, what the ‘Western’ world calls nepotism may be recognised only as family responsibility or wantokism: ‘a request from a family member cannot be denied.’

A young lawyer writing for the Pacific Young Lawyers Forum commented:

the wantok system is very common in the Solomon Islands ... the position as a public servant is used to serve the benefit of relatives, family members and friends. It is a form of corruption that has been imprinted in the minds of the general public. As long as one is a public servant you have to serve your wantoks despite the facts that you have certain codes of conduct to abide by. So it’s a conflict between performing up to the expected standard and using the office for the best interest of wantoks.

In addition, wantok obligations may well be felt more strongly than any obligations to state law. State law may impose responsibilities upon lawyers which conflict with and are antithetical to wantok obligations, and may also be seen by Melanesian lawyers as less significant. For those in Melanesia it may be more important to have wantok on side and supportive, than to have the support of state law and the legal profession. A young lawyer interviewed for this research project stated:

I went to the jail to see a client. My two cousins were there charged with murder, and they wanted me to represent them. When I said I couldn’t do it they were very, very upset. I tried to explain but they are still very unhappy.

34 For example a bill introduced into the Vanuatu Parliament in June 2010 in support of independence for West Papua was entitled ‘Wantok Blong Yumi Bill’ (Our Wantok’s Bill).
When you have close relatives you will have conflict. Custom obligations say ‘you are wantok, if you don’t do this you are neglecting me/us. What I do for you, you must do for me.’ Wantok do not understand the legal profession.

Clearly this will have major implications for lawyers in the South Pacific, pulled between obligations to the law on the one hand and obligations to kin and community on the other.

B The ‘Foreignness’ of the State Legal System

Most Pacific Island countries have gained independence only recently. Although the colonisers’ systems of law have been in most of these countries for over a hundred years in some shape or form, for much of that time they have continued to be, or to be seen as, the laws of foreigners. It is only since independence that the current state legal systems could be said to belong to the local community — which in the case of Solomon Islands is only since 1978, and in Vanuatu since 1980. At independence these new states chose to adopt their current legal systems, although to many in the Pacific Islands these systems remain foreign. An expatriate magistrate working in Honiara after independence described occasional ‘downright anger and hostility towards what they (Solomon Islanders) saw as the dominance of the “foreign” or “white man’s” law’.

While the state law may be better understood in the main towns, for much of the population the state-based common law legal system remains foreign, and to some degree even irrelevant. As in any pluralist legal system, there must be an understanding that ‘the law’ will mean something different from “‘the’ law” in a state with only one legal system, but even after the adoption by the state of the common law legal system in Melanesia, it is still commonly referred to as ‘modern law’, ‘introduced law’, ‘adopted law’, ‘foreign law’, ‘white man’s law’, or ‘formal law’, which differentiates this law and legal system from other laws and legal systems existing in these countries. This foreignness of the state legal system, along with its limited reach in practice, contribute both to a lack of understanding of the system and to a lack of commitment to it within these communities.

In addition to its character as an imported system, this law is not the only system in use, and in fact to many it may be a secondary system of little importance in the ordering of their day to day lives. The majority of Ni-Vanuatu and Solomon Islanders live traditional lifestyles in rural and remote areas to which formal law rarely extends.

Rather, custom ‘is indisputably the way in which the majority of conflicts in every rural and urban community in [Vanuatu] are managed’. The same is true of Solomon Islands where, for ‘most citizens, the first resort in the case of disputes are local [custom systems]’ and the ‘dominant form of justice and dispute resolution comes from traditional community and village level mechanisms’. The reach of formal law is also perceived to be decreasing rather than increasing over time. The continuing traditional lifestyle of many, along with the pluralist nature of law in the Pacific Islands, may make interaction with or commitment to the state legal system superfluous for much of the population.

In addition, even for those for whom the introduced legal system is an important part of life — including indeed trained lawyers — their knowledge of the law does not come with an understanding or ownership of the traditions of that law. For example basic assumptions of common law such as treating people as individuals (rather than as part of a larger community), relying on reason and logic (and refusing to accept magic or spirits), and relying on and applying rules and precedent (rather than looking for the best resolution of the issue at hand), may contradict everything a Melanesian person believes about the world. Hence while the state common law system relies on certain understandings and expectations, the system’s transplantation from one place to another may fail to carry with it those understandings and expectations. The very concepts may be so foreign as to need considerable teaching and reinforcement, keeping in mind that the concepts may be not only unfamiliar but may also be misunderstood or even actively disdained.

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44 Guy Powles, above n 39.
46 Narokobi, above n 16, 74: For Melanesians at least, ‘the active participation of the “spirit” in human affairs will continue to dominate their perceptions of the law’; and Narokobi, above n 16, 9 ‘The place of spirits in Melanesian social order cannot be overemphasised … any development of Melanesian jurisprudence will have to give full cognisance to the interaction between living persons and the spirits of the dead.’
Foreignness is not confined to the legal system, which operates alongside a ‘foreign’ system of government. Like the common law system, the Westminster system also requires certain understandings and commitments if it is to function effectively — understandings and commitments which have developed over many years elsewhere, and which may not be easily transplanted. The political party system, poorly understood at the time of independence, continues to be unstable in both Vanuatu and Solomon Islands. It is rare that a single party has a majority, and at times it is not even clear which members of parliament do and do not support the government. Votes of no confidence are common, allegiances are swiftly changed, and court actions are commonly used to change governments. Instability is the norm, and the desire to attain or maintain power often outweighs any commitment to values or a party platform. Corruption and mismanagement are constant concerns, and leadership codes are frequently alleged to be breached, but breaches are rarely disciplined. The poor functioning of the introduced system of government may add to suspicion of state law and lack of commitment to the common law legal system.

C Lack of Disciplinary Procedures

Many South Pacific countries experience considerable difficulty with unethical and unprofessional behaviour within the legal system, and beyond. Efforts have been made to address these issues through the introduction of rules, codes, enforcement mechanisms and disciplinary bodies.

For lawyers the written rules are found in legislation and delegated legislation. In Solomon Islands the Legal Practitioners Act (1987) requires that the Chief Justice be satisfied that an applicant for admission is a ‘fit and proper person’ before admitting him or her as a legal practitioner. The legislation goes on to delegate to the Chief


50 Ibid.


52 As noted above however, the legislatures creating (or delegating power to create) rules of conduct and corresponding disciplinary regimes for lawyers, may themselves be chaotic and undisciplined, and the rules may thus be given less respect than may otherwise be the case.
Justice in consultation with the Rules Committee, power to make rules relating to (among other things) professional practice, conduct, complaints, and discipline of practitioners. Breach of such rules may carry fines and may constitute ‘professional misconduct.’

The Solomon Islands Legal Practitioners (Professional Conduct) Rules (1995) are lengthy and detailed. Among other things, they place duties on legal practitioners to observe the ethics of the legal profession, and not to engage in conduct (whether in pursuit of his profession or otherwise) which:

• is illegal;
• is dishonest;
• is unprofessional;
• is prejudicial to the administration of justice; and
• may otherwise bring the legal profession into disrepute.

As in Solomon Islands, in Vanuatu a person must be fit and proper to be admitted to practice. New lawyers are initially registered conditionally for two years, after which they may be admitted unconditionally. The Legal Practitioners Act 1980 establishes a Law Council, and delegates to it responsibility for the etiquette and conduct of legal practitioners. The Rules of Etiquette and Conduct of Legal Practitioners Order 2011 oblige lawyers to:

• uphold the rule of law;
• facilitate the administration of justice;
• not attempt to obstruct, prevent, pervert or defeat the course of justice; and
• use legal process only for proper purposes (among other things).

In both Solomon Islands and Vanuatu procedures have been established for disciplining lawyers who breach the Rules. However, although the need has been recognised for a number of years, in

53 Legal Practitioners Act 1987 (Solomon Islands), s 21(2).
54 Legal Practitioners (Professional Conduct) Rules 1995 (Solomon Islands), rule 4.
55 Although this may need to change, given the ruling of Justice Spear in Hamel-Landry v Law Council [2012] VUSC 119; Judicial Review Case 01 of 2011 (27 June 2012): ‘The two tiered admission process undertaken in Vanuatu with a registered legal practitioner being admitted either conditionally or unconditionally has no proper basis in law.’
56 Legal Practitioners Act 1980 (Vanuatu), 2, 5(d). Note this is the Legal Practitioners Act 1980, as amended. The Legal Profession Act of 2005 has never commenced.
58 Legal Practitioners (Amendment) Act 2003 (Solomon Islands) No 2 of 2003 provides that ‘[t]here shall be a Panel consisting of legal practitioners appointed by the Chief Justice for the purposes of constituting a disciplinary committee to investigate any complaint on the conduct of any legal practitioner,’ yet the first panel was not convened until 2012. See also MacFarlane, above n 11. ‘Small jurisdictions raise special problems in terms of conflicts of interest and confidentiality. In these circumstances it is even more important to have effective Rules of Professional Conduct and a client-focused mechanism for dealing with complaints.’
neither country are the rules well enforced. In the Solomon Islands to 2011 ‘no practitioner ha[d] yet been sanctioned’ for reasons including ‘lack of commitment by disciplinary committee members, lack of procedural rules as to how a hearing should proceed, and conflicts on the part of practitioners sitting on the disciplinary panel.’\textsuperscript{59} However, at the time of writing a panel had been convened to hear one matter.\textsuperscript{60}

Likewise in Vanuatu it is difficult to find any record of lawyers being disciplined,\textsuperscript{61} although in 2011 it was reported that ‘there are some serious complaints now with the [Law] Council.’\textsuperscript{62}

D \textit{Lack of Supervision and Support in Practice}

New and inexperienced lawyers working in the South Pacific face particular difficulties in developing an understanding and practice of ethics and professionalism. To begin with, they will often be supervised by others who themselves have had little ethical or professional training, or who have had a non-contextualised training. Secondly, they may not be much supervised at all. In interviews conducted with lawyers in Solomon Islands and Vanuatu, local lawyers were far less likely than expatriate lawyers to mention mentoring, supervision or instruction as methods of improving their skills.

Some local lawyers did mention supervised practice and mentoring: ‘I was lucky to have a mentor’ or ‘it was informal before but now the firm has put in structures to teach the young ones. Each Fri at 3.30 we close up shop and conference the cases we’ve had that week and what is coming up for the following week. Senior lawyers talk about their experiences, difficulties, and young lawyers can talk


\textsuperscript{60} ‘Panel Appointed to Look Into Ashley’s Case’ \textit{Solomon Star News} (Honiara), 11 May 2012 <http://www.solomonstarnews.com/news/national/14594-panel-appointed-to-look-into-ashleys-case>. Note a 2003 amendment provides for the establishment of the disciplinary panel, above n 58, yet the first panel was not convened until 2012. It is unclear whether or not the Disciplinary Panel has made a decision on this matter, but it has ‘discussed’ it according to the Solomon Islands Broadcasting Corporation <http://www.sibconline.com.sb/story.asp?IDnews=33149&IDThread=44>. The \textit{Solomons Star} has reported that Ashley ‘has been unable to practise since he came out of jail after the High Court registrar refused to renew his practising certificate.’ Daniel Namosuia, ‘Ashley Joins Forum’ \textit{Solomon Star News} (Honiara), 8 October 2012 <http://www.solomonstarnews.com/news/national/16128-ashley-joins-forum>.

\textsuperscript{61} The annual reports required of the Law Council are not accessible. However, a former member of the Disciplinary Committee reports that cases have been heard in the past. A judge of the Vanuatu Supreme Court also reported that he had ‘heard of some cases having been heard previously.’

\textsuperscript{62} South Pacific Lawyers’ Association, above n 59, 28.
also. Otherwise experience goes to waste because there is no avenue to pass on that knowledge.

However, most local lawyers did not mention mentoring or supervision as ways of furthering learning, with one stating that there is ‘no time, especially in private firms ... because time is money, they need to get paid, so [there is] no time to teach a young solicitor. Learning is time consuming and thus costly.’

Most local lawyers talked rather about learning on the job by observing and doing. While this is an excellent way to learn good practice, it is equally an excellent way to learn poor practice if those in the more senior and supervisory roles are untrained or act poorly. And there is no doubt that many of them are acting poorly: ‘You see some really appalling behaviour, rarely disciplined. So young lawyers see this and think it’s an appropriate way to behave.’ ‘Some senior lawyers are not setting a good example.’ ‘Some of the most senior lawyers are the worst offenders re professionalism and ethics.’ ‘Judges make comments about the lawyers in the cases ... there is a disciplinary mechanism but it’s rarely used. Some lawyers don’t tell clients the case is hopeless, in order to continue to get fees. They adjourn and adjourn. Some time limits are enforced, but when they’re kicked out of court the client loses out, not the lawyer. Clients don’t know they can act against their lawyer’.

The problems here are not all due to a lack of integrity on the part of more senior lawyers. Lawyers work within an often unstable and disorganised governmental and legal environment, with little if any support from institutions such as strong law societies or other such bodies. Even senior lawyers in Vanuatu and Solomon Islands often lack training, lack experience, and lack time and resources. They are often working in high-pressure jobs with poor pay and conditions, with frequent opportunities and high incentives for corruption, carrying the expectations of their communities and the obligations of their wantoks, poorly equipped to handle these things, and with inadequate supervision and support structures around them. As one lawyer said ‘they may be professional, but then not handle it on the ground.’ Another lawyer noted the lack of supervision in practice, and commented of the transition from law student to lawyer: ‘I had to fend for myself much of the time.’

Clearly law students and lawyers in the South Pacific need training in ethics and professionalism, and need ongoing supervision and support if that learning is to be applied. Currently legal ethics is taught in the undergraduate law degree, and taught again in the Practical Legal Training Program, yet it appears that there is still room for considerable improvement. Training in ethics and professionalism should not be seen as something done once, or even twice, but rather as something which develops along a continuum, requiring theory and practice and supervision and support. Suggestions are made below for how this might be improved for South Pacific lawyers.
IV Suggestions for Teaching Legal Ethics and Professionalism in the South Pacific

Improvements in teaching legal ethics and professionalism could be made in three different but related areas:

• better contextualising the teaching of legal ethics and professionalism;
• improving supervision and support in practice; and
• creating a stronger ethical environment.

It is important that the latter two, focusing on the post-university development of ethical and professional skills, are taken into account. Firstly, teachers of ethics and professionalism at university level need to be aware of what lies ahead for their students. Secondly, teaching ethics and professionalism at university level is an opportunity to influence what happens in the future in terms of post university training, as future lawyers are those most likely to be in a position to change the profession. Thirdly, in the absence of admission boards, law societies, or CLE providers looking into legal education, articles such as this, and the activities of those teaching ethics and professionalism, offer the best scope for input into developments in the local legal profession.

A Contextualising Teaching

At the University of the South Pacific Law School, text books and teaching materials from overseas are often relied upon as the only material available on a topic. While a ‘South Pacific Law’ series was published by Cavendish in the late 1990s and early 2000s, and some titles have since been updated by other publishers, 63 no textbook or collection of materials on ethics and professionalism in the South Pacific has been published. As a result teaching of this topic has relied on overseas textbooks, and local case law and legislation as far as it has been available.

Contextualising the teaching of legal ethics and professionalism could really help students to develop the required knowledge and skills, as it would build on their background knowledge and experience and prepare them not in the abstract, but rather for the actual environment in which they will practice. For example teaching that ethical and professional behaviour is required to ensure that the state legal system is respected, trusted, and not brought into disrepute, particularly where the state legal system is not yet fully entrenched, may be more meaningful than teaching that this

behaviour is required because lawyers belong to a ‘profession’. To teach more contextually, emphasis could perhaps be placed on an examination of the development (or lack of development) of the local legal profession, and look at reasons for that development or otherwise. Students could themselves be encouraged to generate ideas for improvement, and for increasing commitments to ethics and professionalism. They could examine concrete ways to further the development of the local legal systems and the application of law, taking into account the history, constraints, and opportunities in their local environment.

Concepts of professionalism may be difficult to take on board for students new to the system. For example in a formal common law system, record keeping is simply part of professional practice, as well as being essential for evidentiary purposes; but for those less schooled in written cultures such activities cannot be presumed. One lawyer emphasised the importance of ‘filing, storing things properly, knowing to come back to it.’ Another thanked a departing VLSSP officer: ‘she taught us how to file. Before she came we just lost the documents, and when we went back to court we had to make them all over again. Now we can file our documents and use them next time.’

Filing and record keeping, making written responses to correspondence, dating letters, and keeping copies, are just examples of practices which may be important in the state legal system in a way they are not in Melanesian life generally. They may thus require explicit reference in classes.

While those from outside the South Pacific may see such topics as unbefitting tertiary academic study, the assumptions which Australian and New Zealand universities may make about the skills and knowledge of their law students and graduates simply do not hold true here. The ‘high level professional skills’ expected of lawyers cannot be developed without ensuring basic professional skills are also in place. To that end the first mandatory CLE in Vanuatu was held in June 2011, with Chief Justice Lunabek encouraging participants ‘to be on time, as timing is an important aspect of the

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64 Thanks from State Law Office to departing VLSSP team. Farewell function at the Prime Minister’s Offices, Port Vila, Vanuatu 2012.
65 ‘I particularly welcome the emphasis on the responsibilities of professional bodies and law schools to develop high-level professional skills’: Daryl Williams (then Attorney General of Australia) quoted in Peter MacFarlane, ‘The Teaching of Legal Ethics at the Undergraduate Level (Working Paper)’ (2002) 6 Journal of South Pacific Law <http://www.paclii.org/journals/fJSPL/vol06/7.shtml>.
66 The Rules of Etiquette and Conduct of Legal Practitioners Order 2011 (Vanuatu), s 19 states that ‘a lawyer must undertake the continuing legal education and professional development as provided for by the Vanuatu Law Society Act’. However, in 2010 ‘the VLS struggled to meet the requirements outlined in the new Vanuatu Law Society Act of 2010, which provides for CLE for lawyers. The VLS needs to have a more structured approach to CLE to the extent that it is spelled out in law as being mandatory for each practitioner for the purpose of renewing a practising certificate.’ South Pacific Lawyers’ Association, above n 59, 22–23.
legal profession.’ Basic Court Etiquette was the topic of the CLE, with sessions including dress in court; seating in court; bowing and maintaining silence in court; introducing oneself in court; standing in court; addressing the bench; addressing other counsel; indirect speech; giving the court undivided attention; acknowledging a ruling from the bench; addressing or referring to witnesses; staying in your place; referring to evidence; dealing with questions from bench; assisting the record of evidence; and being reliable.’67 Clearly, what requires emphasis in the development of professional skills is very different in different jurisdictions.

The topic could also be further contextualised by the use of local case studies, which more truly reflect the type of ethical and professional dilemmas South Pacific lawyers are likely to face in their careers. In small jurisdictions with few lawyers, cases in which conflicts of interest may arise are rife.68 The need to act against wantoks, chiefs, a bigman, or others above the lawyer in the social hierarchy will frequently create difficulties for lawyers, while the inability to act for wantoks will create other problems.69 Learning to deal with these is likely to be both more useful, and more understandable, than learning from overseas cases. Although common law and principles espoused in foreign cases will apply, the use of local fact situations is likely to aid learning, and to make it more useful in practice.

In addition, local lawyers could be brought into the classroom, whether as ongoing teachers or guest lecturers, to explain and to help guide students in how ‘real life’ challenges may be met. Without this students may feel that they are learning about the ideal without meeting the reality on the ground. Bringing in practising lawyers to discuss ethics would give students an understanding that the learning is not merely theoretical but is practical also, and is valued by lawyers in their own jurisdictions. Even more importantly, it would provide role models in practice for students soon to join the profession. Note however that to be useful, any guest practitioners would need knowledge of and a commitment to ethical and professional practice, as well as a willingness and ability to reflect on this practice for the benefit of others. Such lawyers may be difficult to find.

Strong local law societies could assist greatly with this. A law society which involves itself in the training of lawyers, as well as supporting lawyers in practice, would be in an excellent position to influence the development of the profession. Law societies will have the best knowledge of the difficulties facing local lawyers, as

68 See, eg, South Pacific Lawyers’ Association, above n 59, 28, 35.
69 See example above under wantok/kin relationships.
well as an interest in ensuring that their training is suited to the local context. However, the law societies are only in a position to do this if independent from interference, which is not always the case in the South Pacific.  

Clinical practice can also be an excellent way to help develop ethics and professionalism in students. Clinics allow the modelling of best legal practice, give high-quality supervision of actual legal work, offer feedback in response to real-life situations, create opportunities to reflect on experience, to integrate theory with practice, and to develop an awareness of law in the context of a student’s own community. Like the previous point, however, clinical education will be useful only if the students really do see ethical and professional best practice applied within their clinic. While this was emphasised in the USP initial placement and later clinical program, it is apparent that it is very dependent on the placement and the clinical staff available at any given time, and that modelling best practice cannot merely be assumed to occur. 

In addition to the above suggestions, a pervasive approach, which involves incorporating or integrating legal ethics and professionalism into all aspects of the law curriculum, would really assist students to develop a deeper understanding of the topic, and of how and where it may be relevant in practice.

For example ethics concerning advocacy and the role of prosecutors might be incorporated within criminal law, the ethics concerning negotiation might be dealt with in torts; examination, cross-examination and dealing with witnesses could be picked up in civil or criminal procedure or evidence, conflicts of interest might be incorporated into contract or property law. 

However, such an approach requires a considerable degree of institutional support, and significant effort across the curriculum. Nonetheless, this may be a particularly useful approach in the South Pacific environment. Given that legal ethics and professionalism are central to the process and practice of state law, yet may be both unfamiliar to students and in fact in conflict with their experience and world view, confronting it at every level of the curriculum would

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70 See, eg, Legal Practitioners Decree 2009 (Fiji) which took over the regulation of lawyers and removed the Law Society’s complaints handling and disciplinary powers, following the abrogation of Fiji’s Constitution.
73 Michael Blaxell, Reflections on the Operation and Direction of the USP Community Legal Centre, Port Vila 2013 (unpublished, copy with author).
74 MacFarlane, ‘Teaching of Legal Ethics’, above n 65; Evers, Houston and Redmond, above n 4, 7.
76 Ibid.
give increased opportunity for students to develop both the skills and commitment required in this area.

B Ensuring Post-admission Support

The provision of post-admission support, supervision, education and training may strain the resources of firms, government offices, and local law societies.\(^\text{77}\) Also, as discussed above, in Melanesia the supervision and support received by new lawyers in practice is often somewhat hurried, disorganised, or even non-existent. This would place pressure on new lawyers in any legal environment, but more so in a legal environment which is itself somewhat chaotic. A number of government departments, such as offices of the Public Solicitor or Public Prosecutor, as well as some private firms, are trying to provide ongoing in-house support for their lawyers. There are reports of individual supervision, weekly meetings, and in-house CLEs, as well as occasional opportunities for ongoing support and training via courses such as those offered by Pacific Islands Legal Officers Network (PILON) or the Victorian Bar. However, there seems still to be an unmet need for supervision and support in practice.

The offices reporting the most organised supervision and support, both government and private, are those which have or have had expatriate lawyers. This may be due to those lawyers having themselves been supervised and supported, as well as having perhaps a greater confidence in their ability to model appropriate behaviour for other lawyers.

Capacity-building programs such as RAMSI in Solomon Islands and the Legal Sector Strengthening Program in Vanuatu have built into their programs this type of support,\(^\text{78}\) which is recognised by local lawyers as extremely beneficial. However, while lawyers are being supervised and supported under these programs, they are not necessarily developing the skills themselves to supervise and support others, so that when the programs finish, the supervision and support of others is not often continued within the office. Further, many of those who are trained under these programs leave the offices to take up other employment,\(^\text{79}\) which can badly disrupt the continuity of such schemes. It appears that such capacity-building exercises do support lawyers in developing the skills they need in their legal work, but could perhaps be aimed more directly at building capacity.

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\(^{\text{77}}\) In 2010 ‘the VLS struggled to meet the requirements outlined in the new Vanuatu Law Society Act of 2010, which provides for CLE for lawyers,’ South Pacific Lawyers’ Association, ‘Needs Evaluation Survey’, above n 59, 22.


\(^{\text{79}}\) Ibid 7, 8.
in mentoring and supervision, and focus also on creating supervision and support structures aimed to outlive the particular program in question.

In addition, as discussed above, legal ethics and professionalism is not something which can just be ‘taught’ as filing documents or drafting statements may be. It is likely to require trust in another person and the ability to speak in confidence about issues arising. This can be particularly difficult in small jurisdictions still based to a large extent on kinship, where it may be difficult to find truly impartial, disinterested advice and support. Suggestions to assist with that include the creation of mentoring relationships beyond the organisation or even beyond the country, such as with overseas counterparts, with local or visiting judiciary, and with other senior lawyers. In addition to such hierarchical relationships there have been suggestions of peer support via the networking of junior lawyers across South Pacific countries.80

As well as individual relationships, larger bodies can often lend support to those caught in ethical dilemmas. For example the International Association of Prosecutors has offered advice and spoken out publicly against unethical pressure brought to bear on South Pacific prosecutors by governments, and the United Nations Office on Drugs and Crime offers support for lawyers trying to prosecute corruption. In addition, ‘twinning arrangements’, for example between the parliaments of Queensland and of Solomon Islands, encourage inter-country advice and support.81

Local law societies and bodies such as the regional South Pacific Lawyers Association may provide supportive interactions, along with CLE and workshops to teach and encourage ethical and professional behaviour. These may be more successful with less experienced lawyers still keen to learn, and who are less likely already to have been caught up in unethical and unprofessional practice.


C Strengthening the Legal Environment in Support of Ethical and Professional Practice

Where unprofessional and unethical practice is common, it can be difficult to hold an ethical line without structures in place to support that line. Although ethics and professionalism are not easily "taught" or learned out of context, the support of strong rules, codes of conduct, or legislation can help lawyers in this sphere. Firstly, it can make clear at least the minimum requirements of ethics and professionalism for individuals uncertain about what behaviour is and is not acceptable. Secondly, having rules to back them up can assist lawyers to stand up to pressures to act unethically. Thirdly, it can assist the society to understand the behaviour required of lawyers, and thus can lead to higher expectations from clients and the community generally.

If the laws, rules or codes are to function effectively they also need a method of enforcement, along with actual enforcement in practice. Rules which exist but are ignored without sanction are unlikely to create higher ethical standards, but enforcement itself raises further problems.

If the government is to take a role in enforcement, there is the issue of needing to prioritise the use of scarce resources: is it better, for example, to prosecute unethical practice or to prosecute assault or murder? If a non-government body such as a Law Council, Legal Ombudsman, or Legal Services Commission is created for enforcement, still resources must be found. A strong law society may be able to perform the task, but where there are few lawyers, and lawyers are not well off, the law society is also unlikely to have the resources required. Even apart from a shortage of financial resources, there is likely to be limited time and expertise available for running an enforcement process.

In addition, social factors will make enforcement difficult. Discussion above regarding small communities, hierarchical structures, and wantok relationships are relevant here, and the issues they raise are as real in enforcement as in practice. Lawyers do not like to act against or criticise one another, especially where unprofessional and unethical behaviour is widespread, and a criticism of one lawyer may actually be a criticism of the practice of many.

Clients and the community are also reticent to complain about the behaviour of lawyers, often trusting lawyers because they are lawyers: they are educated, they have the knowledge. Clear rules could create higher community expectations of lawyers, which may in turn lead to more complaints being made, and more action demanded in response. However, this would require clear rules, a clear avenue of complaint, and a process for action to be taken.
In societies with a long-standing, stable, and well-resourced state legal system, it is easy to expect that all lawyers will behave well, and that those who do not will be taken to task. However, in a still-developing legal system with a shortage of resources, a lack of ethical role modelling and a lack of experienced practitioners, it may be worth focusing equally on encouraging, recognising and rewarding good ethical and professional practice. Complaints, enforcement and punishment are all necessary to protect the legal system from incompetent and unethical practitioners, yet focusing on the best practitioners may do more to improve the practice of the legal profession overall. Rewards could include accreditation as an ethical practitioner, resources to assist the person to mentor others, or preferred selection for overseas workshops and training opportunities.

V CONCLUSION

It is clear from the above that while some aspects of ‘ethics’ may be universal, the context within which the law is taught and practised must be taken into account in determining the appropriate content and method for teaching legal ethics and professionalism. The history, the stage of economic development, and the social structure of a country will be important, as will be the history and stage of development of the legal system or systems, the current state of legal practice, the opportunities for legal education to continue beyond the classroom, and the availability of mechanisms to check unethical behaviour. All of the above must be taken into account if legal professionalism and ethical practice is to be improved in the South Pacific.
INTRODUCTION: DEVELOPING GRADUATE ATTRIBUTE OF CULTURAL AWARENESS IN TEACHING CRIMINAL LAW AND PROCEDURE

A critical, contextual approach to the criminal law has always been the most appropriate way to teach students about crime. This now coheres with the pedagogical milieu of Threshold Learning Outcomes (TLOs) and graduate attributes, which requires law schools to go beyond legal doctrine and to delve into legal contexts and skills. Six Law TLOs are stipulated in the Australian Learning and Teaching Council’s Bachelor of Laws Learning and Teaching Academic Standards Statement. These include the Knowledge TLO, which states that graduates should be able to demonstrate knowledge of ‘principles of values and justice’ and ‘broader contexts in which legal issues arise’; and the Thinking Skills TLO, which mandates that graduates be able to engage in critical analysis. These TLOs require students to learn about the differential impact of the law, including on culturally marginalised groups. In addition to TLOs, graduate attributes have been developed in a number of law faculties that set out more specific aspirational qualities, including cultural awareness, understanding cultural diversity, and understanding and appreciation.

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** Melanie Schwartz is a Senior Lecturer in the Faculty of Law, University of New South Wales.
1 Sally Kift, Mark Israel and Rachel Field, Learning and Teaching Academic Standards Project: Bachelor of Laws — Learning and Teaching Academic Standards Statement (Australian Learning and Teaching Council, 2010).
of Indigenous legal issues. The University of Technology Sydney’s Faculty of Law graduate attributes, for example, include the ability to:

- identify different perspectives, recognising difference as having inherent value;
- recognise when bias, stereotyping and negative attitudes are manifesting in self and others;
- understand how different legal systems handle diversity; and
- comfortably and empathically interact with people from diverse backgrounds.

Similarly, the UNSW Law program objectives aim to have graduates understand and appreciate:

1. Legal knowledge in its broader contexts
2. Indigenous legal issues

Therefore, an appreciation of how the law affects and accommodates diverse groups — in addition to being the only principled way to teach criminal law — is squarely required by TLOs and other desired graduate attributes.

This article explores methods for incorporating Indigenous issues in the subject Criminal Law and Procedure (hereafter ‘Criminal Law’) to allow students to gain a greater understanding of cultural diversity, how it operates in the legal system, and the differential impact of the law on different groups. It draws on the authors’ experience in teaching Criminal Law at a number of universities in Sydney since 2006, and our use of current textbooks and other resources, in-class activities and assessment to enhance students’ understanding of Indigenous issues without compromising the core requirements of the Priestley 11.

Criminal Law is an obvious site for considering Indigenous issues given the stark interface between the criminal justice system and Indigenous Australians, but it is by no means the only one. Indeed, for students to gain a true understanding of the significance

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5 Kift et al, above n 1, 13.

6 This includes the University Technology, Sydney, the University of Sydney and the University of New South Wales.
of the criminalisation of Indigenous people, they need grounding in issues relating to the place of Indigenous laws in the Australian legal system, courts’ historical refusal to recognise Indigenous title, and international human rights obligations. The teaching of Indigenous issues in Criminal Law, therefore, is best built on and supplemented by the teaching of Indigenous issues in other subjects such as Foundations of Law and Real Property.

While this article focuses on Criminal Law, many of the approaches it discusses could be adapted to other subjects. For example, principles of incorporation of Indigenous voices and perspectives in legal analysis, critical analysis of the application of formal laws to various groups and a commitment to ethical and equitable treatment of people from diverse backgrounds, can be usefully applied in any number of teaching contexts.

The teaching strategies discussed in this article have been used in our law faculties with positive outcomes in the development of students’ cultural awareness. For some of our students, there is initially a degree of resistance to learning about Indigenous issues in the criminal justice system. These students are pushed out of their comfort zones when their uncomplicated concept of doctrine is muddied by the lived realities of the criminal justice system. Professor Larissa Behrendt notes that students can feel ‘uncomfortable and therefore alienated’ in discussions on Indigenous issues, resulting in their ‘tun[ing] out’. The challenge for us as teachers has been to engage students who resist this knowledge by relating it back to basic principles, such as substantive equality or abuse of process, while also imbuing a sense of cultural awareness of the ‘difference’ of Indigenous perspective and laws. We have found that a few weeks into the subject, students who initially may not have engaged with the cultural dimensions of the criminal justice system begin to initiate their own class discussion of these issues, in some cases even requesting resources to further their burgeoning understanding outside the classroom. Achieving this shift to openness in learning has been more feasible when students are prescribed a textbook that integrates issues of cultural diversity throughout the Criminal Procedure and Law subject. Such books are more likely to provide for a deep understanding of cultural issues because they explore systemic

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bias against Indigenous people across the criminal justice system. They are also important aids for teachers of criminal procedure and law who do not have a strong background in Indigenous issues. In contrast, when we have grouped Indigenous issues into just one class or have raised them in an *ad hoc* manner, students are more likely to tune out.

Whether students initially resist or embrace learning about Indigenous issues, we have found that as the subject progresses, they not only gauge the relevance of these issues but also make independent contributions about the way they perceive criminal laws and procedures impacting on Indigenous accused and their communities. Students who are encouraged to leave their comfort zones can be the ones who acquire the most from a subject that confronts the complex issue of Indigenous criminality and criminalisation. Indigenous issues also resonate strongly with Indigenous students and students from cultural minorities who may have entered the classroom with a sense of legal discrimination but come away from the subject with the capacity to theorise and substantiate their experiences. We have noticed that these students contribute to class discussion on Indigenous issues more freely than they do when the material is concentrated on doctrine. Moreover, engagement with these issues is more viable when class sizes are smaller. When numbers exceed approximately 30, it becomes more difficult for students to summon confidence to contribute to class discussion. Where the subject is taught in larger seminars or lectures, many of the strategies discussed in this article can be applied by asking students to break into smaller groups.

Student surveys indicate that students value learning about the implications of the criminal justice system for marginalised groups and its differential impact on Indigenous people in particular. For example, at the University of New South Wales (‘UNSW’), Course and Teaching Evaluation and Improvement survey\(^\text{10}\) results suggest that students appreciate the ongoing integration of discussion of the impact of the criminal justice system on Indigenous issues. It is interesting to note the responses to the UNSW Law School Survey of Student Engagement (2012) question of whether their studies had contributed to ‘Understanding people of other racial and ethnic backgrounds’. Students who had just finished studying Criminal Law (second-year LLB students, no: 52) had reported the highest proportion of positive responses than in any other year of LLB study (first to fifth year, no: 277):\(^\text{11}\) 88 per cent said that their

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\(^{10}\) See Law School Survey of Student Engagement (\text{http://lssse.iub.edu}).

\(^{11}\) There were a small number of respondents in the 6th year of their LLB (11), 86% of whom indicated that their studies had contributed to their understanding of people of other racial and ethnic backgrounds ‘some’, ‘quite a bit’ or ‘very much’. 
studies had contributed ‘some’, ‘quite a bit’ or ‘very much’ to their understanding of people of other racial and ethnic backgrounds; 54 per cent responded ‘quite a bit’ or ‘very much’.12 At UNSW, the textbook Brown et al is used for Criminal Law.

Students’ sensitivity to these issues is also demonstrated by a portion of our students expressing a keen interest in applying for volunteer work with Aboriginal legal services, law reform agencies and the national Aurora Indigenous internship program, towards the conclusion of our Criminal Law subjects. Anecdotally, students also demonstrate a greater interest in social justice programs more generally, such as the Brennan Justice and Leadership program at the University of Technology, Sydney, which involves participation in volunteer work and activities relating to social justice,13 or the social justice internships at UNSW. Students’ interest in such programs suggests that the teaching of Indigenous issues imbues students with a greater appreciation of cultural diversity and social justice. Since discrimination in the criminal justice system also applies to groups other than Indigenous people — examples include the over-policing of Middle Eastern men in Sydney and Somalis in Victoria as well as homeless people generally — teaching Indigenous issues can make students think broadly about the effects of criminal justice policy and practice on a range of marginalised groups.

By acquiring knowledge on Indigenous perspectives and laws, students are also sensitised to difference in diversity rather than assuming ‘unity-in-diversity’ where non-white groups are assigned the status of Other and whiteness is normalised.14 This is a crucial skill for dealing with clients and appreciating the uneven impact of the law, even within marginalised groups. The contemporary experiences of Indigenous Australians stem from colonial and postcolonial policies that have displaced Indigenous peoples, laws and societies. However, these experiences are varied depending on the community or status within a community, for instance, as determined by gender, age and authority over the transmission of laws. Larissa Behrendt suggests that issues of cultural diversity should be linked ‘to students’ broader understanding of how society operates’, so that they realise that the law is not ‘black and white’ but ‘a reflection of the diversity of the society in which we live’.15

In essence, developing cultural awareness in students involves teaching them about Indigenous laws, how the legal system

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12 Eleven per cent of respondents said that their studies had contributed very little to their understanding of people of other racial and ethnic backgrounds.


perpetuates cultural disadvantage and how it can be a source of empowerment. As early as 1991, the Report of the Royal Commission into Aboriginal Deaths in Custody recommended that teaching students ‘to understand that Australia has an Aboriginal history and Aboriginal viewpoints on social, cultural and historical matters’ should be part of the curriculum.\textsuperscript{16} Critical approaches to teaching Indigenous issues allows students to acquire a sense of the diverse implications of legal practice and gives them a grounding from which to contribute to better justice outcomes for Indigenous people.

\section*{II FROM ORTHODOX TO CONTEXTUAL LEARNING OF CRIMINAL LAW}

Studying or teaching criminal law can be suffocatingly doctrinal — covering the \textit{mens rea} and \textit{actus reus} elements of assault, sexual assault, manslaughter, murder, property offences, and then going over the same again for attempted crimes before examining the elements of the defences. A solely doctrinal approach can leave students with an impression that the criminal law is about the application of principles to a blank canvas involving neutral voices. This ‘shopping list’ approach gives no indication of the dynamics of the criminal process that give rise to the vast over-representation of Indigenous peoples in the criminal justice system, or of the unique issues involving Indigenous people that may arise. Before the landmark publication of Brown et al’s \textit{Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW} in 1990,\textsuperscript{17} textbooks were almost exclusively doctrinal. \textit{Criminal Laws} provided a teaching template for framing the law in the context of social practices and situating it within a critical and historical analysis. Since then, Australian criminal law textbooks have been increasingly written in a way that takes the context in which the criminal law operates into account.\textsuperscript{18} This includes the role of the criminal law in colonisation, the significance of the exercise of discretion by criminal justice actors, and the existence of institutional discrimination.\textsuperscript{19}

In any subject purporting to approach Criminal Law from a critical or contextual standpoint, we argue that Indigenous issues need to be


\textsuperscript{19} For example, Findlay, above n 18, 10; Bronitt and McSherry, above n 18, 851; David Brown et al, \textit{Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW}, 5th ed (Federation Press, 2011) 64–73.
invoked. There are arguments for their inclusion from a practical perspective, in the sense that the degree of overrepresentation of Indigenous people in the criminal justice system mandates that these dynamics be examined. But there is also a principled argument for the inclusion of Indigenous issues in criminal law courses, and not only because of their resonances with TLOs that seek to develop cultural sensitivity. The intersection between the criminal law and Indigenous communities raises difficult and pressing questions about colonialism and neo-colonialism, and exposes some of the central issues pertaining to Indigenous disadvantage in Australia today. Teaching criminal law and procedure without recognising — with a degree of depth and engagement — the historical and ongoing impact of the criminal justice system on Indigenous people entrenches ignorance around these issues, promotes invisibility of the drivers of Indigenous contact with the criminal justice system and ignores the historical and contemporary use of the criminal law as a tool of discrimination against Indigenous people. For these reasons, inclusion of Indigenous issues in the criminal law curriculum is necessary.

The following questions then arise: What is the minimum material that needs to be covered to adequately address Indigenous issues? What needs to be taught so that the subject of Criminal Law is not contributing to silences about Indigenous criminal legal issues, or worse, their suppression? Answering these questions is no easy task, given that there is limited time in the Criminal Law syllabus to deal with these issues, compared with the scope that would be available in a specialist subject on Indigenous criminal justice. But to do justice to a consideration of Indigenous issues in Criminal Law, we argue that there needs to be a sustained treatment of the dynamic relationship between the criminal justice system and Indigenous dispossession, disadvantage and overrepresentation. In our classes, we introduce students to the intersection between the lives of Indigenous people and the criminal justice system and explore the way that the criminal law operates to discriminate and assert social control.

What follows is a range of suggestions for introducing students to the relationship between Anglo-Australian criminal law and Indigenous laws, cultures and people. This article suggests ways in which teachers can include Indigenous themes across criminal law topics, in teaching and assessment, without rewriting the whole subject. Generally, the gamut of strategies discussed can only be incorporated in a two-semester Criminal Procedure and Law subject (with four hours of seminar time per week and 13 weeks per semester). Accordingly, at UNSW, where the subject is taught over two semesters, there is scope to develop these strategies. Nonetheless, where Criminal Procedure and Law is a one semester subject, or where Criminal Procedure coexists with Civil Procedure
in a broader procedure subject, there is ample capacity for some incorporation of Indigenous issues. However, it will require teachers to be more mindful of embedding the issues in the interpretation of prescribed cases and statutory provisions rather than teaching them separately in short blocks. It may not be feasible to implement every strategy suggested below. However, at least some of what is set out here does not require an enormous commitment of class time; rather, it requires a reorientation and a consciousness in teaching to allow for the themes suggested below to become part of the way students are exposed to the operation of the criminal law in Australia.

III INTRODUCING STUDENTS TO INDIGENOUS LAWS AND THE ONGOING IMPACT OF COLONISATION

A Understanding the Ongoing Operation of Indigenous Laws

Indigenous laws need to be addressed on their own terms rather than merely as a system subservient to the introduced criminal law. While colonisation has had a destructive impact on Indigenous laws, they nonetheless continue to exist in communities across Australia to varying degrees. Some universities, particularly those that use Brown et al’s *Criminal Laws* text, may teach the impact of the early introduced criminal law on Indigenous people, and this is critical, but it is not the same as teaching the impact of colonial law on Indigenous criminal law. This reorientation requires preliminary teaching of Indigenous laws (by an Indigenous person where possible) as holistic systems of regulations and sanctions. We have found that this is most effective when done at the very beginning of the subject. If an Indigenous speaker is not available, students can be shown a short film, *Bush Law* (27 minutes), which demonstrates the ongoing significance of punishment and atonement processes under Indigenous law in central Australia.

The introduction of Indigenous laws paves the way for a critical approach to the system of criminal law that currently operates in Australia. It introduces the idea of modes of criminalisation as historically, culturally and socially contingent — a theme explored in Brown et al’s text. Under the heading ‘Cross-cultural perspectives’

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21 See Brown et al, above n 19, 64–73.

22 *Bush Law* (Directed by Danielle Loy, Australian Broadcasting Corporation, 2010).

23 A whole chapter of *Criminal Laws* is devoted to problematising criminalisation: Brown et al, above n 19, Ch. 2, 42–115.
Brown et al demonstrate the way that appreciation of cultural relativism can act as ‘an antidote to the taken-for-grantedness, the commonsensical cast of current definitions of crime’. The textbook might well add here a consideration of the ways in which Indigenous laws stand conceptually alongside Anglo-Australian law, and examine whether Anglo law is, as Watson suggests, a ‘body of Western knowledge that works against the centring of Aboriginal ways and knowledges’.

In teaching Indigenous laws, it should be stressed that Indigenous legal systems vary among Indigenous communities. Students should be cautioned against simplistic dichotomies between law and Indigenous lore/custom. Students also need to be informed of the resilient and dynamic nature of Indigenous laws, and their complicated, but ineluctable, engagement with Anglo-Australian rights and obligations.

B Coexistence of Indigenous and non-Indigenous Criminal Law?

Once students have acquired a sense of the contemporary operation of Indigenous laws they may be encouraged to discuss how such laws may be accommodated or, inversely, how their dismissal contributes to the overrepresentation of Indigenous people in the criminal justice system. In discussing the possibility of a coexisting Indigenous criminal justice system, students should be mindful of the limitations imposed by the domestic legal regimes. A useful case to signal the limitations of recognition and the exclusivity of Anglo-Australian criminal law is Walker v New South Wales. There, Mason CJ of the High Court stated:

The proposition that criminal statutes do not apply to Aboriginal people must be rejected. If accepted, it would offend the basic principle that all people should stand equal before the law. There is no analogy in the criminal law of the finding in Mabo that native title could be held notwithstanding radical title being vested in the Crown. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.

However, this should not rule out classroom discussion on the ways in which recognition does arise in criminal statutes, common law or policy and the propensity for the further reforms. Legislation such as the Sacred Sites Act (NT), which criminalises trespass on certain significant Indigenous sites, is one example that could be

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24 Brown et al, above n 19, 53.
27 Ibid.
considered. Reference to developments in New Zealand or Canadian case law may be a useful pedagogical tool for introducing to students other avenues for recognition. Discussion of avenues of law reform which recognise Indigenous laws and cultures allows students to think both critically and constructively about the operation of the criminal justice system. To facilitate this, students may be referred to law reform commission reports that consider ways in which Indigenous laws may coexist with the mainstream criminal law.

C Understanding the Criminal Law as a Tool for Subjugation

It is important for students to grasp the ways in which the criminal justice system is bound up with the colonial tradition, and, specifically, the role of the criminal law as a tool of dispossession. This is evident both in an examination of the declared laws and policy in the protection and assimilation eras, and in a reading of case law. Some ways that we have used to introduce students to the criminal law as an instrument of colonisation are suggested below.

1 Case Law

The New South Wales (NSW) Supreme Court decision *R v Murrell and Bummaree* (1836) shows that the process of land dispossession (through the rationale of *terra nullius*) went hand in hand with the enforcement of criminal law statutes. In that case, an Aboriginal man, Murrell, was on trial for the wilful murder of another Aboriginal man, Jabbingee, in Windsor, New South Wales. At trial, Murrell pleaded not guilty, and argued that if he were to be tried the applicable law was his customary law. He claimed that New South Wales was occupied by his own people before it was occupied by the King of England. The leading judgment was handed down by Justice Burton, who held that the jurisdiction of the Supreme Court of New South Wales was exclusive, and included jurisdiction over Indigenous people. This was because the state was not inhabited by people who had ‘attained the numbers and civilization to form government and laws of sovereign states’. Furthermore, Indigenous laws merely represented the ‘grossest darkness and irrational

28 The Canadian case of *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.), where Indigenous marriage was recognised, could be discussed.


30 *R v Murrell and Bummaree* (1836) NSWSC <http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree_1836.htm>. This website is a good teaching site because it provides background material to the judgment.
superstition’. Therefore, Indigenous people were subject to the criminal law of the colony and the Supreme Court did not allow the Indigenous community to try to punish the Aboriginal defendant. It is useful to also draw students’ attention to the contrasting NSW Supreme Court decision of *R v Bonjon* (1841), which reveals that *Murrell* was not an inevitable decision but a choice the courts adopted to legitimise colonisation. In 1841 Justice Willis also tried an Aboriginal man for the alleged murder of another Aboriginal man. After hearing arguments similar to those put in *Murrell*, the judge in *Bonjon* stated that New South Wales was not ‘unoccupied’ in 1788 because ‘a body of aborigines appeared on the shore, armed with spears’. The judge applauded the English settlers who entered treaties with the US Indians. In the end, Justice Willis decided not to declare the law on this matter. While this meant that the reasoning in *Murrell* prevailed, students should nonetheless consider the relative merits of the reasoning of each judgment.

2 *Legislation and Policy*

Students tend to be shocked by the fact that in the period after colonisation, the laws of murder and rape were virtually suspended where the victim was Aboriginal, and by the existence of criminal offences which are only applicable to Indigenous people. Such history shows, as Reynolds notes, that racism was ‘as functional for the frontier squatter as the Colt revolver. One cleared the land, the other cleared the conscience’. But students should also be taught that this discriminatory approach endured after the frontier period when statutes were enacted. Extracts from publications that draw on primary sources, such as those by Mark Finnane, Heather Douglas and Anna Haebich, are useful in illustrating these statutes and their impacts. Some such sources also appear in Brown et al. For example, Western Australian statutes provided that Indigenous people alone would be subjected to corporal punishment and executions to ensure their subjugation. The *Capital Punishment Amendment Act 1871* (WA) provided for the public execution of Indigenous offenders. These executions lasted until the late nineteenth century,

31 Ibid.
36 Above n 19, 64–8.
while they ceased for non-Indigenous people in most colonies by the 1860s. Also, while whipping was phased out as a sentencing option for non-Indigenous people in the 1870s, it remained available for Indigenous people in Western Australia under the *Summary Trial and Punishment of Native Offenders Ordinance 1849* (WA) and the *Aboriginal Offenders Amendment Act 1892* (WA). In 1892, the Attorney-General of Western Australia, Septimus Burt, continued to justify the whipping of Indigenous summary offenders in the following terms: ‘You can only deal with [Indigenous offenders] like you deal with naughty children — whip them ... Give them a little stick when they really deserve it, and it does them a power of good’.

The use of the criminal law as a colonial tool of subjugation provides a background for a more general understanding of criminalisation (directly or indirectly) based on race. Students can be introduced to a continuum of law and policies that criminalise Indigenous behaviour, from the protectionist and assimilation policies of the early colonial period up to the present day, with the *Northern Territory National Emergency Act 2007* (Cth) and the *Stronger Futures in the Northern Territory Act 2012* (Cth). One good example of the unequal application of ‘equal’ laws is of the child welfare laws of the nineteenth and twentieth century which produced the Stolen Generations. As noted in the *Bringing Them Home* report, children removed under such laws had to be found to be ‘neglected’, ‘destitute’ or ‘uncontrollable’. These terms were much more readily applied to Indigenous children because ‘the definitions and interpretations of those terms assumed a non-Indigenous model of child-rearing and regarded poverty as synonymous with neglect’.

Thus, the *Neglected Children and Juvenile Offenders Act 1905* (NSW) included in its definition of neglect: ‘no fixed abode’, ‘sleeps in the open air’, and ‘having no visible means of support’ — all criteria particularly targeted at Indigenous communities. Essentially, the criminalisation of Indigenous laws, practices, cultures and customs were concealed behind law and welfare. These welfare regimes placed restrictions on movement, language, culture, marriage, employment and wages and were enforced, often violently, by the police with the backing of the criminal justice system.

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38 See *Aborigines Protection Act 1909* (NSW); *Aboriginal Protection Act 1869* (Vic); *Aborigines Act 1905* (WA); *Aboriginals Ordinance 1918* (Cth); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).
40 Ibid.
41 Ibid 266–7.
It is crucial that it is made clear to students that such policies cannot be consigned to the unenlightened practice of a dim and distant past. Students are often visibly stunned to learn that forced removal of children continued to be implemented in many jurisdictions into the 1970s. What must be made clear is the continued detrimental application of the criminal justice system to Indigenous peoples, and the continued criminalisation of Indigenous laws and families. There are, sadly, any number of examples on which teachers can draw to illustrate the point: mandatory sentencing, public order offences such as offensive language/behaviour, and the (mis)use of police discretion in cautions/arrest, to name but a few.

An assessment task which ties in closely with general themes around modes of criminalisation is one where students are asked to keep a scrapbook with newspaper clippings, including online newspaper sources, of criminal representations of Indigenous people. Their assessment then involves the presentation of this media portfolio along with a commentary that includes critical reflection on the main themes, reflections on criminalisation and discussion of any prevailing stereotypes. This assessment has been weighted at 20 per cent. The learning outcomes include that students exercise self-management by locating sources and identifying articles on which they will reflect in their commentary. It allows students not only to appreciate how the media conveys cultural issues as they pertain to the criminal justice system but also to reflect on how their understanding of criminal law and procedure has helped to process these issues. Unlike assessment based on factual answers and passive thinking, which produces fragmented outcomes and limits students’ ability to acquire meaning from legal principles, this assessment personally engages students and challenges their everyday perceptions of crime and their cultural preconceptions. The ‘criminal news’ assessment takes the student outside of textbook approaches to learning and requires them to consider how the world operates. While some students struggle with this assessment at the outset, they soon develop an affinity with the issues in the sources, and the presentation of their work reflects a lot of attention and thought to Indigenous issues. Their personal engagement with the issues is much deeper than it would be with a formal exam or assignment based on a hypothetical problem question.

For a more research-based task (which is generally assessed at 30 per cent or more of the total marks for the course), students

42 Ibid 165.
have been asked to write an essay assessing the role of community justice avenues in the relevant state or territory, potentially through a comparative framework using New Zealand and Canada. Alternatively, students have been asked to reflect on whether the historical criminalisation of Indigenous people has any ramifications for today’s criminalisation processes. The focus of this assessment includes the criminalisation of property offences, public order offences and move-on laws. Parallels may be made with the frontier period of offences under the Aboriginal Acts. Such an assessment ties into course learning outcomes that encourage application of the principles of criminal law in their broader context and which require students to demonstrate knowledge of the key processes and ethical issues involved in criminalisation by engaging in policy analysis.

D Overrepresentation of Indigenous People in Prisons

The overrepresentation of Indigenous people in prisons is an ongoing feature of the criminal justice system. For subjects using Brown et al as a text, the connections between colonialism, penal welfarism, criminalisation and overrepresentation are well made through a series of extracts exploring these dynamics in turn. One of the extracts is the primary report on one of the 99 deaths in custody investigated by the Royal Commission into Aboriginal Deaths in Custody — the death of Malcolm Charles Smith. It is a good example of the power of primary documents in teaching. The extract outlines the suicide of a mentally ill young man in a prison toilet cubicle when he drove a paintbrush through his left eye (following the biblical instruction that ‘if the eye offend thee, pluck it out’). It then says:

46 The Aboriginal Acts at the turn of the twentieth century were: Aboriginal Protection Act 1869 (Vic); Aborigines Protection Act 1886 (WA); Aboriginal Protection Act and Restriction of the Sale of Opium Act 1897 (Qld); Aborigines Protection Act 1909 (NSW); Aborigines Act 1911 (SA); Aboriginals Ordinance 1911 (Cth); Aboriginals Ordinance 1918 (Cth).

47 At the University of Sydney, when Criminal Procedure and Criminal Law was a single 8 credit point subject taught over one semester, it was viable to have all of the following assessment: the media ‘scrapbook’ assignment (discussed above, worth 20%), research assignment (30%), class participation (10%) and exam (40%). For a 6 credit point subject, the research assignment may be dropped and replaced with a greater loading of 70% on the exam. Furthermore, the exam may include questions that engage Indigenous issues. For example, a question relating to the application of the Bail Act where an Indigenous offender has multiple locations of residence and no constant employment; or a question on provocation or negligent manslaughter where the Indigenous offender commits the crime in pursuance of their cultural responsibilities; or an essay question requiring students to critique the effect of objective tests for Indigenous offenders (as they arise in homicide offences or the defences).
So much for how Malcolm died. Why did he die? Why was he in prison, seeking to pluck out his eye? The answer being (depending on how long a perspective one takes), some where between 26 January 1788 and 5 May 1965. On the former day there commenced the European settlement that, in Rowley’s phrase, was to mean ‘the progress of the Aboriginal from tribesmen to inmate’ … the other date from which Malcolm’s story may be commenced … [was when he] was taken away from his family by police, cut off from his family, whom he did not see until he was 19, and sent to Kempsey, over 1500 kilometres away on the coast, beyond the boundaries of their accessible world.48

This is a powerful integration of the themes of colonisation, forced removal, penal welfarism, criminalisation and deaths in custody. It also touches on other important criminal justice realities such as the prevalence of mental illness in prisons. It allows students to understand these links through the life story of one young man, and to approach for themselves the understanding of lives destroyed ‘not by the misconduct of police and prison officers, but in large measure by the regular operation of the system of self-righteous and racist destruction of Aboriginal families that went on under the name of protection or welfare’.49 Again, students should be informed that such policies are not limited to the twentieth century, but that Indigenous children continue to be disproportionately removed from their families, in jurisdictions including the Northern Territory, at higher rates than during the official assimilation era.50

By the end of Week 1 of Criminal Law, students would have been introduced to notions of historical and institutional discrimination in the criminal justice system in preparation for an application of these notions in studying the rules of criminal law and procedure in the coming weeks. The remainder of this article explores Indigenous issues in the substantive aspects of Criminal Law, including some attempts by the criminal justice system to redress bias against Indigenous people. Delving into Indigenous issues provides cogent examples and illustrations of legal principles.

**IV INDIGENOUS ISSUES IN LEARNING CRIMINAL PROCEDURE**

The area of criminal justice process presents the richest ground for discussion of Indigenous issues in teaching criminal law, because so many concerns arise in the interaction between the system and its actors and Indigenous people. At all stages of the criminal justice

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49 Ibid 70.
system, from street policing through to bail and sentencing, discrete dynamics exist for Indigenous people which speak volumes of the system as a whole, and which therefore constitutes important pedagogic material. A selection of these are discussed below.

A Overrepresentation, Policing and Interrogation

The over-representation of Indigenous people (and particularly young people and women) in the criminal justice system constitutes a powerful and important indicator of the magnitude of the problem of adverse Indigenous contact with the criminal justice system. However, we stress to students that there is no simple relationship between crime rates and rates of imprisonment. Rather, the use of the prison is a function of government choices around the use of punishment, and of the interplay of choices of other criminal justice actors including the judiciary, police, parole boards and the media. There is also a nexus between early colonial practices and modern policing and punishment, which can be explored through Baldry et al’s notion of the penal/colonial complex. This way of thinking about ‘penal culture’ encourages a much more nuanced exploration about why the rates of Indigenous imprisonment are so high. The rise in Indigenous imprisonment rates appear to be explicable not in terms of higher crime rates, but rather because of more frequent use of the prison for longer periods of time. In our Criminal Law classes, we challenge students to consider why this might be the case.

Issues pertinent to Indigenous people can be used as examples in discussion of pre-trial processes, including charge, arrest and bail refusal. In teaching policing, a discussion of the connection between policing particular crimes and the over-representation of Indigenous offenders in the criminal justice system should be explored. Students should read the relevant police powers legislation with a view to considering the role of discretion.

52 Indigenous people are over 14 times more likely than non-Indigenous people to be in prison — an increase from 10 times in 2001. Australian Bureau of Statistics, Prisoners in Australia, no. 4517.0 (Commonwealth of Australia, 2011) 50.
When teaching about police questioning powers, students could be referred to the historical mistreatment of Indigenous suspects and fabrication of Indigenous evidence. This has resulted in modified questioning, investigation and detention requirements for Indigenous people. The judgment of *R v Anunga*\(^57\) was one of the earliest attempts to address the language and cultural issues in police interviews and curb potential unfairness or injustice for Indigenous people. Forster J in the Supreme Court of the Northern Territory formulated a set of rules (widely known as the ‘Anunga Rules’) to guide the police when conducting interviews with Indigenous people. They include the provision of a lawyer and an interpreter, the presence of the ‘prisoner’s friend’, administering cautions in terms that the Aboriginal prisoner can understand, and avoiding leading questions. These rules have, however, been applied inconsistently\(^58\) and have limited applicability in court room questioning. Legislation and regulations now partly address these concerns in some Australian jurisdictions.\(^59\)

The exercise of police powers also provides a range of possibilities for assessment. For example, a problem question could involve police officers apprehending a young woman in the vicinity of a smashed window, as a suspect in relation to the property damage. Students could be asked to identify the relevant lawful police powers used in requesting identification, searching, questioning, arresting and detaining. Then, they could be asked to consider how the police powers would be modified if the woman was Indigenous.

**B Victimisation and Under-policing: Enforcement of DVOs**

Teaching criminal procedure involves addressing protection not only for suspects or defendants, but also for victims. Whereas over-policing of Indigenous people is an important theme, it is equally important to note that over-pricing generally applies only to suspected Indigenous offenders: Indigenous victims are less likely to receive the protection of the police. This is particularly the case for victims of domestic violence. The discussion of police practice in relation to victims extends the discussion of police discretion and relationships between communities and law enforcement authorities. The lack

\(^{57}\) (1976) 11 ALR 412.


of police response, for example, is attributed to under-reporting arising from a range of factors relevant to victims in general, such as repercussions of reporting. But there are also Indigenous-specific reasons that have deep socio-historical roots, such as ‘fear and distrust of justice system and other government agencies’, as well as a lack of services in remote communities, discussed below.\(^\text{60}\) Indigenous female victims have expressed concern that the police cannot relate to their perspective, and make them ‘feel inferior’.\(^\text{61}\) They state that this is due to ‘police racism’ and a ‘lack of respect’.\(^\text{62}\) The result is that police officers may make the victim of a breached DVO feel like she is lying and over-reacting because she is a ‘black woman’.\(^\text{63}\) These dynamics can also be discussed when teaching police discretion, domestic violence or apprehended violence orders.

C Legal Services

Our teaching of criminal procedure is given a practical dimension with regard to the critical role of legal services. In accordance with the key legal principles, we teach students the importance of legal services and how there is a right to legal representation for serious indictable offences.\(^\text{64}\) But we also emphasise that Indigenous suspects and defendants, unlike many non-Indigenous people, have access to free legal representation through Aboriginal and Torres Strait Islander Legal Services (ATSILS). Nonetheless, the provision of these services is undermined by inadequate resourcing. This issue gives rise to in-class discussion on the nature of access to justice.\(^\text{65}\) ATSILS practitioners deal with clients who face higher levels of literacy and numeracy issues, disability and health complaints, and for whom English may be a third or fourth language. Their clients live more remotely than those of mainstream legal aid services and there is a need for interpreter services to address the different understandings in cross-cultural communication,\(^\text{66}\) even though interpreter services


\(^{62}\) Kelly, above n 61, 6.

\(^{63}\) Ibid 6.

\(^{64}\) Dietrich v The Queen (1992) 177 CLR 292.


are not always readily available or used by ATSILS. One good resource for illustrating the nature and challenges of the work of ATSILS, particularly in remote communities, is the first episode of the (fictional) SBS series *The Circuit* (approx 50 mins). Bringing to the fore the importance of adequate and appropriate legal services is a good example of a teaching approach that ‘honour[s] the ‘big stories of the discipline’ in the context of the law’s particular relationship with Indigenous communities’.

**D Bail**

Bail is a central topic in criminal law and procedure. Remandees who are refused bail represent a significant portion of the prison population: remandees were 26 per cent of all NSW prisoners in 2011. Indigenous people were held on remand at a rate of 583 per 100,000 population, compared with the average rate in New South Wales of 49 per 100,000. In teaching bail, we point to special problems and needs of Indigenous accuseds in the bail process. The requirements for bail may be especially difficult for Indigenous people to prove, given they are less likely to stay at one residential address, which leads to perceptions that they are a flight risk. The Royal Commission into Aboriginal Deaths in Custody Report (1991) noted that Indigenous people face special difficulties in acquiring police bail because of their socio-economic circumstances and cultural standing. The Report stated:

The lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles.

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68 *The Circuit* (Directed by Steve Jodrell, SBS, 2009). The first episode traces the experience of an Indigenous city lawyer who moves to Broome to work on circuit for the Aboriginal Legal Service there. The show picks up on a number of relevant issues for Criminal Law subjects like the ‘sausage factory’ realities of local courts, the large workload of duty solicitors, and the interplay between the criminal law and social marginality. But it also contextualises these themes within an Indigenous service delivery context, such that students are exposed to the key role of the field officer in ATSILS, the difference in the delivery of and access to justice in remote areas, and issues involving cross cultural communication with clients. Watching these issues dramatised allows students to connect to them in a way that a formal discussion may not (and often leads to follow-up emails asking where the rest of the series can be accessed).
71 Ibid 59.
72 Johnston, above n 16, [21.4.2].
Although not statistically current, a 2002 report of the NSW Aboriginal Justice Advisory Council called *Aboriginal People & Bail Courts in NSW* provides some excellent case studies that can be incorporated into a more general class discussion about bail. The following example, which can be used as the basis of a group exercise or discussion, provides a compelling insight into the importance of appropriate bail conditions, as well as demonstrating the pitfalls of ‘fly in fly out’ justice:

A 55 year old Aboriginal woman living in a small Western NSW town had an argument with her husband resulting in her throwing a shoe at him. The shoe missed him and went through a window of a house they were renting. A neighbour had called the police when the argument began and the woman was arrested for causing malicious damage. It was her first offence. The magistrate imposed bail conditions on her that she reside[s] 5 kilometres from her husband. Neither the magistrate nor her legal representative realised that the town was less than 5 kilometres wide. The woman, being intimidated by the court process, did not speak up and believed that she was being given a choice of going to prison or camping in the bush. She chose prison and subsequently spent some months on remand waiting for her case to be heard. When her case was finalised it was dismissed without conviction.73

There is also a body of case law on whether the administration of Indigenous law punishment should be considered in the decision to grant bail. Students may be asked to consider the short Northern Territory bail remarks and decision of *Anthony*74 involving a Warlpiri man who sought to be let out on bail to be punished by his people. This can feed into a discussion of the considerations under the relevant bail legislation. Questions for students include: ‘what do the interests of the community mean?’; ‘who is considered a bail risk?’; ‘what crimes are more likely to be exempted from bail?’.

E Sentencing

We discuss a range of Indigenous issues in our classes on criminal sentencing because they provide pertinent examples of the way courts apply aggravating and mitigating sentencing factors, including Indigenous culture, Indigenous law punishment and socio-economic disadvantage and alcoholism. There are leading sentencing remarks which indicate that these factors have lessened the sentence for Indigenous offenders.75 However, we are mindful of Professor Larissa Behrendt’s concern that teaching about culture as an

74 (2004) 142 A Crim R.
75 See *Neal v The Queen* (1982) 149 CLR 305; *R v Fernando* (1992) 76 A Crim R 58 (on socio-economic disadvantage and alcoholism); *R v Minor* (1992) 105 FLR 180 (on culture and traditional punishment).
explanation for a crime assumes that Indigenous culture is violent.\textsuperscript{76} O’Donnell also cautions against teaching culture in a way that leads to stereotypes.\textsuperscript{77} Accordingly, our teaching emphasises that culture is not a blanket defence but a context for mitigating culpability based on facts, which are verified by the community, that the person acted according to cultural expectations. Students are invited to critically consider whose voices are aired in this sentencing process and whether the voices of women and other sections of the community are adequately represented.

While we convey to students that sentencing legislation and case law provides for judicial discretion to consider a range of factors,\textsuperscript{78} we also make them aware of how such legal principles can be vulnerable to change, for instance, as a result of racially targeted legislation. Students should be informed of Federal government legislation that restricts courts from taking into account cultural and customary law factors in sentencing and bail applications in the Federal and Northern Territory jurisdictions. This restriction was originally stipulated under specific legislation arising from the Northern Territory Emergency Response in 2007\textsuperscript{79} and is now included in the \textit{Crimes Act 1914 (Cth)} ss 16A–AA.

Students may also consider whether judicial discretion in sentencing is sufficient to account for the views of the community and the victim. To this end, some discussion on alternative sentencing mechanisms such as Indigenous circle sentencing in New South Wales and Koori Courts in Victoria, in which the offender’s Indigenous community has a say in the sentencing process and outcome, would be valuable. If time permits, it is worth showing students a short DVD (the relevant Parts 1–3 run for 15 minutes), \textit{Circle Sentencing in New South Wales}, which includes footage on the operation of a circle.\textsuperscript{80} This provides students with a sense of how Indigenous courts can work, and is a useful contrast to what they may have previously witnessed in a local court observation. Many students find that circle sentencing offers significant advantages over the formal court process, especially by including the community and victim and reducing the defendant’s alienation, and that it would be a valuable alternative not only for Indigenous people but for other offenders.

\textsuperscript{76} Behrendt, above n 15.
\textsuperscript{79} Northern Territory National Emergency Act 2007 (Cth) ss 90–91. Also see \textit{Crimes Amendment (Bail and Sentencing) Act 2006 (Cth)}.
\textsuperscript{80} \textit{Circle Sentencing in New South Wales} (Directed by Karl McPhee, Judicial Commission of New South Wales, 2009). The DVD can be obtained from the Judicial Commission of New South Wales.
For both sentencing and bail, a challenge in providing alternatives to custodial sentences for Indigenous people is a lack of essential preconditions such as access to appropriate housing, especially in rural and remote communities where a substantial proportion (although not the majority) of Indigenous people live. The court in *R v Ku & ors; ex parte AG (Qld)*[^81] made it clear that there are limited options for rehabilitation programs. There is also a lack of corrective services officers in communities to monitor bail and parole conditions. Without such options, imprisonment is more likely to be ordered by the courts.

Any number of assessment tasks can take into account Indigenous issues in sentencing. An in-class activity that may contribute to class participation marks (generally assessed at around 10 per cent of total grade overall) can be asking students to present sentencing submissions in a case involving an Indigenous offender. An example of a case may be an Indigenous defendant who was convicted of driving an unregistered vehicle and driving without a drivers’ licence when travelling outside his community to attend a funeral of a senior Indigenous Elder. Other circumstances can be added, such as where the offender had two passengers who also did not have licences and held lesser driving skills than the offender. Students could role-play the sentencing procedure where the prosecution would propose aggravating circumstances to increase the sentence and counsel for the defendant would submit mitigating circumstances. The student performing the magistrate’s role would be required to take into account cultural submissions against the seriousness of the offence. Taken further, the students may consider some of the differences in approach that might be taken in an Indigenous sentencing court where the voices of the community would be heard. This links to course learning outcomes relating to demonstration of oral communication skills by discussing and debating course concepts in a scholarly, and reflective manner, and demonstration of awareness of the principles of criminal law and their relationship to the broader context.

V Indigenous Issues in Criminal Law Offences and Defences

There are a number of points in the teaching of substantive law where issues relevant to Indigenous people can be raised, and where doing so will improve students’ understanding of the operation of the offences/defences in question. In relation to the offence of assault, students may consider the role of consent where it involves the victim taking part in Indigenous law punishment. For example,
in R v Judson\textsuperscript{82} a number of defendants were charged with assault occasioning bodily harm arising from an incident where a young Aboriginal girl was subject to traditional punishment. The alleged offence involved the girl being hit with sticks and a crowbar. The defendants were acquitted by a jury after defence counsel had submitted that the victim had consented to the assault (in Western Australia consent is a defence). Defence counsel relied on evidence which showed that the attack was consistent with the relevant traditional law in order to show that the victim had consented or alternatively that the defendants held an honest but mistaken belief that she had consented.\textsuperscript{83}

The Judson case highlights the fact that Indigenous cultures may be considered within the boundaries of the Criminal Law. It is, however, also important to explore the ways in which Indigenous rights to culture may clash with women’s rights to safety, and how employment of the abovementioned defence arguments may negate the views of female victims — an issue worthy of consideration throughout the subject.\textsuperscript{84} Other cases in the Northern Territory such as R v Miyatatawuy\textsuperscript{85} illustrate instances where female offenders can be subjected to non-violent community views, meetings, banishment and non-drinking orders made by the community were taken into account in sentencing.

Because of the degree of overrepresentation of Indigenous people for public order offences such as offensive language and offensive behaviour,\textsuperscript{86} the teaching of these offences can draw on a wealth of examples of the intersection between these substantive offences and police powers. There are a variety of scenarios, based on the facts of cases, in which students can decide whether actions are truly offensive or represent harmless activities. These can be used to illustrate the subjective nature of crimes requiring ‘offensiveness’ and the (mis)use of police discretion.

Indigenous social and cultural factors (such as attitudes to autonomy, responsibility and social location) do not alone form a basis for a criminal defence. However, students should be invited to consider their relevance to criminal intent, to seriousness of the offence and as a defence. In teaching substantive criminal law, we introduce Indigenous issues and issues of cultural diversity primarily


\textsuperscript{83} Ibid.

\textsuperscript{84} Elena Marchetti, ‘How the Mainstream Criminal Court System is Still Getting It Wrong’ (2011) 7 (26) Indigenous Law Bulletin 27.

\textsuperscript{85} (1996) 87 A Crim R 574, 578.

in relation to provocation. This partial defence reduces a conviction from murder to (voluntary) manslaughter. Provocation raises the issue of whether cultural circumstances should be taken into account in assessing whether the gravity of the provocative conduct would have induced the ordinary person to have lost self-control. In other words, should the ‘ordinary person test’ in *Stingel v R*\(^{87}\) be extended? The Brown et al *Criminal Laws* text provides a discussion on the relevance of ethnicity to this test — that is, attempts to extend the partial defence through attributing ethnic characteristics as an aspect of ‘ordinariness’ — and is followed by a separate consideration of Aboriginality.\(^{88}\) Here, the approach in the Northern Territory is canvassed, whereby the ‘ordinary person’ can be taken as meaning ‘an ordinary Aboriginal male living today in the environment and culture of a fairly remote Aboriginal settlement’.\(^{89}\) Again, students should be reminded that the cultural response may not always be generalised, returning to the point made above that teaching of culture should avoid fixed, static notions.

**VI CONCLUSION: CULTURAL DIVERSITY IN CRIMINAL LAW**

This article has demonstrated that there are numerous moments in the Criminal Law curriculum where consideration of Indigenous specific issues can enhance learning outcomes without departing significantly from the core material. Reorientating teaching in this manner fulfils a number of objectives. It gives students an informed perspective about a range of legal, social, political and moral issues that arise in the development and practice of the criminal law. It sensitises students to the fact that no area of law is self-executing, by demonstrating the impact of the criminal process on the practical operation and meaning of criminal law. Ultimately, all of this serves to move the student to a place of deep learning, with an increased capacity for a critical, contextual approach to the law.

Teaching criminal law with this reorientation is also a vehicle for introducing students to some of the primary shaping forces of the society in which they will go on to practice law. Given the increasing significance of Threshold Learning Outcomes (TLOs) in law faculties, it is not sufficient to relegate explorations of values, justice and broader contexts, or skills in critical analysis to a Foundations of Law subject or a specialised elective. James and Field write in their first-year textbook, which draws heavily

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87 (1990) 171 CLR 312.
on TLOs, about recent changes in legal education, including the move towards supplementing teaching of fundamental legal concepts with ‘developing useful legal skills’ and ‘contextualising doctrinal knowledge by examining social, political, cultural and critical perspectives on the law’. For legal education to do justice to these TLOs, they need to be incorporated across core subjects. One important way of doing this, especially in Criminal Law but also in other subjects, is to engage Indigenous issues, experiences and perspectives. Given the vast overrepresentation of Indigenous people in the criminal justice system, Indigenous issues provide a prism for critically analysing the criminal law. This article has traced the ways in which our teaching has drawn on Indigenous issues to highlight central Criminal Law and Procedure principles as well as to produce graduates who are culturally aware, able to engage with clients from diverse backgrounds, and able to critically appreciate Australia’s historical and present use of the criminal justice system to suppress Indigenous cultures, societies and laws. It positions the law graduate not only to apply the law but also to think critically about law reform and the need for legal practitioners to be sensitive to the backgrounds and perspectives of culturally diverse groups.

INCORPORATING INDIGENOUS CULTURAL COMPETENCY THROUGH THE BROADER LAW CURRICULUM

A J Wood*

I INTRODUCTION

It might appear self-evident that Australian law schools should teach Indigenous Cultural Competencies (ICC) and perspectives as part of their curriculum.1 If it is not, then the Universities Australia (UA) 2011 Cultural Competency Framework Report2 reiterates the importance of an inclusive curriculum.3 However, UA recognises that to be done effectively, there needs to be provision in such a curriculum for Indigenous cultural competency.4 If this premise is correct then, in addition to the appropriate pedagogical considerations that underlie good teaching generally, developing ICC among a cohort of students necessitates the addition of structured and targeted but safe ‘Indigenous space’ within the curriculum5 — one that provides an opportunity for constructive engagement.

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1 Many countries recognise their First Nations Peoples and it would seem reasonable to improve the broader community’s understanding of these peoples. Further Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples (‘DRIP’): United Nations Declaration on the Rights of Indigenous Peoples GA/RES/61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295, UNGAOR (13 September 2007); and ANU law students, as future lawyers and leaders, will be expected to have some familiarity with DRIP. Hence some formal study of these areas would greatly assist law students while simultaneously improving the level of cultural competence generally.


3 UACC Report, above n 2, 52; UACC Report xxvi, also recommended the incorporation of Indigenous knowledges in the broader curriculum.

4 Universities Australia, Guiding Principles for the Development of Indigenous Cultural Competency in Australian Universities, (Canberra, October 2011) 3. [Referred to as the UACC Guiding Principles hereafter]

5 See discussion at n 26 below.
This ‘space’ should be characterised by an opportunity for students to engage with fellow Indigenous students, who in turn should feel safe for the sometimes confronting nature of the material, which often originates in their communities or sometimes even has links to their families. Engagement takes place at both an individual and group level, and introduces a broad range of subjective, informed Indigenous perspectives.

While a great deal of lip service is often paid to these goals of inclusion in higher education, there is a paucity of good practice. There is also a dearth of knowledge, research and information on Indigenous knowledges and perspectives. The Australian Research Council (ARC) arguably has recognised this gap and has funded an extensive network of several Indigenous researchers from a range of disciplines under the leadership of the internationally renowned professor Aileen Moreton-Robinson, the National Indigenous Researchers and Knowledges Network (NIRAKN). The network could significantly contribute to the volume of Indigenous knowledge and hence to improve ICC.

There are many important reasons for incorporating Indigenous knowledges into the broader curriculum and a full discussion of this issue is outside the scope of this paper. However, a society that believes and characterises itself as a ‘knowledge nation’ must give some consideration to the custodians of knowledge of the land and its waters even if only for its practical benefits. On a more ordinary level, Prime Minister Abbott, then Leader of the Opposition, aptly put this as ‘[Australia] is the envy of the earth, except for one thing — we have never fully made peace with the First Australians’.

7 Other law schools with electives on Indigenous Australians and the Law include University of Canberra, Southern Cross University, University of New England, University of New South Wales, University of Newcastle, University of Technology Sydney, University of Western Sydney, University of Wollongong, Charles Darwin University, James Cook University, Queensland University of Technology, University of Queensland, Flinders University, University of Adelaide, La Trobe University, Edith Cowan University, Murdoch University, University of Western Australia and Curtin University. For unit outlines/content of these programs please refer to the institution’s web site. While, as noted above, there are several universities with programs similar to the ANU unit, there did not appear to be a single text that was suitable for this unit. The cost of texts is a significant consideration at the ANU when the issue of a ‘prescribed text’ for any unit is considered. While the ANU teachers of this unit have been approached by publishers to create a suitable text, this is still a matter that is in train. On the other hand, as has been evident with the handing down of judgment in the Akiba Case this year by the HCA, the unit strategy of depending principally on primary materials, available as online resources which do not have to be purchased and which may be printed, appears to be sound both pedagogically and economically.
Knowing and understanding Indigenous perspectives is a good first step towards a peaceful co-existence. Further, recognition at law that the continent was not ‘empty’ exposes contradictions in both the law and the Constitution, and brings into the law considerations of a once ‘invisible’ and neglected people. This can be a confronting issue for students. But addressing these contradictions openly and in an honest manner will help to reconcile social attitudes with the law as it evolves and moves to accommodate issues such as the recognition of Indigenous people in the Constitution.

This article is in seven parts. Part II explains the concept of ICC and Part III identifies some pedagogical considerations. Part IV outlines the approach to development of ICC at the Australian National University’s College of Law (‘ANU Law School’), and Part V considers how the ANU law school unit, Indigenous Australians and the Law (‘unit’) is evaluated. Part VI examines what mutual lessons there might be for law schools and institutions, some of which have already begun their own attempts at incorporating ICC. Part VII contains concluding remarks.

II DEFINING INDIGENOUS CULTURAL COMPETENCY

There is no universally accepted definition of ICC, but UA’s definition has been endorsed by senior Indigenous bodies and carries the imprimatur of the UA, and is therefore adopted here.

The UACC Report defines ICC as:

Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples.

10 UACC Guiding Principles, above n 4, 5–29. The 5 principles are also summarised at page 8 of the UACC Report, namely that:
(1) Indigenous people should be actively involved in university governance and management
(2) All graduates of Australian universities will have the knowledge and skills necessary to interact in a culturally competent way with Indigenous communities
(3) University research will be carried out in a culturally competent way in partnership with Indigenous participants
(4) Indigenous staffing will be increased at all appointment levels and, for academic staff, across a wider variety of academic fields and
(5) Universities will operate in partnership with their Indigenous communities and will help disseminate culturally competent practices to the wider community.

11 UACC Report, 171 (emphasis added). The UACC Report is comprehensive and covers a range of ICC-related issues such as a national stocktake, identifying best practice, developing Indigenous research capacity. It advocates inclusion of Indigenous perspectives at all levels of university governance. These aspects are not repeated here.
The definition has two broad limbs. The first limb consists of a two-part cognitive aspect specifying what a person ought to know and understand, and the second limb is a skills element that requires the possessor of the knowledge and understanding (in the first limb), to bring this to bear on practical exigencies and to do so in a particular way.

A Knowledge, Understanding and Awareness

The aim, from a pedagogical perspective, and without being prescriptive, is to make the scope of learning required in the first limb manageable within the resource constraints of a university teaching framework. That is, to enable students to gain an adequate knowledge and understanding through an undergraduate university course — or, in higher degree research courses, a deeper, more detailed knowledge and understanding.

The second part of the first limb requires an ‘awareness of Indigenous protocols’. At a functional level this is a modest requirement. For example this could mean being aware of the various ethical clearance protocols that institutions including universities have in place for undertaking research with Indigenous subjects as both the institution and the Indigenous communities require. While lawyers are not bound by these protocols per se in practice, requiring lawyers to have an awareness at least of these protocols is perhaps a very modest requirement. There is much more to Indigenous protocols than is indicated briefly here other than to note that such awareness should be seen as a first step only.

The UACC definition is not a legal definition. Nonetheless, it adequately captures the broad elements and provides a reasonable basis for adaption. Thus for example in practice, for a ‘working definition’ the scope UACC definition could be read down to mean a ‘(reasonable or adequate) knowledge’ and perhaps also a ‘(reasonable or adequate) understanding’, ‘of (one or more) Indigenous Australian cultures’. The term ‘cultures’ should be read quite broadly to include what His Honour Justice Finn referred to as ‘a plain English definition of the different possible societies’, which include localised regional (Indigenous) groups and broader regional (Indigenous) groups, which could encompass variations such as distinct groups of languages.\(^\text{12}\)

B The Skills Element

The second limb consists of the development of practical skills and experience to apply the theoretical knowledge gained through formal study. In law schools this is usually achieved to some basic

\(^{12}\) Akiba v Queensland (No 2) [2010] FCA 663 [175].
extent through clinical programs and after graduation through practical legal training programs such as the ANU’s Graduate Diploma in Legal Practice (GDLP). This is offered under different names by many law schools and other institutions. At the ANU neither the clinical nor the GDLP program has a specific ICC development component; this is a gap that needs to be addressed in the future. To this end the ANU is undertaking an audit of its law units with the aim of identifying how ICC can be strengthened within the framework of the current constraints.

It is unlikely that law students will be truly culturally competent even to deal with a local Indigenous community at the end of their degrees. At minimum, however, their knowledge and awareness should sensitise them to the vast gap that could exist in practice between the communities. There are many relevant issues, a few of which are raised here for illustration. The Law Council of South Australia, for example, has created a helpful document for lawyers dealing directly with local Aboriginal clients. The protocols capture the frustration of an Aboriginal client who said ‘Dealing with the whitefella law is like playing football when the other team and the umpire are applying basketball rules’. Acquiring the necessary skills to deal with these frustrations, including the difficulty of tackling the complex issues facing Indigenous women in rural towns, is also a key ‘access to justice’ issue for governments. The High Court has recognised that ‘Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices’, which may in cases have an enduring effect with attendant legal consequences. Gray et al refer to the range of equitable issues that must be considered when dealing with disadvantaged communities generally, but specifically addressing their case study in Indigenous communities. Physical barriers such as a high level of hearing loss among Aboriginal peoples make court processes difficult and compound inadequate English language competency issues. Ideally the university sector will be able to provide appropriate clinical programs that address these types of issues not only for graduates who will practice law but also for other who will work in legal policy areas — for example those who work closely with the Aboriginal Legal Services (if they survive the

13 Law Society of South Australia, Lawyers’ Protocols for Dealing with Aboriginal Clients in South Australia (1st ed, 23 August 2010).
14 Ibid, 4.
15 Judy Putt and Kate Crowley, Working with adolescents to prevent domestic violence: rural town model (Canberra, Attorney General’s Department (Cth) 1998), 10.
18 Law Society of South Australia, above n 13, 19.
current changes in government policy), the community legal sector, NGOs and the many other public and private organisations such as the Office of the Registrar of Indigenous Corporations (ORIC).\textsuperscript{19}

Indigenous people have a civilisation and culture which is significantly different from the majority Anglo-European culture. These differences clearly necessitate specific and appropriate approaches if problems and issues are to be addressed sensibly and to the satisfaction that is expected in a first world economy. Positive statements by governments and leaders in the broader community create some expectations on the part of the Indigenous community that their needs, including legal services, will be addressed by measures that are appropriate, targeted and of the same standard and quality enjoyed by the mainstream. The mass media such as the Australian Broadcasting Corporation or NITV, the Indigenous TV Chanel, have begun to educate viewers about the majority of Indigenous protocols and customary norms that apply widely, although perhaps not universally, among Indigenous communities. The need for holistic and comprehensive programs that address Indigenous communities, however, remains undiminished. That there is an implicit requirement that legal service providers be competent to deliver such programs has been recognised widely.\textsuperscript{20} These broader attributes include the skill needed to address the feeling of impotence among Indigenous men and the associated issues of alcohol and violence that put many men in an adversarial situation vis-à-vis the law.\textsuperscript{21} Lawyers should also know and understand the support mechanisms that are in place within Indigenous communities to deal with historical issues and to acquire the necessary skills to work with, and in concert with, these mechanisms so that this cooperation will bring about the optimal social benefits to Indigenous communities while remaining true to their obligations as officers of the Court.\textsuperscript{22} These are aspirational targets being considered by Indigenous law academics at conferences and seminars with a view to realising such change in the not too distant future. But the clock is ticking on these issues. Aspirations of Indigenous communities being served by a legal profession that understands them was proposed in 1993\textsuperscript{23} — an aspiration that remains unfulfilled 20 years on.

\textsuperscript{20} Paul Memmott, Rachael Stacy, Catherine Chambers and Catherine Keys, \textit{Violence in Indigenous Communities} (Attorney General’s Department (Cth) 2001), 87.
\textsuperscript{21} Ibid, 26, 29, 96.
\textsuperscript{22} Ibid, 97.
III SOME PEDAGOGICAL CONSIDERATIONS

Improving ICC generally will require universities to deliver substantive legal content in a manner that is acceptable to the broader academy and simultaneously culturally appropriate and sensitive. The substantive content would also have to meet the standards of the law school and the profession, and arguably for best learning outcomes, complement the broader law program.

In Lizzo et al’s terminology, the unit should aim to improve both ‘hard’ learning (academic achievement) as well as ‘soft’ learning (satisfactory development of key skill) outcomes that are, in this context, suitable for the profession. In many instances, subjects on Indigenous Peoples and the Law appear as later-year law electives, enabling teachers to build upon previously acquired knowledge and skills in a scaffolding process that fosters independent learning, promotes a broader view of law and society, and encourages students to appreciate that the study of law is more than simply a means to obtaining professional credentials.

The inclusion of Indigenous teachers and students in ICC programs is likely generally to enhance the student experience, particularly if the programs are integrated into the broader curriculum. The inclusion of Indigenous participants can sometimes bring into the unit people with first-hand experiences of traumatic events such as removal from families, racism, alienation by both the law and the mainstream community and other possible adverse circumstances and situations as experienced by the individual, their family or community.

The inclusion of Indigenous participants therefore creates a concomitant obligation on institutions, and arguably extends its normal duty of care, to create culturally safe environments for Indigenous students — an issue which has not, according to Bin-Sallik, received adequate recognition. Indigenous students and teachers in the academy come from a range of backgrounds including urban, rural and remote, bringing with them a range of experiences that when openly shared are greatly beneficial to the mainstream cohort. The concept of what a culturally safe space could mean is now discussed below.

The concept of a ‘safe cultural space’ is a critical issue, particularly if the law school would like non-Indigenous students to participate in a constructive and all-round beneficial manner with Indigenous students and teachers. The concept, as used in practice at the ANU,
is best characterised by Aboriginal elder Richard Frankland, who describes a culturally safe ‘Indigenous space’ as:\(^{26}\)

A place where you [that is, an Indigenous person] can practice your own culture without fear of being ridiculed or being put down or bullied or harassed about it; where it is celebrated; where there is an exchange of ideas and cultures; it is a meeting place of cultures; it is a place where you can take what is great from every culture and build a framework of a place where you are safe and secure.

The negative indicators raised by this definition — such as establishing protocols for preventing ridicule, harassment or put-downs in class — are relatively easy to name and address, particularly through negotiation and mutual agreement. Moving beyond merely addressing the negative elements, and on to issues such as identifying, taking and appreciating what is best from each culture and celebrating such cultural aspects, in addition to being quite subjective, are a bit more difficult to achieve in a short time or in a class environment. This is likely to be the case even if agreement has been reached on issues such as what constitutes a celebratory aspect of culture. The desire by students to ‘celebrate culture’ or ‘appreciate Indigenous ways’ more broadly in the longer term is sometimes evident through their reflective postings. Students elect whether or not to post more than a mandatory minimum of these ‘personal reflections’ and many do so, particularly when they think that they have something particularly insightful or useful to share with the cohort. The often positive feedback they receive, sometimes almost instantaneously, reinforces the practice of sharing ideas in this safe space. Some students are, however, reluctant to participate online, and they express this in the unit feedback.

Interaction which is open and engaged with the substantive issues of the day is generally positive for the cohort, particularly for the non-Indigenous students, some of who have never knowingly met or interacted with an Indigenous person. In this context all students are exposed to a range of subjective Indigenous perspectives — albeit somewhat unpredictable — together with a set of more ‘objective’ legal materials. While it is conceded that not every Indigenous person will bring a fully informed cultural perspective, the absence of Indigenous input through teachers or students can mean that mainstream students are not exposed to a range of live and engaged Indigenous perspectives, and this can diminish their learning experience.

On the other hand, it might not be possible or practical always to ensure Indigenous engagement on every topic. Alternative strategies

such as the delivery of Indigenous perspectives and content via film, music, role plays and art is necessary. These extrinsic elements can complement face-to-face teaching. The content of this material can be used to show links to the common law for purposes such as saving evidence (under the Uniform Evidence Act), and can simultaneously be used to teach aspects both of the common law as well as Indigenous ‘law and culture’.

For strong cultural reasons, which are practised in the teaching of the classes, lectures are not recorded and footage is only used in class (as opposed to being available on the class website) and only when the permission of the traditional owners has been obtained for the use of this material as a teaching aide. It is also used within the cultural protocol limits of each separate community. For simplicity and consistency, other cultural protocols are extended even when not strictly necessary. For example, not all Indigenous cultures avoid the use of the name of a recently deceased person, but this cultural norm is practised in class as far as possible — for example using popular case names to refer to cases that in the official record bear the name of a deceased Indigenous party.

IV The ANU Approach to Promoting ICC

In 2010, as part of its 50th year celebrations, then Dean Coper invited an international panel of eminent lawyers and legal educators (‘the panel’) to audit the Law School. The panel, while recognising the College’s ‘valuable initiatives’ with respect to Indigenous matters, such as the retention and successful graduation of Indigenous law students, highlighted the absence of a law unit on ‘Indigenous peoples and the law’ as ‘troubling’, particularly given the ANU’s position as the national university and the Law School’s own deep commitment social justice issues. This specific recommendation, coupled with calls for the broader inclusion of Indigenous knowledges in the professions by figures such as Professor Larissa Behrendt, a renowned Indigenous lawyer and legal academic, prompted the Law School to respond positively and introduce the Indigenous Australians and the Law as a unit in the Bachelor of Laws.

The ANU’s policy of research-led teaching means that subjects are taught by staff researching in the field. Thus, incorporating
Indigenous law classes in the curriculum was not straightforward, as there is a dearth of active research in this area generally, and a reliance on research-led teaching can limit the range of available Indigenous related electives. Additionally, in teaching ICC, there can be tension between the opportunity to engage in deep learning in a small number of topics and the temptation to provide a broad survey of Indigenous peoples and their interactions with the law. At present there is insufficient data, or collective experience, to gauge which is the better pedagogic approach in this context, or to identify an ICC strand which would find favour with students and work within resource constraints and the requirements of the broader pedagogy in the wide range of disciplines that cover all university courses, vocational or otherwise. The ANU Law School approved a unit of study that included the study of a limited number of legal areas in some depth, reinforced through research-based assessment items and reflective exercises. This reflected an appropriate compromise in developing ICC using research-led teaching.

Aim in Improving ICC

The broader aim of the Law School is to promote ICC through independent learning in areas of law affecting Indigenous peoples. As with other elective units, the aim the unit is to achieve a deeper coverage of subject matter, building on the material covered in the Priestley 11 and compulsory units. The coverage of Indigenous materials in Priestley 11 units is either largely incidental or quite small. Available information generally appears to reinforce the perception that Indigenous people are statistically underrepresented in education, employment and good health statistics and are over-represented in areas of petty crime, poor mental health, unemployment, sexual offences and homelessness. However, for a development of the understanding in the first limb of the ICC definition, students must internalise the fact that many of these issues are intergenerational and a result of circumstances which have their genesis in Indigenous history. These detrimental conditions are not intrinsically permanent but nonetheless will require imaginative solutions to address in the shortest possible time. Unless student understanding of the deeper issues is well-developed, their knowledge of Indigenous issues is likely to remain quite unsophisticated and shallow, and hence their proposed solutions likely to be limited — a symptom clearly visible in the broader polity. Understanding these underlying issues is crucial in developing sustainable and fair solutions. This understanding helps to contextualise the current situation for Indigenous peoples, which in turn will help students to develop their competence in the skills limb of the ICC definition.

32 UACC Report, above n 2, 32.
Although not the only avenue for non-Indigenous people, ICC generally develops with an appreciation of why and how Indigenous people can feel alienated in an otherwise open, democratic and free society. The study of Indigenous alienation can be linked to forced removal from traditional lands and removal of children from parents — and consequently from traditional language and culture. In making the link with law, the unit examines circumscribed, abstract Western legal concepts such as ‘alienable interests in land’ or the English Crown’s acquisition and desire to acquire sovereignty in a land 12,000 miles from its homeland, and to do so for purely economic and hegemonic purposes that nevertheless resulted in removal of Indigenous people from both their traditional lands and their families — a dispossession that is compounded by the simultaneous denigration and rejection of Indigenous peoples and their ontologies. Understanding the associated dissonance that is often caused for Indigenous peoples by ‘isolated’, non-contextualised discussions of such legal concepts, including the legal fictions that are constructed to allow otherwise intelligent and caring Europeans to accept these notions as ‘right’ and ‘just’, is also an important part of developing knowledge and understanding within the meaning of the first limb of the ICC definition.

The ethic of the class is to acquire the knowledge and understanding required for reasonable levels of ICC and then knowingly to promote the creation of substantive equality for Indigenous peoples by learning to accept Indigenous people and ways peoples as ‘truly equal’, and not because they have been assimilated.

What is evident is that a small cohort studying a limited number of units cannot satisfy UA’s aim of a general acquisition of ICC. It is however important to assess whether the limited number of students exposed to the unit will gain an adequate depth of understanding. What will constitute ‘adequate’ will depend upon the aims of the various programs. For UA, it is that students are able to follow its guidelines; for the ANU unit it is to enable students to accept Indigenous ontologies ‘as they find them’ and to work towards the creation of true equality including in the Constitution.

The broader separate question is: how will these methods be adjusted to cover a large cohort of law students, and eventually to all university students? Or do newer more appropriate units need to be developed to achieve ICC at a general level? There is insufficient data at the ANU to answer these questions definitively but it appears evident that ICC must be included in all or at least the majority of the Priestley 11 units and some clinical units if all law students are to acquire this skill and attribute.

33 UACC Guiding Principles, above n 4, 6–8.
B Substantive Content: Indigenous Australians
and the Law Unit

The ANU Law School’s approach to selection of unit material is only one such approach to content determination and is subject to the many constraints mentioned above. The unit commences with a general and broad introduction covering some groundwork by examining the history of contact, Indigenous identity and the development of the nation. Indigenous perspectives are introduced to complement the current written Australian legal history, which at present is significantly empty of Indigenous content, but is slowly evolving to include such content. The three other major components of the unit are now examined, along with a rationale for inclusion.

Firstly, for the law, and the teaching of law, arguably a key area is to examine how, why and more importantly whether it is true that the law permitted the exclusion of Indigenous people from the earliest days of English settlement and then through Federation. Thus the study of the Australian Constitution and its evolution, particularly the aspects that permitted such exclusion are useful components of study. Further, that part of Constitutional law which covers the constitutional provisions which directly and indirectly affect or touch upon the lives of Indigenous people are thus included in the curriculum.

Secondly, while colonisation appears to have had a devastating impact on many lands and civilisations, the treatment of Australian Indigenous people was unique. This is probably because the colonists did not recognise or understand the complexities of Indigenous connections with their lands and its waters, and recognition of such connections did not occur at law until relatively recently.  

Thus the law, as it stood for more than 200 years, held that the Australian Continent was ‘almost uninhabited’ and that the few humanoids who were present and — being genetically inadequate and intellectually inferior — were ‘barely civilised’ at English settlement. Further, it was not until 1992 that the High Court, in its seminal case, acknowledged the falsity of this notion of an empty land.  

This case, for example, bears the name of one of the plaintiffs who has passed on. For cultural reasons in parts of Australia, the continued use of the name held by a now-deceased person is avoided, and where possible, a convention is adopted to call it the Murray Island Case.
Brennan described the status quo ante as ‘the fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent [and consequently that it] has no place in the contemporary law of this country’.\(^{39}\) The legal consequences of *terra nullius* however still persist in the law and it will take time to expunge these deleterious effects. Thus it is important that students gain some understanding of how Australian property law and its theories of tenure and ownership of estate in property have interacted, affected and contrasted with Indigenous notions of custodianship. Such custodianship and rights that derived from it, such as the rights to enjoyment or to exclude,\(^{40}\) even today are not recognised as ‘rights’ *per se* at common law but only as rights acquired under another normative system.\(^{41}\) These rights and interests are recognised\(^{42}\) but subject to extinguishment\(^{43}\) for the English law’s superior status.

It is not that Indigenous people did not demarcate their territories or boundaries between groups or sometimes even between individuals. They did so, but in a manner that did not appear formally to match English notions of the power to alienate interests in the land while radical title perpetually vests in the Crown.\(^{44}\) How these English notions were transported to Australia is shrouded in the mysteries of the trick the Englishman has of carrying with him some English law wherever he goes\(^{45}\) — in this case to the utter detriment of ‘aboriginal natives’.

Justice Finn held that the ‘varieties of sharing [territory]’ in certain instances equated with ‘ownership’ in the English legal tradition.\(^{46}\) The coastal dwellers of Botany Bay in 1788 did not take the colonisers on a boat ride pointing out the traditional areas of use by various families and groups, as the Torres Strait Islanders did with Justice Finn. Such an omission is perhaps a tragedy of history which cannot be reversed, but its effects can be mitigated through education and cultural understanding, which are important aims, and the reason for incorporating ICC in the curriculum. Property law and its effect on Indigenous land use and custom is therefore a reasonable addition to the unit content.

Thirdly, it was decided that it was important for students to understand the history of the impetuses for change in race relations in Australia. From Federation to the early 1960s there was little

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\(^{39}\) Murray Island Case, 71.
\(^{40}\) *Milirrupum v Nabalco Co Ltd* (1971) 17 FLR 141, 272.
\(^{41}\) *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43].
\(^{43}\) *Native Title Act* (1993) (Cth) Div 2B.
\(^{46}\) *Akiba v Queensland (No 2)* [2010] FCA 663, [262].
domestic pressure or appetite for change in the racial politics of Australia.\(^47\) Gardiner-Garden refers to Australia’s ‘poor international image’ and other pressures on the government in the early 1960s in relation to its treatment of Indigenous people.\(^48\) This international image had some effect on the bureaucracy with respect to Indigenous affairs.\(^49\)

The major impetus for change in the 1960s was a result of international factors.\(^50\) While Gardiner-Garden does not elaborate on these international factors, they probably included the formal defeat of Nazism and the rise of the notions of universal human rights, independent of race, creed or colour.\(^51\) Chesterman specifically notes Australia’s official desire to criticise South Africa’s practice of apartheid.\(^52\) Recall that notwithstanding the defeat of fascism in Europe, the White Australia policy was still officially in place. Thus, the domestic apartheid regime would have made Australia look hypocritical, and arguably quite foolish, as Aboriginal peoples in Australia were by this stage never going to constitute other than a very small minority and, unlike black South Africans, to be in the numerical position to end White rule. There was therefore a sense of urgency in the Executive to dismantle the race based laws of Australia.\(^53\) Thus an examination of international law and custom and the incorporation of some of these norms into domestic law is a useful third limb for the unit content.

Many other areas of law could have been included in a broader subject in the nature of a survey of a relevant topic. These include the impact of the criminal law on Indigenous people; intellectual property issues for the protection of Indigenous peoples’ biological resources and artistic and cultural works;\(^54\) the study of Indigenous companies, businesses, and corporate entities and Native Title Representative Bodies (NTRBs);\(^55\) family law issues and considerations of the kinship aspects of Indigenous custom;\(^56\) administrative law, which


\(^{49}\) Ibid.

\(^{50}\) Summers, above n 47, 6.


\(^{53}\) Gardiner-Garden, above n 48, 8.


\(^{55}\) Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).

\(^{56}\) Family Law Act 1975 (Cth), s 61F.
affects the rights and entitlements of many Indigenous people; the study and use of media law for Indigenous communities broadcasting in both English and their own languages; sports law for the large numbers of Indigenous people seeking a way out of poverty through sport; or anti-discrimination laws for self-evident reasons. These would all, but for time and space, have made equally useful additions to the unit. As more law schools consider the question of content with respect to ICC, it is likely that a useful body of knowledge and experience will develop. This experience will assist future unit convenors and help them to navigate the difficult issue of balancing the tension between breadth and depth of the substantive content.

C How the Substantive Unit Content Was Determined

Unit content at the ANU is determined by a range of factors including the research interests of teachers, prerequisite units available to prepare students, and faculty research priorities. The availability of Indigenous lawyers with research or practice interests in the area, and their availability to teach, is also a relevant factor. The current unit has had significant Indigenous input both in its design and delivery, and satisfies a broader aspirational criterion at the ANU Law School. As a general statement, however, the question of design and delivery of this, or any other unit, is subject to the availability of suitable teaching staff. The actual percentage of Indigenous academic or teaching staff in the Law School at the ANU is not dissimilar to other universities, which, with its attendant downstream consequences, is significantly below population parity.

Several factors were relevant in determining the contents of this unit. As mentioned, the ANU has a broader policy of research-led teaching. Further, issues of contemporary interest form a criterion and serve as a vehicle in delivering content to the class. With these factors in mind, the current unit content includes: a property law section on native title, including the issue of commercial exploitation of resources of the water column within the Exclusive Economic Zone; examination of constitutional recognition of Indigenous peoples in the context of their historical treatment at law; a comparative section

59 See also the discussion around n 31.
60 Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 (7 August 2013).
examining Indigenous issues in colonised common law jurisdictions similar to Australia; and a brief examination of Indigenous people at international law including an examination of the UN Declaration on the Rights of Indigenous People (UN DRIP).\textsuperscript{62} The class aims a depth of coverage in preference to a more comprehensive survey or broader coverage of material.

Some of the omitted content includes: examination in detail of the legislation and case law of the effects on the Aboriginal community of the operation of the Corporations (Aboriginal And Torres Strait Islander) Act 2006 (CATSI Act); examination of Aboriginal cultural heritage protection; broader human rights; international law; family law; child protection; and general criminal law issues. It would be difficult to sensibly cover the range of issues and areas of law that affect Indigenous people in any significant depth, and exclusion of important topics is necessary and thus inevitable, but can nonetheless be a subject of critique. It is therefore necessary to leave out content (or in some cases encourage incorporation of Indigenous content in other law units). The unit also cannot be characterised as focused on critical race theory.\textsuperscript{63}

Further, the unit does not include Indigenous laws — as opposed to Western laws that impact upon Indigenous Australians. Such a law unit is still some way in the future, both at the ANU and in Australia in general.\textsuperscript{64} As a point of comparison, in the Canadian experience Victoria Law School provides a full program in Indigenous law, some details of which can be gleaned from its publicity material.\textsuperscript{65}

However, ideally, ICC content would incorporate such Indigenous perspectives, laws, knowledge, tangible and intangible heritage,


\textsuperscript{63} See Richard Delgado and Jean Stefancic, Critical Race Theory: The Cutting Edge (Temple University Press, 2\textsuperscript{nd} ed, 2000).


\textsuperscript{65} See generally John Borrows, Canada’s Indigenous Constitution (University of Toronto Press, 2010) which argues for the recognition of Aboriginal law as a third source of law (after English common law and French civil law); Jeremy Webber, ‘Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples’ (1995) 33 Osgoode Hall Law Journal 623. The position on use of customary Aboriginal law in Australia is that Federal government laws ‘prevent judges taking account of customary law when passing sentence’ — a position opposed (among others) by the Law Council of Australia: Chris Merritt, ‘End ban on customary law in sentencing, urges law council’, The Australian, 18 February, 2010. Such prohibitions would make the discussion on the teaching of Aboriginal laws at Australian universities somewhat premature.
and skills (‘Indigenous knowledge’), in the general university curriculum. This ultimate aim then would seek not only to increase the level of ICC ‘about Indigenous people’ among non-Indigenous students but to help enrich their lives through knowing, feeling, seeing through Indigenous eyes, ears, hearts and minds — in a sense becoming one with their Indigenous compatriots in experiencing the sacredness of the Dreamtime vision of this timeless land. This body of knowledge is still largely not accessible through traditional Western educational avenues, but is, and will, become increasingly accessible through innovative programs such as NIRAKN mentioned above, which intend to help accelerate the process of Indigenous engagement and knowledge creation with the academy.

D Teaching and Learning Considerations

The primary pedagogical approach to the unit is student-centred, with assessment aligned to learning outcomes which demonstrate in-depth understanding. Class sizes are relatively small by design, which is potentially inconsistent with the aim of making ICC a generic attribute or skill. Indigenous students are a minority in all law classes. Further, a self-selecting group of later year students forms the class cohort, which limits the number of students gaining ICC.

In class, the method of delivery is basically a standard lecture and tutorial model. However, to increase student engagement, lectures and tutorials are interactive, with a mark attached to active class participation. The substantive legal content concentrates on primary sources: legislation and case law for domestic law, and primary international law materials.

The unit employs what is broadly referred to as the Socratic Method, a teaching method used in the Law School. Students are quizzed semi-randomly on the readings to gauge their understanding of the broader legal implications of the law. Law students generally face a high level of stress, and thus it is necessary to take reasonable

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66 It is conceded that the use of the term ‘Indigenous knowledge’, sometimes referred to as ‘Indigenous knowledges’, does not enjoy universal acceptance. It is used in this context to highlight the complexity that may arise from a plurality of perspectives and knowledge-producing research that stems from such diversity as is currently present in the Australian Indigenous community.


68 Statute of The International Court of Justice art 38(1).

69 Massimiliano Tani and Prue Vines, ‘Pointers to Depression in the Legal Academy and the Profession?’ (2009) 19 Legal Education Review 3, 6. Teachers spoke regularly to the class on this issue to help alleviate students’ concerns and help them to ‘relax’ a little. Student feedback on stress, including stress introduced by the Socratic Method (after their initial apprehension), confirmed that taking a more relaxed approach to assessing participation helped reduce stress levels.
steps to help allay student concerns and reduce stress levels in an interactive environment that can sometimes include confronting materials.

Students are assured that it is not so much about getting the ‘right answer’: the object of the exercise is to promote informed and respectful debate on some very complex human issues and that in any event, there seldom is a ‘right answer’. The student feedback on the ‘relaxed delivery and teaching style’, an intentional element of teaching method, is arguably working to help overcome some of the stressors and to help promote active thinking on the issues and therefore deeper learning outcomes.

The Socratic Method of interaction also loosely aligns with the traditions and cultural practice of oral traditions of teaching and learning in Indigenous cultures, which helps the perception that this method is more authentic, encourages participation and helps overcome student reticence. Interactive learning also helps students to tease out the complexities of the material while maintaining a livelier but ‘safe’ class learning environment. Student engagement is also enhanced through performativity such as role plays, scenario-based learning and practice moots in conjunction with general legal argument, based on pre-set ‘facts’ and reading. The aim here is for students to ‘feel’ what practical engagement with Indigenous people might mean in a legal setting in their future practice of law.

Taking an experiential approach, or providing ongoing practical opportunities ‘individually to engage’ by encouraging students to participate as volunteers or observers at Indigenous conferences, symposia and workshops organised by the ANU, further reinforces Indigenous pedagogy and teaching methods. Such opportunities allow students to hear from and interact with Indigenous lawyers, elders, and others working on Indigenous issues and to do so in a direct, face-to-face or first-hand manner.

The second limb of the ICC definition requires students to recognise that ‘Indigenous clients’ are as diverse as any other group, and to develop students’ own communications skills in a way that would enable them to act with a degree of empathy based on a deeper level of knowledge and experience. Students are encouraged to identify relevant distinctions by asking: ‘What does “law” mean to a particular Indigenous community?’ and ‘How and what is the appropriate language that most effectively and accurately communicates “my reflection of Indigenous perspective”, whatever that might mean, to the client, the tribunal or the court?’

The Law School also works closely with the National Centre for Indigenous Studies (NCIS), headed by Professor Mick Dodson, a

70 For a Canadian application of this method at a law school see: <http://ring.uvic.ca/news/experiential-learning>.

71 UACC Guiding Principles, above n 4, 4.
prominent Indigenous legal academic. The NCIS is co-located with the Law School, where law students can and are encouraged to deepen their engagement with Indigenous staff and with a range of practical Indigenous issues and research interests. Such engagement includes undertaking short research projects for credit, possibly creating options in the longer term for internships, or being supervised for their honours or higher degree research programs by Indigenous academics. The programs conducted at the NCIS can also provide students with the option of direct experience with such research and projects.

The resource intensive nature of broad experiential learning does not, however, help to broaden the base of the number of students acquiring ICC. On the other hand, all of these teaching methods would reasonably help to improve students’ ICC as defined in the UACC Report.

E Assessment Regime

The theoretical framework and methodology applied to the unit assessment regime is a form of that articulated by Miller, employed here as it is used generally at the ANU. It is described below.

The first limb of the ICC definition requires the acquisition of requisite knowledge and understanding. Knowledge of the set readings and case law is assessed in many ways, including by questioning students in class throughout the semester. To promote engagement, marks are allocated for students’ active participation. Students’ level of sophistication of analysis is often academically rigorous and insightful. Evidence of deeper learning and understanding are assessed through research papers, which include set topics and related issues nominated by students. There is no final exam in this unit; assessment is continuous to encourage on-going engagement with the material and to best assess the students’ growth throughout the unit.

The second limb of the ICC definition requires the skilful application of the knowledge and understanding acquired in the first limb. Students’ ability to apply the law is assessed through case studies and online writing as well as by the submission of several short pieces selected from among a range of scenarios. Role-plays give students the opportunity to demonstrate their appreciation of the various stakeholders’ interests, perspectives and positions. Students are not expected to ‘own’ a perspective, only to be able to articulate

73 Allocation of marks to an activity including bonus marks appears generally to be the single most effective motivating factor for students to engage.
and present a client’s position as best they can, and for which a grade is awarded.

According to the feedback, the exercises and debriefing were both described as informative and ‘fun’ — an indication that an atmosphere conducive to deep learning was likely to be taking place.\textsuperscript{74} It is also a clear marker of students’ productive engagement with the unit material. The ‘student shows how’ aspects are also assessed in plain English statements. For example in one case a submission was made to a ‘live’ on-going enquiry, and in another a letter was sent to the editor of a local newspaper on an Indigenous issue.

Finally, while not a direct element of Miller’s methodology, building empathy with Indigenous peoples as clients, stakeholders or citizens is an implied element of the second limb of the ICC definition. Empathy is about understanding another’s perspective and demonstrating this understanding. Empathy is assessed through reflective posts submitted online, if necessary privately, where students can be open and honest, expressing true-to-character views, as long as the work is well researched, thought out and considered.

\section*{V Evaluation of Teaching and Learning}

ANU evaluation of units is carried out by the Student Evaluation of Teaching and Learning (SELT), an administrative section of the university that is independent of the faculties. Standardised unit evaluations are administered, collated, and anonymised by SELT. Results are provided to teachers in a standardised format. Unless otherwise indicated ‘student feedback’ in this paper refers to quotes taken from anonymous feedback.

Since evaluations changed from paper to a computer-based system, the response rates generally have dropped dramatically. Since 2010 much of the data collected by the computer-based systems, particularly for smaller classes, is too limited to be statistically significant. However, they are still indicative.

The general feedback for the unit was that the enthusiasm for teaching, the relaxed non-judgmental atmosphere of the class, and the use of film, music and humour stimulated and increased the students’ own interest and love for the subject. Many students commented that this was their favourite law unit so far, and this arguably creates a desire for further learning and engagement with the Indigenous community — at least for these students. Ideally, university students will acquire a love for lifelong learning, including for Indigenous legal issues.

\textsuperscript{74} For a discussion of deep as opposed to shallow learning see: Michael Head, ‘Deep Learning and “Topical Issues” in Teaching Administrative Law’ (2008) 17(1&2) \textit{Legal Education Review} 159.
This paper employs Biggs’s taxonomy to examine the operation of the teaching approach taken in the unit and whether it achieves its stated (and aspirational) aims, broadly speaking, of increasing ICC. The unit is considered as a law elective and counts as part of the students’ law program. All written work and essays are marked according to Law School standards.

A Presage: Learning Environment and Student Characteristics

The important broader issue with respect to evaluating the penetration of such a unit is to use student evaluations to help develop strategies to appeal to those who do not at present engage with Indigenous legal issues through their law program. To be effective in its current format the class size has to be relatively small, and is a distinct disadvantage in achieving a broader ICC.

The Priestley 11 and the compulsory law units already give mainstream students some familiarity with important Indigenous issues. This general exposure however, in the opinion of the Panel, did not go far enough. The need for incorporating ICC in the compulsory units has been widely recognised and is endorsed in this article.

SELT feedback generally is positive. However, the requirement for public postings of their views has been criticised at times. Some students indicated that they would prefer to post privately only but without being negatively perceived as not engaging with the rest of the class. In response to the critique students now engage with hypothetical problem questions which allow students to represent a putative client’s views and therefore to explore a range of legal and policy options available to the hypothetical lawyer or stakeholder without having to express their personal views, other than on the substantive law which applies.

In the same vein, in the role playing opportunities, students are encouraged to act ‘true to type’ (including ‘the extremes’ for good pedagogical reasons). Students appear to be much more comfortable with expressing a range of views through a ‘role’ than they are with expressing a personal opinion and student feedback on role play

75 John Burville Biggs and Kevin Francis Collis, Evaluating the quality of learning: the SOLO taxonomy (structure of the observed learning outcome) (Academic Press, 1982).
76 See above n 29, 1.
77 UACC Report, above n 2.
78 The incorporation of Indigenous perspectives in the Priestley 11 has been considered by scholars, for example see above n 57. The systematic incorporation and penetration of ICC into the Priestley 11 is likely to take some time and will arguably depend on the success and popularity to some extent among students of units such as the indigenous Australian and law type electives: see above n 7.
aspects of assessment are generally positive with respect to the acquisition of ICC.

Finally the exercise of engaging with public fora such as conferences, workshops and symposia on Indigenous issues is generally regarded positively although the student response is that these events are sometimes too close to the exam period or that the allocated marks do not always fairly reflect the time and effort expended on these activities. These are reasonable critiques, but they are difficult to address due to the Law School assessment regime and the permissible quanta for marks distribution or the scheduling by others of conferences and symposia over which teachers have little control.

B Developing a Body of Indigenous knowledges

As mentioned, there is a paucity of information on Indigenous knowledges, particularly from Indigenous perspectives, in a form acceptable to the mainstream academy. While Europeans have studied Indigenous ways, languages, laws and spiritualities, there must be some questions as to the level or depth of scholarship, as it took nearly 200 years for these scholars to establish as a matter of legal fact that the continent was not empty, or that Indigenous people were civilised, or that Indigenous people should be counted in the census. This is clearly a very superficial and shallow argument and the complexities of these issues need much better information bases and depth of analysis. But the point is that unless Indigenous voices are heard in the mix, the perception that this body of scholarship is ‘colonial’ is likely to persist.

Yet it could not be coincidental that there is a correlation between the absence of Indigenous researchers in the academy in the past and the paucity of research in the area. It is true that Indigenous people are greatly underrepresented in the academy, but on the other hand, it must be acknowledged that Kumantjayi Perkins, perhaps the first university graduate, was permitted to enter the academy as a student only very recently, historically speaking. On this yardstick Indigenous people have done remarkably well to show high rates of growth in their participation rate in universities to date. The absolute numbers are clearly very low, and must be improved if a significant body of knowledge is to be built and which reflects Indigenous views.

79 See Australian Broadcasting Corporation (ABC), Fire Talker: The Life and Times of Charlie Perkins (2011) <http://www.abc.net.au/programsales/s2850343.htm>. Kumantjayi is a name used to refer to a deceased. He was known in life as Mr C Perkins.

The Australian Research Council has arguably recognised this gap — or at any rate supported\(^\text{81}\) the creation of the National Indigenous Researchers and Knowledges Network (NIRAKN):\(^\text{82}\)

NIRAKN will comprise 44 Indigenous academic network participants from 21 universities, the Australian Institute of Aboriginal and Torres Strait Islander Studies and five Indigenous partner organisations. It is intended that the Network will have a dispersed presence, administered from a central ‘hub’ at QUT under the leadership of Professor Aileen Moreton-Robinson. The Network will work with collaborative ‘spokes’ of Aboriginal and Torres Strait Islander researchers throughout Australia.

The research output of such a group is likely to be significant, and bodes well for the development of Indigenous knowledges in the medium term. Their research output in several fields will mean that the knowledge component of ICC is likely to benefit, and can form the basis of future units on Indigenous law itself.

VI SUGGESTIONS FOR LAW SCHOOLS SEEKING TO EMBED ICC IN LAW UNITS

While it would be good to be able to provide a comprehensive guide to other law schools embarking the ICC journey, it is clearly much too early for the ANU unit to provide any definitive pearls of wisdom. As an elective unit, its reach is quite limited and the aim of achieving universal coverage is not met. Reaching all law students can perhaps only be achieved by inclusion of ICC elements in the Priestly 11 or some other mandatory law-school-wide program. Although the authors of the Learning and Teaching Academic Standards Statement recognise that law is ‘informed by many perspectives (including Indigenous perspectives)’, the Teaching and Learning Outcomes for the LLB do not include ICC as a specific educational outcome.\(^\text{83}\) What can be said is that taking up the UACC Report’s challenge is itself a positive exercise.

The subject content is limited by the areas in which researchers are actually working. Therefore the rationale given above for limiting unit content to constitutional law, property law and international law might be a justification of the inevitable, given researchers’ areas of interest, rather than a true objective and rational choice. Undertaking the process of rationalisation is nonetheless useful, as it creates opportunities for critique. In any event, it is necessary to have limited

\(^{81}\) Special Research Initiative for an Aboriginal and Torres Strait Islander Researchers’ Network (05/11/12) <http://www.arc.gov.au/ncgp/sri/atsirn.htm>.


\(^{83}\) Sally Kift, Mark Israel, Rachael Field, Bachelor of Laws Learning and Teaching Academic Standards Statement (Australian Learning and Teaching Council, 2010).
topics in order to get depth and not merely breadth. An enormous range of topics could be used, and it makes sense for teachers to choose ones they are researching in, can share their expertise about, and will be able to present to students in engaging ways by virtue of their own interest in and passion for the topic.

A shortcoming of the pedagogical method is that it is only likely to work with a small cohort because of its resource-intensive nature. As the unit matures and a body of critique and experience grows, perhaps novel means of expanding student numbers can be examined. The outputs of networks such as NIRAKN, which are producing books and journal articles, are also resources upon which ICC proponents can draw.

Finally, it is perhaps the collective knowledge of the experiences of the many law schools that will provide the substantive body of knowledge, experience and student responses which, when interrogated as a combined data-set, will provide better answers to the range of questions that need to be answered. In the meantime, articles such as this will hopefully find a critical audience to provide critique and feedback for improvement and help to develop both the content and the delivery of the ICC, at least to law students. UA aims for all disciplines to engage in ICC, and law students — many of whom are in joint programs across faculties — could provide a useful bridge and insight as to how the delivery of ICC can be expanded. The UACC Report gives examples of pilot projects in non-law areas and does provide general guidance for areas in the social sciences.84

VII CONCLUSION

There is no agreed definition for ICC, but the UACC definition is a useful base which can be refined and adapted over time. One of the key objects of the ANU unit described in this article, and part of the development of students’ ICC overall, is to give them an appreciation for the complexity of Indigenous ontologies, communities, laws and history. This is a broad and complex outcome and the assessment, as discussed above, was designed to elicit understanding of this body of learning.

Some of the cognitive outcomes are assessed by way of a research essay through which students can demonstrate a deeper understanding. In a period of just over a century Australia went from considering Indigenous people as ‘fauna’, to considering them full citizens, generally enjoying equal formal rights. Students, through their essays, ably demonstrate the implications of such change while recognising that achieving substantive equality is still some way in the future.

84 UACC Guiding Principles, above n 4, 29.
The greatest drawback from the perspective of achieving ICC is that only a limited number of students can take up the unit. Broader coverage can only be achieved by incorporating ICC elements into the compulsory units. This is, however, a significant step and the faculty will require much more data from a range of universities’ programs before it is seriously considered.

On the other hand, it comes a surprise to many mainstream students that there is a world outside the Constitutional liberalism which so shapes their lives — particularly with respect to the ‘legal limbo’ in which some Indigenous people live, a Constitutional twilight zone that permits drastic ‘lawful’ intrusion into their lives and communities, as occurred in the Northern Territory Intervention. For some students it is the first realisation that legal and constitutional hurdles of the past still lie in the path of Indigenous peoples, say in achieving formal constitutional equality, let alone substantive equality. In her feedback one student described her ‘Aaah moment’, after which she found it easier to be either critical or sympathetic on Indigenous issues as necessary. The ultimate aim of the unit therefore, to cite this student, is to enable each student to reach their own ‘Aaah’ moment in this area. However, to expect an institution, or even one generation to do all that, it is necessary (to use the words of Olney J in another context) to ‘wash away’ the historical tide of oppression — something that is probably quite unrealistic.

Yet there is reason for optimism, as students taking the unit are largely self-selecting, self-motivated, self-directed and eager to make a difference. In most cases, they are naïve enough to believe that they can individually make a difference, and probably clever and motivated enough to actually change their world through their legal careers. Therefore, harnessing this goodwill, youthful exuberance and desire for justice, and giving them the confidence and skills to engage with our open political system, is not an unrealistic aim. A greater level of confidence to deal positively and affirmatively with Indigenous peoples will further enhance their abilities and skills, already developed to high degree by an excellent law program. Not only arming students with knowledge and skills, but also fostering empathy and inspiring the desire and passion for change, is an important role that all universities can and must play in healing the lingering symptoms of the historic sore of Indigenous dispossession and discrimination.

A NEW LEGAL ETHICS EDUCATION PARADIGM: CULTURE AND VALUES IN INTERNATIONAL ARBITRATION

MAGDALENE D’SILVA*

I INTRODUCTION

Cultural understanding and sensitivity, or the lack thereof, is perhaps the single major cause of international disputes in the first place. Let us not fall into the same trap as does the western businessman who closes a deal in unknown territory without first doing his homework, assuming the rest of the world operates the same as his own culture and is then baffled when his venture runs into trouble.¹

This article offers a typology for rethinking the case for legal ethics education in the English law degree curriculum, by discussing the role of culture and values in the field of international arbitration. Unlike the situation in other Anglo-American common law jurisdictions such as Australia and the United States, legal ethics is not currently a mandatory foundation subject in the English law degree. Persistent debate in England and Wales now revolves around whether it should be. The question is the subject of ongoing discourse,² and in this ‘outsider’s’ opinion the reasons for hesitancy are valid. There are understandable concerns about an already over-crowded law degree curriculum, and whether a law degree should remain a purely academic qualification for a liberal education that

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¹ Karen Mills, ‘The Importance of Recognising Cultural Differences in International Dispute Resolution’ in Michael Pyles and Michael Moser (eds), Asian Leading Arbitrators’ Guide to International Arbitration (Juris, 2007) 76.

recognises the existence of different values and teaches students to be aware of the need for individual autonomy to make conscious choices about their own values. By doing this, a liberal education refrains from promoting any particular values over others and does not seek to inculcate students with some values but not others.³

There is also uncertainty about what actually constitutes legal ethics. Even if the scope of this concept is agreed, it does not precisely determine what should be taught in accredited legal ethics courses. In this context it should be noted that post-graduate legal ethics courses based on professional practice usually adopt a largely rules-based focus on legal professional conduct regulation.⁴ The 2013 Legal Education and Training Review (for the future of legal services education and training regulation in England and Wales) said:

The centrality of professional ethics and legal values to practice across the regulated workforce is one of the clearest conclusions to be drawn from the LETR research data, and yet the treatment of professional conduct, ethics and ‘professionalism’ is of variable quality across the regulated professions.⁵

Yet the delay in introducing legal ethics in the English law degree can be seen positively, as providing a unique opportunity to produce a first class curriculum, and the discussion’s growing focus on legal ethics as synonymous with ‘values’⁶ is highly commendable. This is because the legitimacy and effectiveness of legal ethics education might be harmed by a positivist legal practitioner conduct rules-based approach — which, as Barnaby⁷ has said, requires a re-conceptualisation of legal ethics in a way that responds to real life experience.

This article addresses the topic as follows. Part II explains why, in a liberal legal education, different legal cultural values play a role in academic and practice-based legal ethics and arguably ought to be included in legal ethics education generally. Part III attempts to


⁴ Ibid 1.


demonstrate this argument by referring to legal ethics issues and soft law reform developments in the field of international arbitration as a typology. The article concludes that the case for rethinking legal ethics education in a graduate or undergraduate law degree (regardless of jurisdiction) can perhaps be made on the basis that in a liberal legal education, teaching about diverse cultural values in legal ethics courses is necessary for all law students who will inevitably graduate into a transnational/sub-global and global environment, whether or not they enter legal practice. In so far as moves toward a global mindset as a formal goal of legal education are concerned, the International Association of Law Schools Global Deans Forum (of more than 80 law schools around the world), convened in Singapore in September 2013 and agreed on the Singapore Declaration on Global Standards and Outcomes of a Legal Education (‘Declaration’). This Declaration states (amongst others matters) that legal education needs to be informed by evolving domestic and international norms. The Declaration also recognises that one of the desired legal education outcomes for law students is an understanding of ‘Values’:

A law graduate should know and understand the need to act in accordance with:

i. The professional ethics of the jurisdiction; and

ii. The fundamental principles of justice and the rule of law.

Consequently, this article is based on the premise that a main function of a liberal legal education is to provide law students with an awareness of different legal profession norms and values within their own jurisdiction and other jurisdictions, in diverse ‘social, political and economic contexts.’ The article argues that this function can be fulfilled by a new legal ethics education paradigm by referring to culture and values in international arbitration as a typology.

10 Ibid 3.
11 Ibid, 4.
II THE SCOPE OF LEGAL ETHICS EDUCATION

This Part discusses the scope of legal ethics education in the context of its current gestation in England and Wales, where undergraduate legal ethics courses are not yet mandatory. A brief comparative overview of examples of legal ethics education and academic scholarship in comparative common law jurisdictions in Australia and the United States is provided. In those jurisdictions, legal ethics has been a mandatory component in the university law degree curriculum for some decades.

The meaning and scope of legal ethics as a concept (or as it known in some jurisdictions, ‘lawyers’ professional responsibility’ and ‘professional conduct’) is broad and somewhat unclear. Many have already ably sought to define legal ethics, and it is unhelpful to repeat the task here. For the purpose of the discussion in this article, legal ethics is regarded as all legal professional behaviour involving the exercise of discretion. This encompasses not just technical instruction on professional conduct with regard to minimum compliance with professional codes and rules, but also the motivations, incentives and values that influence discretionary decisions about the best approach to take in any given situation when seeking to serve the interests of justice and a client’s best interests.

A prevailing view is that ‘ethics and values are at the core of training and regulation … integral to the concept of a regulated legal services provider’. Seen in this way, the nature and teaching of legal ethics must go beyond technical instruction on meeting minimum regulatory standards, but not so far that it becomes too esoteric, because inter-disciplinary scholarship about lawyer behaviour and legal ethics philosophy is becoming more important to understand and explain concerns about economic downturns in other parts of society (such as the role played by large law firm lawyers in systemic corporate failures around the world during the past decade).  

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13 The term is taken from the title of a leading legal ethics university text in Australia: Gino Dal Pont, Lawyers’ Professional Responsibility in Australia and New Zealand (Thomson Reuters, 5th ed, 2012).
14 For example see Donald Nicholson and Julian Webb, Professional Legal Ethics; Critical Interrogations (Oxford University Press, 2000) 4.
Where legal ethics is taught and studied alongside other substantive
law subjects, it arguably provokes an early ethical mindset in the
inductive or deductive analysis and application of legal principles to
legal problems. As Parker and Rostain cogently argue in their socio-
legal analysis of the role of a large Australian commercial law firm in
the controversy over the James Hardie corporate restructure, had the
relevant junior lawyer involved decided to refer to scholarly literature
on legal ethics, that may have assisted them to better understand the
situational context in which they were working when under pressure
to craft legal advice based purely on black letter law.17

Yet the potentially unwieldy scope of what constitutes legal ethics
is rightly recognised to be an important obstacle to be surmounted
before legal ethics can be uniformly introduced as a legal education
course, as is being considered by relevant professional bodies in
England and Wales with professional academic support.18 The other
issue that needs to be mentioned with regard to the utility of legal
ethics education (but which is beyond the scope of this article) is
the fact that a law degree is not the only route to a legal practice
career in England and Wales.19 This article does not address that
issue but does acknowledge that the introduction of mandatory legal
ethics education in the English law degree needs to engage questions
about why and whether similar education needs to be replicated for
all lawyers, including those who enter legal practice by routes other
than by obtaining a law degree.

It is useful to juxtapose the English hesitancy toward legal
ethics education in the law degree curriculum with the way in which
legal ethics education is more widely taught by law schools in the
United States, where law is studied as a postgraduate degree (the
Juris Doctor or ‘JD’) only after another discipline has been first
studied at the undergraduate level. The possibly more enthusiastic
teaching of legal ethics education in the United States may be part
of a favourable response by many US and Canadian law schools to
the 2007 Carnegie Report.20 That report reviewed the teaching of
law and recommended various ways in which law school curricula

John C Coffee Jnr, "The Attorney As Gatekeeper: Am Agenda for the SEC"
(2003) 103 Columbia Law Review 1293; David Kershaw and Richard Moorhead,
"Consequential Responsibility for Client Wrongs: Lehman Brothers and the

17 Parker and Rostain, above n 16, 2354.
18 Andrew Boon, Report for the Law Society of England and Wales 2010 Legal
Ethics at the Initial Stage: A Model Curriculum (The Law Society, 2010). Also
see Legal Education Training Review, above n 13, 4. Consider the New York
University Law School’s ‘Centre for Professional Values and Practice’: <http://
www.nyls.edu/centers/harlan_scholar_centers/center_for_professional_values_
and_practice>.
20 Anne Colby, William Sullivan and Judith Welch Wegner, Educating Lawyers:
Preparation for the Profession of Law (Jossey Bass, 2007).
could be reformed to better prepare graduates for the practice of law. Although perhaps contrary to the tone of discussion in the English context (a liberal education which is removed from the values solely pertaining to vocational legal practice), the comparison is worth bearing in mind.

Harvard Law School’s JD, for example, requires students to complete two courses from its Professional Responsibility range of offerings, which includes: ‘Ethics and Tactics in Criminal Law’, ‘Government Lawyer’ (prosecutor ethical duties), ‘Introduction to Advocacy: Skills and Ethics in Clinical Practice’ and ‘Legal Profession: Law and Social Movements’. The focus at Harvard (as an example of the approach to legal ethics education courses at leading US law schools) appears to be much broader than the professional conduct of the individual lawyer as a unit of behaviour. Subjects are directed at understanding the legal profession, its history of evolution, its role in politics and community reform, its own diversity — and, indeed, the duty the profession owes to itself to be ethical in the way it operates, not only with regard to client and court room duties, but to one another. Ten years ago, Harvard’s Director of the Program on the Legal Profession, Professor David Wilkins, rightly referred to a law school’s duty to study and teach about the legal profession while acknowledging that legal ethics teachers did not (and perhaps still do not) entirely agree on the meaning of legal ethics. Although speaking about inadequacies in legal ethics pedagogy in American legal education at the time, some of Wilkins’s views were prescient with regard to a lack of serious scholarship on normative structures in legal practice, and the then attempt to address this by creating legal ethics education programs as a foundation for the serious study and understanding of lawyer professionalism. Wilkins’s own comprehensive scholarship on legal profession duties, by way of critical analysis of the evolution of the lawyer–client relationship from agency toward a series of networks (a concept which this paper expands upon in the second part), has been similarly echoed in recent academic scholarship as helping to explain the lack of social connectedness of modern lawyers as hindering their ability to ‘come to grips with the situations in which they find themselves’.

22 Wilkins, above n 12, 47.
23 Ibid 48.
26 Parker and Rostain, above n 16, 238.
Australian law schools similarly provide legal ethics ('professional conduct') as a mandatory course in the Australian law degree curriculum pursuant to the Uniform Admission Rules, which require all courses to address as a minimum an individual lawyer’s professional conduct in the form of ‘duties’ to the court, to clients, to fellow practitioners and to the community, as well as a basic knowledge of trust accounting (the ethical handling of client’s money).\(^{27}\) Legal ethics is also one of six Threshold Learning Outcomes (TLOs) for the Bachelor of Laws (LLB) under the Australian Qualifications Framework (AQF) administered by the Tertiary Education Quality and Standards Agency (TEQSA). TLO 2, on Ethics and Professional Responsibility, states:

Graduates of the Bachelor of Laws will demonstrate:

a. An understanding of approaches to ethical decision-making;

b. An ability to recognise and reflect upon, and a developing ability to respond to legal issues;

c. An ability to recognise and reflect upon the professional responsibility of lawyers in promoting justice and in service to the community; and

d. A developing ability to exercise professional judgement.

Irrespective of whether a law degree is studied as an undergraduate or graduate degree in Australia (depending on the relevant institution’s rules for student acceptance), an accredited law degree is mandatory across Australia for all law graduates wishing to pursue careers as practising lawyers. Australia does not have a non-law degree/diploma qualification route to qualifying as a lawyer. The contrasting position in England and Wales is that lawyers may obtain a non-law degree (in disciplines such as English Literature, Ancient Greek History or Modern Languages for example) and then complete a one-year conversion law diploma before completing a period of pupillage in barristers’ chambers, or a training contract in a firm of solicitors. Those pursuing a career as a barrister must complete either an undergraduate degree in law (LLB) or an undergraduate degree in any other subject followed by a one year conversion law course,\(^{28}\) a one-year bar professional training course (‘BPTC’), and then one year of pupillage in a set of barristers’ chambers.\(^{29}\) Those wishing to become solicitors must complete an undergraduate qualifying law degree or, for those already working in a legal office, apply to become lawyers.


\(^{28}\) The Graduate Diploma in Law (‘GDL’).

members of the ‘Chartered Institute of Legal Executives’ after passing examinations for admission as a fellow. The other option for those who do not hold a qualifying law degree is to complete a Common Professional Examination Course or a Graduate Diploma in Law (a one-year conversion law course). This is followed by completion of the Legal Practice Course, and then a two-year training contract in a firm of solicitors, during which time the candidate must also complete a one-week Professional Skills Course that addresses client care and professional standards, advocacy and communication skills, and financial and business skills.\(^\text{30}\)

Although many law graduates do not go on to qualify and practise law as lawyers, the argument here is that those who study law still need an appreciation of the legal ethical context in which the law is studied, practised, lobbied and reformed. Nevertheless, even in Australia as an example, the minimum legal ethics course requirements at the undergraduate stage are still primarily focused on the regulation of the professional conduct of individual lawyers, and the author is unaware of any empirical research in the Australian context that shows that this form of mandatory undergraduate legal ethics education has produced more ethical lawyers than prior generations who solely learned legal ethics on the job.\(^\text{31}\)

Perhaps empirical research on the ethical standards of Australian law graduates in this regard is unnecessary given that, despite its relatively small population compared to that of the USA and England and Wales, Australia is notably advanced in its legal ethical consciousness in university law school education, in terms of the increasingly uniform incorporation of insightful legal education academic scholarship,\(^\text{32}\) along with a growing number of legal ethics initiatives by legal profession bodies.\(^\text{33}\) The flurry of legal ethics

\(^{30}\) See ‘Routes to Qualifying’ <http://www.lawsociety.org.uk/careers/becoming-a-solicitor/routes-to-qualifying/>.


\(^{32}\) There is a rich body of legal education and ethics scholarship in Australia. For example see: Nick James, ‘Australian Legal Education and the Instability Critique’ (2004) 28 Melbourne University Law Review 375; Parker and Aitken, above n 6; Christine Parker, ‘What Do They Learn When They Learn Legal Ethics?’ (2001) 12 Legal Education Review 175.

\(^{33}\) The Law Institute of Victoria was the first law society in Australia to introduce mandatory ongoing legal ethics education for its legal profession in 2004, and this has been followed by some (but not all) states and territories. The Queensland Law Society is also progressively engaging in legal ethics discourse and education and is nobly seeking to inculcate the question of values into its definitions.
projects activity across Australia might conversely indicate that concerns about the need to adapt and evolve legal ethics education are not unique to England and Wales. Similar debate is also occurring in Canada about the introduction of ongoing mandatory legal ethics education for admitted practising lawyers, noting that ‘Professional Responsibility’ is now a mandatory discrete subject in the Canadian law degree curriculum.

Although various law schools in Australia have created and are producing leading and progressive legal ethics education programs in the law degree curriculum, therapeutic jurisprudence initiatives at Monash University in Victoria are worthy of particular note, given this article’s attempt to demonstrate the importance of legal ethics education by considering the role of culture and values in international arbitration as a typology. According to Evans and King, therapeutic jurisprudence is an approach that recognises the parallel role of virtue ethics (in the Aristotelian sense of an ethic of goodness, courage, honesty, thoughtfulness, benevolence, compassion and resolve), by drawing on studies in behavioural sciences to see the law as a series of processes and actors which recognises that its actors (lawyers and the judiciary for example) have a positive and negative effect on the well-being of others in society. Therapeutic jurisprudence is a progressive approach that the Monash law school appears to be taking to the study and teaching of law and legal ethics in legal education, which recognises that ‘the law and the behavioural sciences share an interest in the nature of the human psyche and human behaviour, and the mechanics of positive behavioural change.

In short, this is an example of an approach to legal education which ultimately accepts that the law and the legal profession comprise diverse social human beings living in ‘communities tied together with normative bonds’. As values and culture are inherent aspects of human beings, it follows that values and culture are inherent in the study and understanding of legal ethics — as the behaviour of lawyers

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35 Professional Responsibility is now a separate and mandatory subject for all Canadian law schools as decreed by the Federation of Law Societies of Canada. See ‘Syllabus Professional Responsibility’ (May 2013) <http://www.flsc.ca/_documents/NCASyllabusProfessionalRespMay2013.pdf>.


37 Ibid 718.

38 Ibid 724.

who are human beings in a professional context, most particularly in international arbitration where values and culture play a leading role. The argument offered here thus does not favour or reject legal ethics as a mandatory legal education requirement in England and Wales. Rather, the aim is to appeal to those who seek to promote the development of law through progressive research scholarship, to inspire all students (whether they become legal practitioners and/or proponents of law reform in other roles) to frame their substantive study of law as an academic discipline, within the context of the cross-cultural legal ethical challenges they will inevitably face in transnational settings of a globalised era.40

A An Example: Legal Ethics at City University
London’s Law School

In addition to courses offered by the Centre for Ethics and Law at University College London,41 the Graduate Diploma in Law Programme (‘GDLP’) one year conversion course offered by the City Law School at City University London (‘City’) is at least one example of legal ethics being made the eighth area of legal knowledge for law students (in addition to the mandatory seven foundation subjects required in all law degrees in England and Wales).42 City’s ‘Introduction to Legal Ethics’ course satisfies the eighth area of knowledge requirement, although it occupies a far smaller part of the programme than any of the foundation subjects. Dr. David Herling reported to the author his having received consistently high positive feedback from student survey responses to City’s legal ethics course curriculum, which is not doctrinal, or based on technical instruction about professional conduct rules. Rather, the stated aim of City’s legal ethics course is to engender students with both an ethical literacy and a sense of the ethical challenges they will face in the practice of substantive law, by taking into account lawyers’ perceived and actual role in society and how their professional duties will be met under commercial and regulatory market pressures imposed by the state.43 City’s legal ethics course is oriented towards engaging thought-provoking discussion about values, and encourages students

40 The author is anecdotally aware that different law schools in the United Kingdom have made various attempts to introduce legal ethics education in undergraduate law degrees with various degrees of success. The author notes for example conference paper abstracts for presentations at the Society of Legal Scholars Bristol Conference on Practice, Profession and Ethics, September 2012.
41 ‘Lawyers: Practice and Ethics’ is also taught in the undergraduate law degree program at University College London by Professor Richard Moorhead.
42 The author thanks Dr David Herling at the City Law School in London for providing information on his legal ethics course in the GDLP, for the purpose of this article.
43 Under the Legal Services Act 2007 (UK) Part 1 s 1(e), a stated regulatory objective is the promotion of competition in legal services.
to reflect on how their own values will be expressed, tested and developed in legal practice.\textsuperscript{44}

B The Evolution of Legal Ethics: Values

These values-based aims are an important foundation of legal ethics education for undergraduate students because they cultivate a conscious emotional awareness of their own values as well as more global and transnational cultural values — in the sense of a legal ethics pluralism that is not confined to one’s own domestic national jurisdiction as non-western legal cultural values also exist. The author has, for example, previously made the case in Australia (where legal profession regulation is further complicated by constitutional federalism) that technical legal ethics education needs to move beyond navel gazing preoccupation with domestic and state-based professional conduct rules.\textsuperscript{45}

This is not to suggest that legal ethics needs to go ‘global’ (although as is outlined later there are certainly movements at the international coalface in that direction). Rather, the suggestion is that legal ethics may be essential for undergraduate law students because, as Flood and Lederer explain, the practice of law is increasingly globalised with many lawyers now training in one jurisdiction, obtaining postgraduate qualifications in another and then working globally, as ‘the legal profession defers to globalisation in response to client demand’.\textsuperscript{46} Indeed, it is due to the phenomenon of cross-border lawyering that the term ‘lawyer’ is necessarily used in this article to refer to anyone with a legal qualification, because the path to legal practice admission varies around the world.\textsuperscript{47}

Legal ethics discourse therefore asks: what do lawyers value, personally and professionally, and what are the broader cultural

\textsuperscript{44} See the City Law School, Graduate Diploma in Law Programme, \textit{Introduction to Legal Ethics} Course Outline 2012/2013. The author understands that other legal scholars in the United Kingdom regularly conduct legal ethics courses at leading universities such as University College London.


\textsuperscript{47} See Harvard Law School’s reports on different routes to legal admission around the world: <http://www.law.harvard.edu/programs/plp/pages/comparative_analyses.php>.

\textsuperscript{48} In Australia, for example, the Queensland Law Society (QLS) website states that: ‘Lawyers’ ethics are principles and values which, along with conduct rules and common law, regulate a lawyer’s behaviour. They act as a guide to ensure right conduct in the daily practice of law’; <http://ethics.qls.com.au/content/topic/legal-ethics>. Also see W Bradley Wendel, ‘Value Pluralism in Legal Ethics’ (2000) 78(1) \textit{Washington University Law Review} 113, 132.
and community contexts in which lawyers fulfil and generate their values. Legal ethics can be a matter of understanding the internal personal values of the individual as well as the way the external cultural values of their working environment (law firm, in-house, government, barristers’ chambers, court rooms, private international arbitration venues, for example) impact upon and influence their discretion in any professional setting. This includes settings outside public court-rooms (such as in private international arbitration proceedings), where law graduates in one jurisdiction increasingly compete with foreign overseas law graduates from other jurisdictions, in a transnational economic and business world that is influenced by global law firm expansionism.

Global law firm expansionism leads to another important point about rethinking the case for undergraduate legal ethics education, which is that legal ethics is recognised to be less a matter of responsibility for just the individual lawyer. Although the regulation of lawyer professional ethics has traditionally focused on the lawyer as an individual behavioural unit who is personally accountable for their professional conduct, the regulation of law firms as a behavioural unit now also exists. The advent of alternative business structures under the UK’s Legal Services Act 2007 (‘LSA’) for example, permits non-lawyers to become owners of legal practices and thereby influence the cultural values and ethical behaviour of

51 Wendel, above n 48, 173.
its lawyers. Scholars such as Parker and Chambliss have also explained how the structure and culture of the traditional law firm partnership model impacts upon and self-regulates the professional behaviour of each employed lawyer.

Furthermore, empirical research into law firm legal ethics culture is increasingly being conducted by legal profession regulatory bodies themselves (an example is the Queensland Legal Services Commission), signalling the more widespread emergence of empirical research in the context of state-based legal profession regulation. If legal profession regulators are now becoming concerned with the broader ethical culture of lawyers as a group, questions arise as to whether a corresponding duty rests on law schools to provide law students with an awareness of the group context in which they are obtaining a liberal education and/or vocational law degree — noting that it is the law school environment, and not the postgraduate stage, where students first set the moral compass for their future careers.

In devising a new legal ethics education paradigm with regard to transnational cultural values, it is important to note that legal professions are regulated differently in each of the world’s national jurisdictions. Each jurisdiction has a diverse approach to the perceived role of lawyers in society and “the law of lawyering”. Traditional approaches to the doctrinal teaching of law and the role of lawyers face interesting competition. New approaches include those arising in the United States, where the Comprehensive Law

59 Parker and Aitken, above n 6.
61 See Christine Parker and Adrian Evans, Inside Lawyers’ Ethics (Cambridge University Press, 2007).
Movement for example, is redefining the practice of ‘law as a healing profession’. The key premise there appears to be a return to traditional ideals of professionalism by serving the interests of justice and the client’s best interests as a form of community public service. Legal professionalism in the US Comprehensive Law Movement appears to also specifically emphasise a heightened conscious duty to advise clients to avoid or resolve legal disputes earlier and more collaboratively, where this is in their best interests (with the added bonus of reducing lawyer stress).

Finally, it is understood that legal education in England and Wales at the postgraduate stage is considered to be increasingly subject to overt capitalist imperatives of large private law firms, which raises ‘fundamental questions about the moral, ethical, and fiduciary values instilled by legal education’. If the moral ethical compass for a student’s career is set at law school, perhaps there is a moral duty on universities to equip students with a conscious awareness and ability to later identify any capitalist pressures to act unethically, if and when they enter legal practice at the postgraduate stage.

### III Culture and Values in International Arbitration: Market Competition for a Dominant Ethics Lex Mercatoria?

This Part suggests a legal culture paradigm for rethinking the case for legal ethics education by combining socio-legal discourse on legal culture with a discussion of culture and legal ethics in international arbitration as a typology. International arbitration is a private and confidential dispute resolution process between international parties, outside a national court system, by which the contracting parties agree to be bound by an enforceable decision of a neutral third-party arbitrator or panel of arbitrators. Although international arbitration is further delineated into private and public forms (international commercial arbitration and international public investor-state treaty arbitration), the term ‘international arbitration’ is used in this article (except where the public-private distinction

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62 Daicoff, above n 50.
63 Dal Pont, above n 13, 7.
64 Workplace stress is reported to be the number one reason for lawyers calling the United Kingdom’s Lawcare helpline in 2012; more than a third of callers were trainees with less than five years of experience: Catherine Baksi, ‘Stress Tops Lawyers’ Concerns in 2012’ The Law Society Gazette 7 January 2013 <http://www.lawgazette.co.uk/news/stress-tops-lawyers-concerns-2012>.
needs to be specified) to encompass both forms for the purpose of discussing legal ethics education.

Disputes that parties choose to have resolved by international arbitration are often of high value, and the legal services involved are a part of the sizeable contribution made by the UK’s international legal services sector to national gross domestic product.67 Globalisation has enabled international arbitration to become the preferred method of private cross-border commercial contract dispute resolution for at least two reasons: the perceived neutrality of the arbitral process outside the national court system of any one country, and the and the correspondingly greater ease of enforceability of an international arbitral award over a national court judgment in the 149 parties to the United Nations’ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.68

Before considering international arbitration as a potential typology for legal ethics education, it is necessary to discuss culture/legal culture and legal ethics, to understand the meaning and context of the argument for a new legal ethics education paradigm.

### A Culture/Legal Culture, Values and Legal Ethics Education

Scholarship in the English legal academy and the 2013 Legal Education Training Review (‘LETR’) in England and Wales shows a growing consensus about the connection between culture, values and legal ethics.69 The 2013 LETR made it clear that the teaching and maintenance of professional ethics and values are central to the integrity and the administration of justice in English legal services.70 Globalisation arguably then requires other legal cultures and traditions to be recognised in legal education. However the term ‘globalisation’ ought to be used cautiously71 as its over-use risks exaggerating and promoting inaccurate perceptions of the true extent of global ideas and arguments in jurisprudence.72 Rather, understanding globalisation

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67 City UK Legal Services Report March 2013, 3.
70 Legal Education Training Review, above n 5, vii.
72 Ibid.
as a process that increases interdependent transnational interactions through the law and other systems (the economy, communications, technology, language, and migration) supports an appreciation of the challenges that arise from different cultures being transported around the world (such as by human migration). Once we accept globalisation as a process by which culture is transported around the world, the term ‘culture’ then requires some definition. Considered to be one of the most complex and flexible concepts in the English language, culture might be simply regarded as:

[A] way in life in general, and encompasses values, premises and practices in terms of which members of any given community order their interactions. It encodes frames of meaning, moral orders and tacit understandings that guide social actors in the course of their daily lives.

Culture is about how we function with each other through different modes and channels of communication. The concept of culture thus has a broad meaning which enables it to be used to describe the behaviour of any group of people — in this case lawyers and their own legal cultures, which includes how they train, qualify and operate. Ogus’ citation of Legrand’s definition of legal culture is helpful here: ‘a framework of intangibles within which an interpretive community operates, which has a normative force for this community … which, over the longer durée, determines the identity of a community as a community’. Ogus has also characterised legal culture as an economic functioning network that is prone to being monopolised by practising lawyers who control entry to their profession and protect against competition. Although Ogus was writing in 2002 before the more recent national law reforms of legal profession regulation in England and Wales which aim to promote competition and a strong diverse legal profession, Ogus’ comments are still valid noting that some sectors may still lack competition and diversity.

Friedman similarly referred to legal culture as ‘public knowledge of and attitudes and behaviour patterns toward the legal system’.

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73 Ibid, 14.
74 Ralph Grillo et al, Legal Practice and Cultural Diversity (Ashgate 2009) ch 2.
76 Grillo, et al, above n 74, ch 2.
77 Mills, above n 1, 55.
78 Cownie, above n 75.
80 Ibid 434.
81 Legal Services Act 2007 c. 29 Part 1 (e)(f).
and ‘attitudes, values and opinions held in society with regard to law, the legal system and its various parts’; according to Friedman, apart from ‘structure’ (the legal framework) and ‘substance’ (the rules and norms used by institutions), legal culture creates the third vital element of a ‘legal system’ (“ideas, attitudes, beliefs, expectations and opinions on the law”).

Friedman has argued that lawyers’ legal thoughts are bound by their culture, which in turn determines the extent to which legal thoughts change. Ginsburg’s critical analysis of culture in international arbitration adds further clarity: lawyers form communities of professionals who produce common sets of norms and expectations that shape behaviour within the community, and globalisation, in turn, puts pressure on national legal cultures that were once autonomous and are now subject to external forces under processes of globalisation. The context of how lawyers think is then, as Cotterrell has rightly pointed out, one in which legal culture is on the one side, a broad comparison and recognition of wide historical movements beyond national state legal systems, and on the other, a form of legal pluralism in a social scientific sense (such as legal anthropology).

Indeed it is perhaps legal culture’s indeterminacy that places it alongside the legal realist view that the law (by way of interpretation and application) has a level of indeterminacy that necessarily challenges traditional models of legal ethics.

Friedman’s original conception of legal culture was thus concerned about an over-emphasis on legal positivist approaches to the doctrinal study of ‘law in books without acknowledging the power of law in action’, and in that context he made his well-known identification of an internal legal culture between legal professionals, and an external legal culture between legal professions and the community.

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87 Ibid 6.
88 Ibid 85.
89 Ginsburg, above n 84, 1337.
90 Cotterrell, above n 83, 84.
91 Ibid. This is important for legal profession studies in the context of globalisation. See for example Mihaela Papa and David B Wilkins, ‘Globalization, Lawyers and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession’ (2011) 18(3) International Journal of the Legal Profession 175.
93 Susan Silbey, ‘Legal Culture and Cultures of Legality’ in John Hall, Laura Grindstaff and Ming-Cheng Lo (eds), Handbook of Cultural Sociology (Routledge, 2010) 471.
legal culture of the wider lay community beyond.\textsuperscript{94} Friedman’s conception of an internal and external legal culture is a useful way to understand the relationship between legal culture, values and ethics in international arbitration, in the sense of autonomous sovereign national legal cultures that are increasingly impacted by the broader external legal culture of a transnational legal community.\textsuperscript{95} This is a useful typology for legal ethics education for modern law students with regard to their own internal values and externally between each other as individuals — juxtaposed with the external cultural values of the various legal and non-legal environments in which they will communicate and operate upon graduation.

Ginsburg has similarly described two notions of legal culture. One is a general legal culture where national aspects of a culture are expressed in its national legal system. The other is a legal culture consisting of norms and expectations shared by legal actors who produce culture over time by repeated actions and, perhaps akin to Ogus’s notion, form an epistemic community.\textsuperscript{96} Globalisation puts external pressure on national legal cultures that are becoming less separate and autonomous due to cross-national interaction. Transnational interaction of cultures occurs in international arbitration, which accounts for an increased discussion of culture in international arbitration legal ethics and the ‘gradual convergence in norms, procedures and expectations of participants in the arbitral process.’\textsuperscript{97}

In the United States, legal scholar’s discourse on legal ethics education has already progressed to analysis of the challenges of cross-cultural legal ethics education in both transnational and domestic legal practice.\textsuperscript{98} In acknowledging that law teachers in the United States use legal ethics to improve legal professions and the delivery of legal services, Genty has said:

All legal cultures struggle with the question of how to educate students and lawyers to be ethical professionals … the purpose of the cross-cultural conversations in this paper would be to develop principles of legal ethics education … that can be applied across cultural contexts.\textsuperscript{99}

\textsuperscript{94} Lawrence M Friedman, \textit{The Legal System: A Social Science Perspective} (Russell Sage, 1975) 195, 233.
\textsuperscript{95} Consider for example arguments about an autonomous arbitral legal order. See Emmanuel Gaillard, \textit{Legal Theory of International Arbitration} (Martinus Nijhoff, 2010). This point is also valid beyond international arbitration, when considering questions on the autonomous sovereignty of national legal systems in the European Union.
\textsuperscript{96} Ginsburg, above n 84, 1335.
\textsuperscript{97} Ginsburg, above n 84, 1336.
\textsuperscript{99} Ibid 37.
A Culture and Values in International Arbitration

A brief critical analysis of culture and values in international arbitration arguably presents a typology for a potential structural approach to legal ethics education in England and Wales. International arbitration can be used to create a new legal ethics education paradigm for teaching law students to embrace their own innate ethical conscious awareness of the role of values in legal professional behaviour, without normatively engaging in debates over legal ethics definitions and codified rules about what one should and should not do. A significant feature of international arbitration that distinguishes it from international litigation through a nation’s public courts is that each of the parties chooses an arbitrator (for what is usually a three-person tribunal panel) whom they believe and are confident will be favourably disposed to their case without the appearance of bias.100 Lawyers and academics who practise and teach in international arbitration almost universally regard the principle of party autonomy (in the form of parties being permitted to appoint an arbitrator to a tribunal panel) as ‘perhaps the most important thing a lawyer does with respect to resolving the client’s dispute.’101 This is because:

[the skill, experience and knowledge of the arbitrators will have a significant impact on the quality of the process and of the award. In addition, arbitrators are fundamentally more powerful than judges, because unlike judges, their decision usually cannot be overturned on the basis of fact or law. An arbitrator can misinterpret the law, or make an egregious mistake … counsel will generally be unable to vacate the award resulting from mistakes.102

International arbitration scholarship generally shows that a lawyer’s capacity to know, understand and manage each international arbitrator’s own ethical approach and cultural values is arguably one of the most fundamental legal skills needed and wielded. As leading international arbitration treatises declare, ‘an arbitrator should be able to ensure that any misunderstandings that may arise during the deliberations of the arbitral tribunal (for instance, because of differences of legal practice, culture, or language) are resolved before they lead to injustice’.104

Assessing the professional and personal qualities, credentials, experience and reputation of international arbitrators is arguably about

100 Moses, above n 66, 122.
102 Ibid.
103 See for example Blackaby et al, Redfern and Hunter on Law and Practice of International Commercial Arbitration (Sweet and Maxwell, 2009) [4.26].
104 Ibid.
assessing their ethical cultural approach and predicting how they will exercise their individual discretion in the management and resolution of a dispute. International arbitrator assessment is therefore one of the most difficult aspects for lawyers and their commercial clients in practice. The difficulty exists because predictability and certainty of outcome are two key values in international arbitration, and are amongst other popular reasons why commercial party clients prefer international arbitration over litigation through national courts. This preference arises from a perception that the values of predictability and certainty are met by ensuring that at least one of the arbitrators on a tribunal panel will be someone known to and appointed by one’s own side. Consequently leading international arbitration legal ethics scholars such as Rogers have proposed arbitrator information projects that seek to collate information about arbitrator candidates in a way that is consistent and publicly accessible. However, as Karton has rightly acknowledged, predictability of an arbitrator’s behaviour and ethical approach still remains one of the most challenging aspects in international arbitration because unlike judges, their past performance is less open to scrutiny as arbitral awards and decisions are not published. This renders the process of knowing and foreseeing a potential international arbitrator’s values and attitudes to a party’s case — “a gamble”.

This brings us to an analysis of the impact of globalisation on the study and practice of law and the need for legal ethics education as an inherent aspect of such study. International arbitration is a useful typology for this analysis because it demonstrates Friedman’s idea of internal and external legal cultures and how processes of globalisation allow international arbitrators, lawyers and their clients, to constantly transcend traditional cultural boundaries. Using international arbitration as a typology in this way can facilitate a paradigm for the design of new legal ethics education in England and Wales, especially noting that international arbitration is presented by some as a legal system that legitimately operates in its own autonomous non-state universe.

105 SIA/PWC 2010 International Arbitration Survey (School of International Arbitration at Queen Mary University of London and PriceWaterhouseCoopers, 2010) 13.
108 Ibid 8.
Local national culture and legal culture in the regulation of international arbitration are very closely related to a conscious evolution of international arbitration legal ethics as comprising culture, values and diverse legal norms. The increasingly widespread recognition of socio-legal and psycho-legal factors in the promulgation of legal ethics standards at the transnational level arguably points to an increasing need to include legal ethics courses in the England and Wales law degree curriculum. As Rogers has said, the inherent legal cultural diversity of international arbitration legal practice regularly creates universal ethical challenges arising from a lack of a uniformly consistent and enforceable global system of regulation of international arbitrators, as lawyers and law firms operate beyond the reach of national bar associations and regulatory bodies. Party-appointed arbitrators in international arbitration are, for example, considered to be translators of ‘legal culture … when matters that are self-evident to lawyers from one country are puzzling to lawyers from another’. Although the idea that international arbitration exists in its own self-regulated autonomous universe has been criticised, if we accept for the moment that international arbitration lawyers work in private and confidential settings in an adjudication system specifically designed to avoid the purview of national state court systems, these settings present regular challenges for international arbitrators and lawyers who are educated and trained in common law and civil law systems and then called upon to apply different sets of substantive and procedural laws from different legal traditions.

110 Margaret L Moses, ‘Ethics In International Arbitration: Traps For The Unwary’ (2012–2013) 10 (1) Loyola University Chicago Law Review 73, 74–78. In 2013 the International Chamber of Commerce (‘ICC’) convened the ICC UK Annual Arbitrators Forum titled ‘Ethics in international arbitration—is the time ripe for an international code of conduct?’ in London on 27 November 2013 to discuss amongst other matters, the role of norms.


112 Ibid 11.


114 See Jan Paulsson, ‘Arbitration’s Fluid Universe’, Lecture delivered at the London School of Economics, 24 November 2009. Also see Michaels, above n 107.

It is not uncommon in such situations for multiple sets of law firms from different jurisdictions to represent the same commercial client in a matter in order for the lawyers acting as advocates to obtain legal advice themselves about the applicable local law of the client’s place of domicile (where, for example, such law was chosen to be the law of the contract in dispute). International arbitration is thus often described as a world in which legal cultural traditions directly meet, and scholarly discourse regularly addresses questions of the need for cultural sensitivity; ethical clashes and legal cultural convergence; and harmonisation as opposed to delocalisation of legal systems of the seat of the arbitration itself. The very notion of a ‘culture clash’ in international arbitration is either asserted or rejected.

Cultural communication issues that arise in international arbitration then go beyond a mere civil law/common law legal system divide to include nuanced differences in language (even when English is the designated language), clothing attire, modes of addressing those from other national traditions, facial expressions when interacting with arbitrators of different cultural backgrounds, body language, the role of religion (for example energy or oil contracts in the middle east may be subject to Sharia law) and even the meaning of ‘truth’ varies across national cultures.

Scholarly commentary in international arbitration thus shows that culture, legal culture and legal ethics are regarded as indeterminate yet fundamental concepts that demand the careful exercise of lawyer discretion with a sensitive appreciation of diverse legal ethical values. These are core, fundamental legal skills that require lawyers to be aware of their own ‘cultural baggage’ and overcome communication challenges arising from personal attachment to their culture (language and religion), by understanding different legal cultural values arising from common law and civil law systems.

Examples where legal cultural challenges arise include the way in which witnesses are prepared and interviewed before a hearing: witness ‘coaching’, as an English lawyer might know it, is permitted

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119 Mills, above n 1, 54–69.
120 Rogers, above n 106, 9.
121 Rana and Sanson, above n 115, 98.
122 Trakman, above n 117.
in the United States, while witness contact is largely eschewed by lawyers trained in civil law systems. Another example is the submission and exchange of documentary evidence: discovery in the United States is far broader than in most other jurisdictions, such that the term is apparently rarely used in international arbitration. Questions also arise as to whether to employ an adversarial common law style of witness cross-examination at the risk of upsetting a civil law system international arbitrator who might be appointed by the other party. The conundrum of understanding and determining what legal cultural values and ethical behaviours are appropriate for one arbitration to the next is thus highly challenging for lawyers operating in international arbitration as a transnational dispute resolution system that is invariably private (proceedings are completely closed to the public), confidential (documents, records and evidence are generally not disclosed outside the tribunal proceedings) and, in the majority of cases, unpublished (when awards are published, names and identities are redacted).

B International Arbitration as a Legal Ethics Education Typology

This section attempts to marry the concepts of legal culture, values and ethics in law to explain the need for legal ethics courses in legal education. It does this by exploring the way in which these concepts are the foundation of a scholarly research boom in international arbitration as one of the world’s fastest growing areas of transnational legal study and practice. International arbitration legal ethics scholarship covers a range of topics from the influence of third-party funders to questions over the need for international codes of conduct. The development and production of debates currently raging over the regulation and ethical self-regulation of international arbitration arguably demonstrate why legal ethics education is important at the undergraduate law degree stage, and why an internal and external legal cultural paradigm may assist the design of such a course as a substantive body of legal academic knowledge, other than just as professional vocation skills.

Following the first major sociological study of international arbitration by Dezalay and Garth in 1996, Karton used grounded

123 Rogers, above n 106, 2–5.
124 Rana and Sanson, above n 115, ch 8.
126 See Yves Dezalay and Bryant G Garth, Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (Chicago University Press, 1996). This work empirically examined the ways in which reputational ‘symbolic capital’ (adopting the theory propounded by Pierre Bourdieu) is generated and enables international arbitrators to be appointed and re-appointed.
theory to conduct an empirical socio-legal analysis of published international arbitration awards (by the International Court of Arbitration at the International Chamber of Commerce), and found that a common cultural approach is being increasingly taken by arbitrators in the area of private international commercial arbitration.\textsuperscript{127} This common culture arguably also manifests common values in a converging legal ethical culture\textsuperscript{128} arising from instrumental network pathways,\textsuperscript{129} such as law student mootng at international arbitration competitions; graduates writing and speaking at conferences and legal education events; and students eventually practising in a law firm that specialises in international arbitration, assisting arbitrators (usually voluntarily and unpaid) or by working for an international arbitration institution or organisation.\textsuperscript{130} Although international arbitration is used as a typology to demonstrate the importance of legal ethics education to inspire students with an awareness of diverse cultural values when studying and applying procedural aspects of international arbitration law, the same can be said for the study of substantive contract law, noting that in so far as legal practice is concerned, those who work in international commercial transactions and contracts must be sensitive to the cross-jurisdictional impact of different legal systems so as to produce an ‘integrated global product’.\textsuperscript{131}

While such instrumentally based networks as conveyors of culture, values and ethical attitudes are not unusual to most professions and other areas of law,\textsuperscript{132} it is equally arguable that such networks are uniquely important in international arbitration because it is primarily through networks (and not just through deductive legal reasoning in the law of statute or the doctrine of precedent under \textit{stare decisis}) that one learns a style of interpreting, applying and advising upon substantive law because international arbitration is predominantly private and confidential (hence legitimate calls for it to become more accessibly open).\textsuperscript{133} While changes have been occurring in 2013 as


\textsuperscript{129} Cotterrell, above n 83, 69, Ogus, above n 79.

\textsuperscript{130} Doug Jones, ‘Challenges and Benefits Facing Young ADR Practitioners’ (Conference Paper presented to the Chartered Institute of Arbitrators Irish Branch, Dublin, 12 November 2011).

\textsuperscript{131} David Howarth, \textit{Law As Engineering: Thinking About What Lawyers Do} (Edward Elgar, 2013) 29.

\textsuperscript{132} Cotterrell, above n 83, 5, 7, 68–78.

more international arbitral institutions begin to break away from the status quo by publishing redacted arbitral awards, publication is done in a way that still maintains party and arbitrator privacy and confidentiality. The lack of public access to the ethical cultural attitudes of arbitrators, in the way the public can access the attitudes of judges through published court decisions, means that being an active member of international arbitration networks as gatekeeper guardians of a dominant legal ethical culture, largely determines one’s success:

We know the process, the institutions and the arbitrators better than any of our competitors. We combine this understanding with industry knowledge, geographical reach and commitment to the highest standards of service that we’re told other arbitration practices cannot match.

One of the most common forms of legal ethical challenge in the private sphere of international commercial arbitration arises in the interpretation and application of the doctrines of client confidentiality, professional secrecy and client/legal professional privilege. It is beyond the scope of this article to examine the various laws and approaches to these doctrines taken by different jurisdictions around the world. It is sufficient to say that in the absence of clear universally enforceable laws for a uniform procedure of international arbitration, what will or will not be considered ethical will depend on the different approaches taken by the arbitrators who are individually appointed to each tribunal panel, on a case by case basis. The different approaches arise by virtue of the fact that lawyers from different legal traditions and cultures will in turn take divergent approaches to deciding what evidence should be disclosed or withheld in arbitral proceedings. Successful lawyers in this field adapt their legal skills set accordingly, as adaptability across different legal cultural

134 See for example the new Singapore International Arbitration Centre 2013 Rules as at 1 April 2013, r 28.10 on the publication of redacted arbitral awards. See also Alberto Maletesta and Rinaldo Sali (eds), The Rise of Transparency in International Arbitration: The Case for the Publication of Arbitral Awards (Juris, 2013).
138 Karton, above n 133, recommends that common law lawyers in international commercial arbitration should be prepared for the possibility that an arbitrator of either common law or civil law system education and training will adopt a civil law system approach to questions of the admission of extrinsic evidence to discern the parties’ intentions behind a commercial contract.
traditions is considered to be the main indicator of competency in international arbitration.\textsuperscript{139}

It is therefore unsurprising that the professional ethics of international arbitrators,\textsuperscript{140} and that of lawyers working in transnational global settings such as private and public international law,\textsuperscript{141} are increasingly the subject of research.\textsuperscript{142} The big issues are being directly tackled by international legal profession bodies such as the International Bar Association (‘IBA’) in its promulgation of voluntary codes and rules of ethics for lawyers practising in international arbitration (for example see the \textit{IBA Rules on the Taking of Evidence in International Arbitration} (2010), the \textit{IBA Guidelines on Conflicts of Interest in International Arbitration} (2004), and the \textit{IBA Rules of Ethics for Arbitrators} (1994)). Similar types of guidelines exist for lawyers practising in the European context under the \textit{Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers} by the Council of Bars and Law Societies of Europe (CCBE 2010).\textsuperscript{143} These guidelines have been adopted by the various national bar associations of European countries\textsuperscript{144} and address matters such as the function of lawyers in society; client confidentiality; trust and personal integrity; and the duties of lawyers in relation to courts, clients, other lawyers and the community at large.\textsuperscript{145}

In May 2013 the IBA’s Arbitration Committee completed a consultative survey project on the legal ethics of legal counsel representing parties in international arbitration.\textsuperscript{146} The IBA taskforce

\textsuperscript{139} For example see Chambers and Partners review and rankings of the world’s best international arbitration law firms at <http://www.chambersandpartners.com/uk/editorial/46311>.
\textsuperscript{140} Rogers, above n 137.
\textsuperscript{141} See for example a very interesting paper by Matthew Windsor (PhD Candidate University of Cambridge 2012–15), ‘International Legal Advisers to Government: Towards a Theory of International Professional Responsibility’ (Presented at the Socio-Legal Studies Association Conference, University of York, 26 March 2013).
\textsuperscript{142} Arman Sarvarian, \textit{Professional Ethics at the International Bar} (Oxford University Press, 2013).
\textsuperscript{144} For the entire list see: <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Table_adoption_of_th1_1358409892.pdf>.
consists of senior international lawyers and legal academics, from various Anglo-American nations, who have sought to address legal ethics dilemmas at the transnational level on issues such as the conduct of lawyers representing parties in international arbitration; whether and to what extent domestic standards of professional conduct will or will not apply to lawyers; how to deal with witnesses and the exchange of expert evidence in international arbitrations; and how to deal with corruption, money laundering, forgery and illegality. The promulgation of such guidelines demonstrates that legal ethics is recognised by international legal profession bodies and the global/transnational legal profession itself to be a substantive issue in its own right that is fundamental to maintaining international arbitration’s legitimacy in order to serve and maintain the global rule of law.

However, students, academics and legal practitioners need to know that unlike the position in many domestic legal professional regulatory regimes, transnational legal ethical rules can be inconsistent, non-enforceable, negotiable, and subject to cultural interpretation — and are consequently not mandatory. The fluidity of transnational legal ethical rules and norms makes the case stronger for legal ethics education at the law degree stage in order to raise awareness of the need for an internal, values-based individual compass. What is also needed is a cultivation of a legal cultural consciousness when studying and practising substantive law in globalised era. In fact, the promulgation of a kaleidoscope of unenforceable soft law in transnational legal ethics has been cogently critiqued by leaders within the field of international arbitration itself, as being inflexible; confusing; uncertain; and unaccommodating of the diverse legal cultures and autonomous domestic legal traditions that comprise international legal practice.

For example when the IBA released its 2013 guidelines for lawyers representing parties in international arbitration, the London Court of International Arbitration simultaneously released its own draft guidelines for discussion. Although calls for certainty in the form of uniform transnational legal ethics codes and rules have been

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148 For commentary on some of the IBA’s guidelines see Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration (Cambridge University Press, 2013).
149 David Rivkin, ‘The Impact of International Arbitration and the Rule of Law’ (International Arbitration Lecture, University of Sydney and Clayton Utz, Supreme Court of New South Wales, Sydney, 13 November 2012).
151 These guidelines are not in public circulation at the time of writing.
urged, these variations of legal ethics pluralism at the international level arguably demonstrate the emergence of a substantive legal ethics market as new competing legal services networks grow whilst more and more private regional arbitral institutions emerge around the world. As Meason and Smith have said:

[T]he current institutional arbitral system reflects two things. First, it is …the Western World’s answer to commercial disputes… Second, when one notes … the many arbitration centers that have hung out their shingles in many developing countries, one is faced with recognising the lack of uniformity that exists…It has been argued that an essential element in the increased resort to arbitration has been the emergence of general international consensus regarding applicable substantive law … But such a statement could not be further from the truth. The ‘consensus’ really only reflects the imposition of Western values … showing our ignorance of … cultural differences.

The proliferation of transnational soft law legal ethics in international arbitration without due regard for diverse legal ethical cultures demonstrates why legal ethics might need to become an area of substantive legal knowledge in the law degree curriculum — that goes beyond rules-based regulation of vocational legal practice. While transnational legal ethics rules and norms are being widely promulgated by international legal profession bodies, there is simultaneous concern about the legitimacy, impact and ineffectiveness of such promulgation. The transnational legal ethics regulation of lawyer conduct is seen by some as superfluous, a condition that Landau and Weeramantry wittily refer to as legislitis: ‘if it moves, codify it’. Others regard legal ethics codification as necessary due to a perceived need to curb uncertainty and unpredictability arising from the global convergence of legal cultures without legal ethical homogeneity.

Does ignorance of diverse legal ethical cultures arise from the lack of a legal ethics mindset in the substantive study of doctrinal law? This is possible if we regard the transnational legal ethics debate in international arbitration as reflecting the patterns identified by socio-legal scholars at a broader level:

152 Ogus, above n 79, 434.
154 Landau and Weeramantry, above n 150.
155 Landau and Weeramantry, above n 150, 4.
While the international field formerly was a closed, exclusive club of state experts, who adopted a dilettante approach to their international activities or viewed them as a matter of *noblesse oblige*, the acceleration of both economic and symbolic trading has led to significant investment in international institutions. What simply used to be the hobby of these ‘notables-generalists’ has become a full-time vocation for a whole array of professional specialists, competitively trying to construct new international arenas configured around their own specific expertises and values.157

These developments demonstrate the need to raise broader legal ethics awareness and there is perhaps no better (or other) place for this to occur than at the early legal education stage. This description of an emerging international legal arena could be used to describe a *legal ethics lex mercatoria*. The characterisation supports a transnational legal ethics analysis that can be extended beyond international arbitration. Daly, for example, has already canvassed the ways in which cross-border legal ethics and professional responsibility issues can be integrated into a law school curriculum.158 This can be done by considering the formal regulation of lawyers and legal services along with the study of professional issues and their philosophical backgrounds, professional norms, and the legal culture that created and supported those norms. Such an approach would allow core ethical issues to be taught and studied at the domestic and international levels. For example, the rules on legal professional privilege and client legal privilege at common law might be studied with regard to their founding values and legal cultural origins. This might be juxtaposed with studying the principles of professional secrecy in civil law jurisdictions and their contrasting legal cultural origins.159

**IV CONCLUSION**

Processes of globalisation bring increasing challenges of cultural diversity to legal practice and legal ethics education, and current discourse on whether legal ethics should be introduced into the English law degree presents an opportune platform to discuss a new paradigm for legal ethics education. This is because such challenges present complex future legal ethical dilemmas for law graduates moving into international and transnational careers. International

159 D’Silva, above n 45, 12.
arbitration is a useful typology to demonstrate the potential ways in which the internal cultural values of lawyers, coexist with and meet the external legal cultures of the legal profession and then again, other national legal systems and legal ethics traditions in a globalised world. The fact that international legal profession groups are attempting to address concerns about a lack of uniformly enforceable ethical regulation of cross-border transnational lawyering, as a legal ethics market arguably emerges, shows the growing importance of legal ethics education as a necessary adjunct to traditional approaches to the teaching and study of substantive jurisprudence.

Ultimately, the introduction of legal ethics education in the English law degree curriculum is a matter for its legal academy, legal profession and regulatory bodies. To assist that discussion however, this critical analysis of culture and values in international arbitration is offered as a typology for a new legal ethics education paradigm.
EQUIPPING STUDENTS FOR THE REAL WORLD: USING A SCAFFOLDED EXPERIENTIAL APPROACH TO TEACH THE SKILL OF LEGAL DRAFTING

TAMMY JOHNSON* AND FRANCINA CANTATORE**

I INTRODUCTION

Jeremy Bentham called for the reform of legal drafting as early as 1843, noting that while regulation would not guarantee perfect drafting, it could impose desirable requirements and might help to prevent ‘certain defects’.1

Despite efforts to import the attributes of ‘brevity’, ‘simplicity’ and ‘clear expression’2 into legislation, law students today are still faced with confusing and obscure provisions in the law that require interpretation and application to factual situations. The task of incorporating complex provisions into legal documents is a daunting process for the legal scholar. The requirement of using plain language in legal drafting provides an additional challenge for the drafter. Significantly, the majority of law students go on to enter legal practice,3 where the ability to draft clearly and concisely is an essential skill and prerequisite. Failure to capture the essence of the law and convey the terms of the document effectively could have dire consequences for the firm and client alike.

This article traverses the difficulties associated in achieving a balance between protecting the client’s relevant legal interests and conveying the appropriate message to the intended audience in plain language. Using an example drawn from a consumer lending

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2 Ibid.

transaction, this article illustrates how educators can provide law students with the guidelines necessary for avoiding drafting pitfalls in legal practice. While it is acknowledged that the development of legal writing skills is important both within and outside the context of law school, the writers make a distinction between the broader skill of legal writing and the more specific skill of legal drafting which is applied in legal practice. This article focuses on the teaching (and development) of legal drafting skills. Its scope is limited to illustrating the benefits of adopting a scaffolded approach when teaching these skills and the advantages this teaching approach gives students as they leave law school and enter legal practice.

Part II of the article highlights the challenges often faced by lawyers drafting legal documents (here using the example of a commercial contract). It also considers the drafting skills that the lawyer must possess in order to effectively address the (sometimes legislative) requirement of plain language drafting. Part III canvasses, contextually, the theory of teaching and learning legal skills; it demonstrates that law students may effectively develop drafting skills in a scaffolded and experiential learning environment. Part IV concludes in favour of a scaffolded approach.

II THE LAWYER’S CONUNDRUM — TRANSLATING LAW INTO PLAIN LANGUAGE

A Laying Down the Law

The requirement for plain language drafting has been codified in a number of Australian statutes in recent years, including the National Consumer Credit Protection Act, the National Credit Code, the Australian Consumer Law (the ACL), and the Australian Securities and Investments Commission Act (the ASIC Act). These inclusions are in accordance with the provisions of European Union Directive 93/13 EC, dealing with unfair contract terms, specifically Article 5, which states:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

4 It is necessary to develop these generic legal writing skills in order to complete the more traditional forms of summative assessment such as essays and exams.
5 National Consumer Credit Protection Act 2009 (Cth), (‘The National Credit Code’).
6 Ibid sch 1.
7 Competition and Consumer Act 2010 (Cth), sch 2 (‘Australian Consumer Law’).
8 Australian Securities and Investments Commission Act 2001 (Cth).
10 Ibid art 5.
The United Kingdom unfair contract terms provisions also use the expression ‘plain and intelligible language’.\(^\text{11}\) In Office of Fair Trading v Abbey National plc and Others\(^\text{12}\) Smith J explained what was meant by it:

Regulation 6(2) … requires not only the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract.\(^\text{12}\)

In Australia the statutory recognition of this requirement was foreshadowed in an early Victorian Government report dealing with clarity in drafting.\(^\text{13}\) The Report made recommendations for formal training of parliamentary counsel in drafting and suggested collaboration with the Law Societies to import plain language into standard form borrowing contracts.

Standard form consumer contracts continue to be scrutinised for their content and, when considering consumer contract terms pursuant to the ACL provisions, a court must take into account ‘the extent to which the term is transparent.’\(^\text{14}\) Loan contracts are also subject to the unfair terms legislation and the implicit requirement for language, which is ‘reasonably plain’, ‘legible’ and ‘presented clearly’.\(^\text{15}\) Failure to comply with these requirements may result in significant penalties, and the offence provisions may (and should) instil a healthy dose of caution and circumspection in lawyers engaged to draft commercial documents.

This recent trend of codifying the requirement for plain language drafting means that it is no longer acceptable to rely on long-used and trusted precedents. While the use of precedents remains beneficial, the legalese found in many documents no longer stands up to inspection in light of plain language requirements, and strong drafting skills are needed to remedy unclear, ambiguous or unfair terms.

In Australia, in addition to potential claims against the drafter for negligence, poor drafting may also lead to a finding of unconscionable conduct under the ACL.\(^\text{16}\) In George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd\(^\text{17}\) the Court considered whether the

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\(^{11}\) Unfair Terms in Consumer Contracts Regulations 1999 (UK), reg 6.
\(^{12}\) Office of Fair Trading v Abbey National plc [2008] EWHC 875 (Comm) at 103.
\(^{14}\) Australian Consumer Law, s 24(2)(a).
\(^{15}\) Ibid s 24(3)(a)−(d). This section states that for a term to be transparent it must be:
   (a) expressed in reasonably plain language; and
   (b) legible; and
   (c) presented clearly; and
   (d) readily available to any party affected by the term.
\(^{16}\) Ibid s 22(1)(c).
\(^{17}\) [1990] VicSC 620.
consumer was able to understand the contract documents presented by the lender. The Court found that poor drafting style rendered the contract unconscionable because it failed to bring the reader’s attention to an insertion in a standard form contract that was contrary to the purpose of the rest of the contract.  

Intelligibility of the language in a contract is also a legislative requirement in New South Wales and contracts or contract terms can be set aside if they are found to be unjust. In Goldsbrough v Ford Credit Australia Ltd the applicant successfully applied for the setting aside of a guarantee she had provided for a trucking lease entered into by her brother. The Court held that the lease had been written in such legalese that not even the office manager presenting the document had understood it, and ordered that the guarantee be set aside.

Similarly in Bridge Wholesale Acceptance (Aust) Ltd v GVS Associates Pty Ltd the Court found that a guarantee by the debtor’s stepdaughter to provide a mortgage over her own house had not been understood by her. It ordered the deletion of the relevant clause from the guarantee. In his judgment Waddell CJ reasoned that the clause had not been written in plain language; it comprised one long sentence and would not be intelligible to a lay person.

Even if these cases prompted a hasty revision of the offending contract provisions by their solicitors, it would have been too late for the disappointed litigants. These outcomes could have been avoided if the contract drafter’s skills had been well developed. Effective drafting practice necessitates that the drafting journey be properly planned in advance, executed with a clear roadmap in mind and with guide posts regularly checked along the way.

B Navigating the Law

Perhaps the first challenge for lawyers in the process of drafting intelligible, clear provisions for commercial documents is an even more fundamental task. Before drafting a document, a lawyer must interpret the relevant legislation. In many instances the onset of this journey is fraught with difficulties, brought about not only by the need to avoid pitfalls such as unconscionable or misleading and deceptive conduct, but by the indeterminate language of the

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18 George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd [1990] VicSC 620
19 Contracts Review Act 1980 (NSW), s 9(2)(g).
20 Ibid s 7.
22 Ibid.
24 Ibid 14.
25 Australian Consumer Law, pt 2-2.
26 Ibid s 18.
legislation itself. It may be useful to identify the ‘guide posts’ on the drafting journey as follows:

1. Identifying and interpreting the applicable statutes (statutory interpretation).
2. Identifying the relevant statutory and commercial provisions for incorporation into the document.
3. Using ‘plain language’ to draft the document.
4. Checking for legislative compliance (avoiding issues of unconscionability, unfair contract terms or misleading or deceptive conduct).

To illustrate these steps, and some of the associated challenges inherent in the process, we will use the example of a typical consumer contract to provide an overview of the drafting process. If the lawyer depicted in this example did not possess the skills and confidence to effectively complete the drafting task, it is likely that a number of potential practical and legal hazards might arise. A poorly drafted document would fail to adequately protect the client’s legal interests; the client may be liable under one or more statutes for unfair contract terms or unconscionability; and the lawyer may be liable for negligence. A lawyer who possesses well-developed drafting skills is able to avoid all of these potential hazards, preparing a document that complies with all legislative requirements, is clearly and concisely drafted, and reflects the client’s instructions and protects the client’s legal interests.

1. A Drafting Minefield

The following example highlights the complex issues that can arise in a seemingly innocuous commercial transaction. In practice, lawyers face the challenge of tiptoeing through a minefield of competing interests. The client just wants the job done quickly and effectively, but the lawyer must be mindful both of the client’s business objectives and of the competing legislative provisions, which at times require additional matters to be incorporated into the final document.

The example illustrates the underlying complexity of any commercial contract drafting exercise. Here, Elise, a lawyer, is required to draft a contract for her longstanding client, Bill Jones, to use in his new business, ‘Rent-to-own Enterprises’. Bill will lease furniture and household appliances to consumers on the basis that they may purchase the goods at the end of the rental period. Customers may also return the goods at any time after an initial rental period, should they wish to do so. Bill hopes to make a profit on the leases and requires Elise’s firm to provide him with a simple pro-forma contract which reflects this arrangement.

Elise accesses the firm’s precedents and finds a ‘Consumer Lease Agreement’ which seems to meet the client’s needs. However,
she soon realises that the nature of Bill’s proposed business will trigger the provisions of the *National Credit Code*\(^{27}\) (the Code). The ‘rent-to-own’ nature of the transaction means the contract will be considered to be a credit contract as defined in the Code.\(^{28}\) Bill will effectively become a credit provider, the lessee a debtor, and any residual payment at the end of the contract will be a part of the contract amount.\(^{29}\) Of further concern to Elise is the fact that the Code provides for the passing of property to the debtor,\(^{30}\) and that Bill effectively becomes a mortgagee over the goods.\(^{31}\) This means Bill loses ownership of the goods even though the lessee has not yet agreed to buy the goods at the end of the term, and may in fact decide not to do so. Additionally, the Code prevents Bill from repossessing the goods in the event of the lessee’s default.\(^{32}\)

The straightforward lease agreement envisaged by Bill is impossible to deliver; what is required is quite different and far more complex, and the precedent is inappropriate for her task. As Elise researches further, it becomes clear that the Code requires Bill to comply with a number of other legislative requirements, all of which must be reflected in the contract.\(^{33}\) Further, because the Code imposes significant pre-contractual disclosure requirements on lenders in consumer transactions, Elise must now draft additional documents to ensure Bill’s compliance with these legislative requirements.

Only after she has identified all the issues for inclusion in the document can the drafting commence. However, the format of the contract remains problematic. Although it is deemed to be a credit contract, it needs to be reconcilable with Bill’s business model, which is based on a rent-to-buy concept. In addition to identifying the content of the contract, Elise must now contemplate its form so that she can produce a document that complies with the legislation, protects the client’s legal interests and satisfies his business requirements.

The path, which seemed clear at the start, has become far more difficult to navigate than anticipated. Elise now needs to consider not only the impact of these provisions on Bill’s proposed business, but also how to turn these provisions into a clear and legible document which Bill can present to prospective customers. The drafting skills that Elise developed in law school are about to be put to the test.

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\(^{27}\) *The National Credit Code*.

\(^{28}\) Ibid ss 5(1).

\(^{29}\) Ibid s 9(4).

\(^{30}\) Ibid s 9(3)(d).

\(^{31}\) Ibid s 9(3)(f).

\(^{32}\) Ibid s 9(3)(g).

\(^{33}\) Ibid ss 85(10) – (11). Breaches of these provisions carry civil and criminal penalties.
C Anticipating Legal Practice

As the above example demonstrates, lawyers may be confounded by ambiguous and imprecise legislation and associated drafting challenges that cannot be resolved by relying on existing precedents. The fact that this source of discontent may be widely acknowledged is of little comfort to the early career lawyer faced with drafting their first ‘real’ contract. Additionally, failure to apply effective drafting practices can result in unnecessary costs to clients, occasioned by additional billable hours. Consequently, it is important that preparation for the challenges of drafting in legal practice be undertaken as part of the development of students’ communication skills within Threshold Learning Outcome 5: Communication and collaboration (‘TL0 5’). 34

A pedagogically sound drafting course should equip students to express the intention of the legislature and the courts, practise precision in legal drafting, and protect their future clients’ interests. Part III of this article considers the scaffolded approach to teaching legal drafting skills to law students.

III THE EFFECTIVENESS OF SCAFFOLDED INSTRUCTION IN LEGAL DRAFTING

The following sentence from a legal contract has 516 words and is considered one of the longest sentences in an official document:

In the event that the Purchaser defaults in the payment of any instalment of purchase price, taxes, insurance, interest, or the annual charge described elsewhere herein, or shall default in the performance of any other obligations set forth in this Contract, the Seller may: at his option: (a) Declare immediately due and payable the entire unpaid balance of purchase price, with accrued interest, taxes, and annual charge, and demand full payment thereof, and enforce conveyance of the land by termination of the contract or according to the terms hereof, in which case the Purchaser shall also be liable to the Seller for reasonable attorney’s fees for services rendered by any attorney on behalf of the Seller, or (b) sell said land and premises or any part thereof at public auction, in such manner, at such time and place, upon such terms and conditions, and upon such public notice as the Seller may deem best for the interest of all concerned, consisting of advertisement in a newspaper of general circulation in the county or city in which the security property is located at least once a week for Three (3) successive weeks or for such period as applicable law may require and, in case of default of any purchaser, to re-sell with such postponement of sale or resale and upon such public notice thereof as the Seller may determine, and upon

compliance by the Purchaser with the terms of sale, and upon judicial approval as may be required by law, convey said land and premises in fee simple to and at the cost of the Purchaser, who shall not be liable to see to the application of the purchase money; and from the proceeds of the sale: First to pay all proper costs and charges, including but not limited to court costs, advertising expenses, auctioneer’s allowance, the expenses, if any required to correct any irregularity in the title, premium for Seller’s bond, auditor’s fee, attorney’s fee, and all other expenses of sale occurred in and about the protection and execution of this contract, and all moneys advanced for taxes, assessments, insurance, and with interest thereon as provided herein, and all taxes due upon said land and premises at time of sale, and to retain as compensation a commission of five percent (5%) on the amount of said sale or sales; SECOND, to pay the whole amount then remaining unpaid of the principal of said contract, and interest thereon to date of payment, whether the same shall be due or not, it being understood and agreed that upon such sale before maturity of the contract the balance thereof shall be immediately due and payable; THIRD, to pay liens of record against the security property according to their priority of lien and to the extent that funds remaining in the hands of the Seller are available; and LAST, to pay the remainder of said proceeds, if any, to the vendor, his heirs, personal representatives, successors or assigns upon the delivery and surrender to the vendee of possession of the land and premises, less costs and excess of obtaining possession.  

Legalese and other poor drafting techniques continue to appear in legal documents. The extract above illustrates the difficulty that deciphering legalese poses, even for those with legal training. The sentence is an excellent example of poor drafting. Law teachers should try to ensure that this style of drafting is not replicated when their students become lawyers, but the difficulty lies in making that objective a reality. Wilcox identifies legal drafting as a basic skill that every lawyer needs. Yet, he laments, ‘no other skill vital to all lawyers is so much ignored in legal education.’ It is therefore essential that this deficiency in legal education be remedied. By implementing a pedagogically effective legal drafting course, law schools can ensure that graduates develop the professional skills necessary for successful legal practice.

To assist in their ‘intellectual and social transition from the role of often-passive student to lawyer’ law students should be provided with as many opportunities as possible to develop their drafting skills. Then, as lawyers entering practice they will have some understanding of how to draft in plain language, and hopefully will also develop their own unique and effective drafting style.

35 The Plain English Campaign, Long Sentences (8 January 2013) <http://www.plainenglish.co.uk/examples/long-sentences.html>.
37 Ibid.
38 Ibid 449.
A Training Law Students to Drop the Legalese: How to Get It Right

Having proposed that plain language drafting is an essential skill in legal practice, it remains to determine what ‘plain language’ means. Using plain language does not mean that legal documents should be dull and boring; plain language means language that is precise, clear and concise. Using plain language in legal documents does not mean they must be ‘dumbed down.’ Rather, it means that the language should be ‘straightforward and user-friendly.’ Asprey describes plain language writing as ‘just writing in clear, straightforward language, with the needs of the reader foremost in mind.’ She asserts that:

there are no hard-and-fast rules. There are no international standards or infallible tests. The main thing to remember is that if what you have written could be unclear or confusing for your reader, or difficult to read or use, you should rewrite it so that it becomes clear, unambiguous and easy to read and use.

Similarly, Cheek sees plain language as using ‘language, structure and design so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it.’

Beginning as early as the 1940s, the Plain Language Movement gained momentum in the UK, and in the USA in the 1970s. This was followed closely by Australia in the 1980s, with the publication of Plain English and the Law, a Report of the Law Reform Commission of Victoria. Today the movement continues to develop and strengthen; it has gained recognition and support in many countries, English-speaking and non-English speaking. Indeed, in 2010 the USA introduced the Plain Writing Act of 2010, which requires federal agencies to ‘enhance citizen access to Government information and services by establishing that Government documents issued to the public must be written clearly.’

40 Ibid 817.
41 Michèle M Asprey, Plain Language for Lawyers (Federation Press, 2006) 13.
42 Ibid.
45 Originally known as the Plain English Movement, ‘English’ was replaced by ‘Language’ when the movement gained recognition in non-English speaking countries. As a result the concept of ‘plain language drafting’ is now capable of universal adoption.
47 Extracted from the long title of the Plain Writing Act of 2010 (USA).
Since the advent of the Plain Language Movement much has been written on the benefits of drafting using plain language, yet the opportunities for formal instruction on how to develop drafting skills are limited. Most lawyers only really begin to learn how to draft when they enter practice; until then their energies have largely been devoted to more academic pursuits, and most law school assessment tasks require the production of a research paper rather than a drafted legal document. Indeed, as Castles and Hewitt point out:

[T]he traditional law degree is focussed on assisting students in the acquisition of academic or doctrinal knowledge (since 1992 prescribed by the ‘Priestly 11’ areas of knowledge). Less attention has been paid in most law degrees to the specific teaching of professional skills.48

Once in practice, however, newly admitted lawyers are likely to be exposed to a myriad of drafting techniques and from this exposure they will gradually develop and hone their own drafting style. But if left untutored, the lawyer is in danger of falling into one or more of the pitfalls of poor drafting. Using poor structure, poor grammar, legalese, archaic words and long sentences (to name but a few) will all result in an overly complex and incomprehensible document. It is therefore imperative that students are aware of the dangers of poor drafting and learn to draft effectively from as early as possible; preferably from their first semester at law school.

B  A Scaffolded Approach to Teaching the Skill of Legal Drafting

If one looks at the development of legal skills as they would the development of their physical musculature it is easy to see that skills, like muscles, do not miraculously materialise fully developed. Both skills and muscles require exercise to become strong and effective and it is important to choose an appropriate starting point for their development. Asprey observes that skills develop with practice and for those drafting in plain language, a natural and individual drafting style will develop and emerge over time.49

Adopting a scaffolded and experiential teaching approach allows students to build and then flex their drafting muscles, incrementally developing their confidence, skills and individual drafting style in the low-risk environment that law school provides. Coe considers that the incremental challenges provided by scaffolded teaching helps to diminish the feelings of intimidation often experienced by students

49 Asprey, above n 41.
who are faced with a new and challenging task.\footnote{Cynthia D Coe, ‘Scaffolded Writing as a Tool for Critical Thinking: Teaching Beginning Students How to Write Arguments’ (2011) 34(1) Teaching Philosophy 33, 34.} By encouraging students to build their skills, scaffolded teaching presents students with ‘a sequence of training tasks with attainable learning goals … that [allow them] to gain feedback about their performance and provides … the opportunities for gradual refinement through repetition.’\footnote{Ibid quoting K Anders Ericsson, ‘The Acquisition of Expert Performance: An Introduction to Some of the Issues’ in K Anders Ericsson (ed), The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports and Games (Lawrence Earlbaum, 1996) 1, 33.}

A course that effectively develops students’ legal drafting skills should require completion of a number of scaffolded drafting exercises, each one more challenging than the last. Throughout the course, students should receive feedback and the opportunity to engage in self and peer-critique. Finally, at the end of the course, having completed the series of drafting exercises, the students should have gained the skills necessary to competently draft a legal document unaided. The key to success lies in the teacher providing a supportive yet challenging environment in which students are encouraged to exercise autonomy and to safely explore and develop their own drafting style. While students are encouraged to imagine themselves as practising lawyers, the safety of the classroom allows students to make typical novice drafting mistakes, and to learn from those mistakes, without having to assume the responsibility that comes with practice.

Tilley et al describe scaffolded teaching as an ‘instructional technique whereby collaboration … and knowledge are combined to facilitate learning.’\footnote{Donna Scott Tilley et al, ‘Promoting Clinical Competence: Using Scaffolded Instruction for Practice-Based Learning’ (2007) 23(5) Journal of Professional Nursing 285, 286.} Scaffolding allows the student to become more involved in the process of learning by encouraging autonomy and accountability and providing an individualised learning experience. Employers find it desirable for law graduates come to them with some of the skills required to actually practice law; bridging the gap between law school and legal practice through scaffolded legal skills instruction provides a benefit to students, their educators and employers alike.

Legal skills instruction, particularly drafting instruction, cannot be taught solely through traditional didactic teaching methods. Adopting an experiential teaching method using scaffolded drafting exercises allows students to put themselves in the position of practising lawyers. Experiential learning allows students to engage
in ‘real life’ exercises. Students are able to experience what it is like to draft increasingly complex legal documents and correspondence in an environment where they have complete control over what the document contains and how their thoughts are presented and expressed. In this regard, Hewitt recognises that students ‘learn more effectively when their activities take place within a practice context’ thus enabling them to become better prepared for their future careers as lawyers.

The Australian Council for Educational Research also recognises that experiential learning assists students to develop an ‘awareness of the workplace and how it relates to their academic learning.’ Mitchell et al believe that, in addition to achieving a number of graduate attributes, experiential learning enables students to become better prepared for their future careers by ‘promoting the acquisition of work-related knowledge and participation in activities that contribute to professional experience and employability skills.’

David Kolb’s experiential learning cycle comprises four distinct phases of learning and offers a way of ‘structuring and sequencing learning to improve the effectiveness of learning from experience.’ Kolb’s model consists of the following stages: concrete experience, reflective observation, abstract conceptualisation and active experimentation.

Wolski identifies that the learning experience can begin at any stage of Kolb’s model but must then proceed sequentially through the other stages. She suggests that, for skills teaching, an appropriate starting point is the abstract conceptualisation stage where students are provided with some initial theoretical instruction relevant to the particular skill. The learning experience should then progress through the other stages, enabling students to engage in, reflect upon and repeat exercises which simulate real-life situations.

While usually associated with studies that involve hands-on involvement, experiential learning is not confined to work experience, internships or placements. It can incorporate any exercise (real or simulated) where students are given the ability to develop the skills required to succeed in their chosen field of employment.


Ibid 79.


Ibid.
thereby encouraging them to develop ‘a “reflexive” relationship between theory and practice.’\textsuperscript{62} While the methodology of skills teaching is ‘grounded in experiential learning theory’,\textsuperscript{63} the coupling of scaffolded instruction with experiential learning enhances the development of legal drafting skills. The discussion below explores ways of effectively using a scaffolded approach to development of legal drafting skills.

1 \textit{Crawl Before You Walk}

To successfully develop the skills required to practice law (particularly the written communication skills required by TLO5), students need to build confidence in their abilities as drafters. A scaffolded teaching model works well because the initial drafting tasks that students are required to complete are set at quite a low level of difficulty. Students are given the opportunity to ‘get the feel’ of drafting using plain language, without the stress of completing a task that requires extensive formatting or a detailed analysis of the law (that is, a less complex task than the example explored in Part II of this article).

A good initial task to ease students into the world of drafting is to have them draft a simple letter of demand. A letter, rather than a more formal legal document, is a useful starting point because students generally have some awareness of the style, structure and level of formality adopted in written correspondence. Having a familiar structure to work with gives students the ability to relax into the drafting task and focus on the language of the document rather than its form. Providing some level of familiarity and security encourages students to ‘move back and forth between opposing modes of reflection and action and feeling and thinking’,\textsuperscript{64} thus facilitating active learning.

Once the letter drafting task is completed, similar tasks can be set to encourage students to build their confidence as drafters. Another useful early task is drafting a special condition for insertion into a standard form of contract. Students adopt the style and formatting of the standard contract for their condition, which will assist them to produce a clause that is certain, clear and concise. Again, by providing the guidelines for the special condition’s basic structure, students can focus on the use of plain language to properly reflect the legal intention of the document.

By starting with some non-threatening and relatively simple drafting tasks, students are encouraged to become familiar with

\textsuperscript{62} Ibid 293.
\textsuperscript{63} Ibid 292.
\textsuperscript{64} Alice Kolb and David Kolb, ‘Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education’ (2005) 4(2) \textit{Academy of Management Learning and Education} 193, 194.
the process of using plain language to communicate with others. Once they demonstrate that they are relatively comfortable with this process, the difficulty of the drafting tasks should increase. Students should also gain experience in undertaking a critical analysis of existing documents; in practice they will be come across innumerable precedent documents, some of which will require extensive redrafting.

2 Walk Before You Run

Redrafting an existing document can be difficult, especially if the original document was drafted using poor structure, obsolete terms and legalese. Words such as ‘heretofore’, ‘hereinafter’, ‘herewith’, ‘thenceforth’, ‘aforesaid’, ‘above-mentioned’ and ‘herein provided’ litter old (and unfortunately some new) legal precedents as autumn leaves litter the ground, sometimes turning redrafting into a mammoth task. It can be more time-consuming to redraft a document than to start over. The drafter is required to undertake the same amount of research with a redrafted document as with a new one to ensure that all traces of legalese are removed, that legislative requirements are observed and that the redrafted document meets the objective of protecting the client’s interests and conveying the appropriate message clearly and concisely to the intended audience.

Failure to pay close attention to detail can, as occurred in George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd,[65] result in the court finding that one of the parties to a transaction has acted unconscionably. And while it may not seem critically important, poor grammar and punctuation can be costly for the parties and the lawyer who prepared the document. The Canadian cases of AMJ Campbell Inc v Kord Products Inc[66] and Rogers Cable Communications Inc v Aliant Telecom Inc[67] illustrate the importance of proper punctuation in contract drafting. In both cases, the placement of a comma led to litigation, and it had the potential to increase the amount payable under the terms of the contract by a significant amount.[68] For the lawyers responsible for the drafting error, an unfavourable finding by the court could realistically mean a negligence suit being brought against them. This is a situation all lawyers wish to avoid.

When attempting a redrafting task, students should be mindful of why the original document says what it does: the information was included in the original document for a reason. Perhaps a provision was included in response to a particular court decision or legislative provision. If so, the student must check to see that the legislation

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67 Telecom Decision CRTC 2006-45.
68 In AMJ’s case the difference was approximately CAN$759,000.00. In Rogers’ case the difference was approximately CAN$1,000,000.00.
remains current, or in the case of a decision, whether it has been overturned. If the legislation has been amended or the decision overturned, the contractual provision may now be obsolete or require significant amendment to ensure that it complies with current law.\footnote{Ros Macdonald and Denise McGill, \textit{Drafting} (LexisNexis Butterworths, 2\textsuperscript{nd} ed, 2008) 19.}

The primary aim of the student should be to use plain language to clearly convey the appropriate message to the intended audience, not to simplify the meaning of the document. Students should be aware that if the nature of the transaction necessitates the inclusion of certain technical language or requires a detailed explanation of how the terms of an agreement are to operate, then so be it. They must appreciate that plain language does not mean simplistic language and that ‘clarity may not be consistent with brevity.’\footnote{Ibid 18.}

A final point here: redrafting requires strict adherence to the ‘golden rule’ of drafting. Never alter the language of a document unless you also intend to change the meaning.\footnote{Ibid 19.} It goes without saying that understanding the meaning of the original document is vitally important. If the drafter does not understand the message being conveyed, it may be more appropriate to abandon the precedent altogether and draft a new document from scratch rather than running the risk of creating a document that fails to deliver the appropriate message.

3 \textit{The Sprinting Phase}

Although it is rare for a lawyer to draft a lengthy document without the benefit of a precedent, the ability to construct a legal document from beginning to end is a valuable skill. Precedents are used to enhance efficiency and save clients money,\footnote{Jonathan Todres, ‘Beyond the Case Method: Teaching Transactional Law Skills in the Classroom’ (2009) 37(2) \textit{Journal of Law, Medicine & Ethics} 375, 377.} but they may not always address a particular client’s needs, as we have seen. A good lawyer can also produce a document from scratch containing concise, precise and effective legal language which satisfies the objectives of protecting the client’s interests, conveying the appropriate message to the intended audience and avoiding disputes between the parties about the document’s meaning. When drafting without a precedent, the drafter becomes more conscious of the document’s potential audience, its structure, the organisation of its contents, any appropriate technical definitions, and the essential topics which must be addressed.

In commercial legal practice lawyers often need to draft specific conditions for inclusion in clients’ contracts. For example a client purchasing real estate may require certain special conditions to be
drafted for inclusion in the standard land contract. The standard contract form contains the conditions usually applicable to a transaction for the sale of land but each transaction has its own peculiarities. This is where the skill of ‘free-form’\textsuperscript{73} drafting is put to the test. In their scaffolded skills instruction students are encouraged to embark on a number of these tasks to test the development of their skills. Good lawyers need to be able to understand the law and to translate that law into legal documents that are clearly and easily understood by lawyers and non-lawyers alike. While there will never be a perfectly drafted document, the more practice students have with both re-drafting and free-form drafting, the more feedback they receive, and the more self-reflection and peer review they engage in, the better equipped they will be for practice.

\textit{C Looking at the Big Picture}

Castles et al pinpoint the ‘predominant view’, which they say is ‘that the contextualisation and actualisation of the theory of law in its practical operation is the preferable pedagogical approach to law teaching.’\textsuperscript{74} Teaching students to ‘think ex ante about clients’ issues or legal matters is important to producing graduates who will excel in practice.’\textsuperscript{75} Drafting legal documents demands precision and drafting exercises expose students to the ‘complexities involved in taking an idea and translating it to a written document.’\textsuperscript{76} Using scaffolded experiential instruction to teach legal drafting, providing constructive feedback and encouraging self-reflection and peer-review allows students to develop the ability to analyse a client’s individual needs and produce certain, clear and concise legal documents.

Students and early career lawyers may make the mistake of assuming that some transactions are the same, when in fact each transaction is unique. Clients seek legal advice for a variety of reasons and a good lawyer is able to recognise what the client is trying to achieve and which of the client’s interests most require protection in the particular circumstances. Highlighting the multi-dimensional nature of many legal transactions, Johnstone recognises the need to teach students ‘in context that law operates in a complex society.’\textsuperscript{77}

The ability to recognise the underlying complexity of a seemingly simple transaction is fundamental to drafting an effective legal

\textsuperscript{73} This is a term adopted by Tammy Johnson to describe drafting without the aid of precedents.

\textsuperscript{74} Margaret Castles et al, ‘Using Simulated Practice to Teach Legal Theory: How and Why Skills and Group Work Can Be Incorporated in an Academic Law Curriculum’ (2009) 26(2) \textit{University of Tasmania Law Review} 120, 126.

\textsuperscript{75} Todres, above n 72, 376.

\textsuperscript{76} Ibid 377.

\textsuperscript{77} Richard Johnstone, ‘Rethinking the Teaching of Law’ (1992) 3(1) \textit{Legal Education Review} 17, 25.
document. The drafter should at all times be conscious of by whom and for what purpose the document is required. Drafting students should be taught to understand their audience; it is often inappropriate to include technical or legal jargon in a contract that will usually be read by laypeople. Where appropriate, a definitions section should be included in the document to provide clarity to the reader. The document must minimise the potential for misunderstanding; it must convey the appropriate message to the intended audience, accurately reflect any applicable legislative requirements and be certain, clear and concise.

D  The Importance of Feedback and Reflection

When students see that their skills are developing and that they are making real progress with their set tasks, this tangible evidence of success encourages greater effort. The opportunity for reflection on completed tasks coupled with regular, detailed and constructive feedback stimulates the development of students’ drafting skills. Langer believes that providing feedback to students is a critical teaching strategy that improves student learning. Without adequate feedback, students are in danger of remaining ignorant of their mistakes and going on to develop a drafting style that is inappropriate for effective legal practice.

An effective method of giving feedback ‘must proactively account for the psychological factors that can thwart students’ development of expertise.’ Any assistance the teacher provides to the student is a reciprocal process and the teacher should pay close attention to the student’s response. An alert teacher can gain valuable insight from the student’s response the student’s perception of the relevance and difficulty of the task just completed, enabling the teacher to reflect on the effectiveness of completed tasks or to modify planned future tasks. This enables the teacher to set tasks that have an appropriate level of difficulty and best meet the students’ needs. Drafting tasks should increase in difficulty as the semester progresses, so if the student’s response to feedback indicates that the task was overly easy (or difficult) then an adjustment of planned future tasks is appropriate.

In addition to obtaining teacher feedback, engaging in peer review and self-critique is another way for students to gain insight

79 Ibid 775.
81 Langer, above n 78, 778.
into their drafting efforts. Dewey recognised that in experiential learning, the combination of experience and reflection creates meaning from the experience and fosters continued learning.\textsuperscript{82} Similarly, Burnard argues that reflection is an essential component of experiential learning. He describes experiential learning as ‘learning by doing, which involves reflection.’\textsuperscript{83} Having students review each other’s work exposes them to different drafting styles and provides a mechanism through which they can reflect upon their own efforts and critique their own work. The ability to self-critique is a valuable skill in itself because it allows the drafter to objectively review a document before its final submission. Self-critique gives the drafter the opportunity to determine whether they have made any of the common drafting mistakes or, more importantly, whether the message being conveyed adequately addresses all legal issues (including statutory requirements) and is certain, clear and concise.

**IV Conclusion**

This article responds to the difficulty that lawyers sometimes face in maintaining the balance between protecting their clients’ legal interests and translating complex legislative provisions into plain language that conveys the appropriate message to the intended audience. Using the example of a consumer credit contract transaction, Part II highlighted common drafting challenges. With these difficulties in mind, Part III discussed the theory of teaching legal skills, with a particular focus on teaching the skill of legal drafting, suggesting that a scaffolded experiential approach to skills development is an effective way to nurture the development of students’ legal drafting skills.

Turning law into legal advice using plain language requires skill. Developing the skills necessary to create a legal document that is certain, clear and concise requires awareness, practice and mentoring, all of which should begin with the implementation of scaffolded drafting exercises in law school.

Drafting legal documents in the low-risk environment that law school offers allows students to build confidence as drafters, better preparing them for the challenges encountered in legal practice. Creating an experiential learning environment where students engage in scaffolded drafting exercises encourages them to cultivate an efficient drafting style which will hold them in good stead as practising lawyers.

\textsuperscript{82} John Dewey, *Experience and Education* (Collier-Macmillan Books, 1938) 45.
TRANSITION FROM LEGAL EDUCATION TO PRACTICE: EXTRA-CURRICULAR COMPETITIONS OFFER THE MISSING LINK

MADELEINE FRASER,* JOANNA MACKENZIE,** DAVID WEISBROT,† WESLEY TAN††

I INTRODUCTION

The capacity for Australian legal education curricula to equip graduates with practical skills and appropriate workplace expectations has become a prevalent topic of debate within universities and the legal profession. Evaluating current legal education curricula is particularly important given the ongoing trend of entry-level practitioners exiting the profession in high numbers.¹ For students aspiring to join the legal profession, extra-curricular legal competitions conducted within universities continue to gain interest and popularity. These competitions encourage students to develop and practise practical legal skills through role-play and mock simulations using hypothetical legal examples. Many student-run law organisations within Australian universities run these competitions as a non-compulsory extra-curricular activity for students. Such competitions include mooting, client interviews, and negotiations, each focusing on a different area of legal practice. These


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competitions serve as a potential opportunity to gain the practical lawyering skills required by the legal profession. The current study sought to investigate the influence of these competitions for law students, specifically focusing on the possible contribution of legal competitions to key graduate skills, which would in turn suggest these competitions contribute to preparing students for the legal profession.

A The Status Quo in Legal Education in Australia

Legal education in Australia tends to follow a traditional model including weekly lectures and tutorials with large class numbers. A common outcome of these large class sizes is the encouragement of a passive student role. Students are predominantly required to commit material to memory and recall it during an exam, or solve artificial vignettes with a prescribed correct ‘answer’. There are fewer opportunities in university course curricula to adopt a problem-solving, process-focused approach, or practise the application of such legal knowledge in the manner required by the legal profession. Many Australian law schools have attempted to increase their focus on teaching practical lawyering skills through implementing smaller class sizes and training in clinical settings. However, high resource costs have sharply limited student access to such opportunities. Thus the focus of legal education continues to be learning legal doctrine (what lawyers need to know in the way of substantive law) rather than acquiring practical lawyering skills to apply such legal theory (what lawyers need to be able to do). This lack of practical lawyering skills may contribute to entry-level practitioners feeling unprepared and unwilling to enter or remain in what is generally considered a high stress and demanding profession dominated by human interaction. Insufficient practical skills may also contribute to the ongoing trend of entry-level practitioners exiting the profession in high numbers.

7 Ibid at 2.23.
8 Law Society of Western Australia and Women Lawyers of Western Australia, above n 1.
The fact that law students may be graduating without practical skills is a serious shortcoming, particularly given it has been argued that the fundamental purpose of law schools is to develop student judgment and legal reasoning capacity, communication capacity and comprehension of professional norms and responsibilities.\(^9\) The Law Teaching and Learning Outcomes (TLOs)\(^10\) and legal curricula guidelines of individual universities\(^11\) outline threshold standards for the attainment of knowledge and skills within a legal degree. There are similar but slightly different TLOs for the LLB and JD, reflecting the fact that the JD is a postgraduate degree. The TLOs were originally drafted in consultation with a range of professional, student and academic stakeholders to ensure the implementation and standardisation of legal skill development. Law schools across Australia differ in the way they structure the student learning environment, yet are required to ensure these threshold standards are met. Specifically, the practical skills outlined by the TLOs include legal knowledge, compliance with ethical standards, critical and analytical thinking, problem solving, research, communication, teamwork and self-management skills. In an attempt to promote practical skills in graduating law students, universities are increasingly integrating practical course components. These include the use of different learning styles, such as collaboration\(^12\) and Peer Assisted Learning (PAL),\(^13\) as well as the introduction of skill-based units.\(^14\) It has also been argued that students need to be given opportunities to participate directly in activities that uncover and engage their values and oblige them to confront some degree of interpersonal value conflict.\(^15\) Such experiences serve as important preparation for the duties and responsibilities of a practising lawyer, and it is thought that more genuine engagement with such issues is likely to develop

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from active law competitions rather than individual work or written assignments.

B Mooting (an Example) and Existing Research

Illustratively, the practice of mooting has gained momentum. Mooting requires teams of students to argue a point of law from a hypothetical case before a simulated court.\(^\text{16}\) It provides the opportunity to develop vital practical skills including communication, problem solving, legal analysis and reasoning, legal research, teamwork and time management,\(^\text{17}\) and there are limited opportunities to master these in a classroom setting. Student involvement in mooting competitions further promotes interaction with a broader range of legal material. This engagement enhances an understanding of substantive law and the development of conceptual links between legal areas, which are typically taught as discrete subjects.\(^\text{18}\) Students are also provided with the opportunity to develop greater awareness of professional conduct and responsibility.\(^\text{19}\) Consequently, mooting may help bridge the gap between skills developed in legal education and those required in legal practice.

Australian universities are increasingly acknowledging this. Mooting is now compulsory for some students (for example at La Trobe University in Victoria\(^\text{20}\) and Griffith University in Queensland),\(^\text{21}\) and available as an elective or extra-curricular activity at most other institutions. Macquarie University recognises participation in the Jessup International Law Moot by awarding course credit, as do other universities.\(^\text{22}\) Macquarie also, like many others, offers a range of extra-curricular internal, external and international mooting competitions to all students. Mooting exercises have gained such traction in current legal education that they have even been made available online. Studies have found that online mooting leads to the

\(^{20}\) La Trobe University, La Trobe Law School — Graduate Entry (2013) <http://www.latrobe.edu.au/law/graduate-entry>.
\(^{22}\) See Jessup Archives for Australian University International Grand finalists <http://www.ilsa.org/jessuphome/jessup-archives>.
involvement of a larger number of students, further development of student forensic skills, and confidence using new technology.  

While legal publications postulate the benefits of law competitions, and universities are increasingly receptive to this view, limited empirical studies have been conducted. At Bond University Law School in Australia, a study found that integration of experiential education into course curricula met the gap between analytical and practical knowledge for legal students. Specifically, the course was titled Mooting, Appellate Advocacy and Legal Practice (MAALP), and included compulsory role-plays and skills exercises that sought to emulate work in a law firm. Such exercises were completed in a similar fashion to assessment tasks, rather than assuming a competitive format, yet the authors found the course was of significant value in preparing students for work in a legal setting. In a 2002 study conducted in South Africa, Watson and Klarren used surveys to determine the educational impact of mooting, concluding that the experience was enjoyed by students and beneficial for their skill development. Similarly, Gillespie in 2007 found that the most commonly cited advantages of mooting were those relating to the development of specific skills, such as research, communication, critical thinking and teamwork. Comparatively, Hammond in 1999 explored the impact of a one-week intensive ‘Legal Problem Solving Course’, which facilitated the learning of practical skills and was received positively by students. In 2010 Bernard suggested that the foundational skills gained from practicing alternative dispute resolution scenarios could substantially raise the performance of practicing lawyers. She proposed that clients in modern society prefer conflict resolution, thus listening and problem solving skills are of increased value and more frequently relied upon in addition to specific knowledge. Many other forms of legal competitions, however, such as client interviewing, trial advocacy and negotiating, are less frequently acknowledged in contemporary research. A recent


26 Gillespie, above n 16.

27 Hammond, above n 14.

paper by Wolski in 2009 evaluated a skills program that integrated modules on advocacy, legal research and analysis, writing and drafting, negotiation and dispute resolution and client interviewing within substantive law courses. Based on the positive feedback from participating students, Wolski emphasises her view that theory and practice are complementary and, therefore, most effectively learned together, and suggests that such a program should be used in place of traditional moots.29

II THE CURRENT STUDY

The current study expands on earlier research by investigating a broader range of legal competitions. It explores student perceptions of the capacity of such competitions to influence student engagement and develop graduate capabilities as specified by the TLOs. The study contributes uniquely by investigating the development of key competencies that are competition-specific and utilises both qualitative and quantitative data.

The aim of the study is to investigate empirically the extent to which extracurricular law competitions at Macquarie University facilitate the development of law-related practical skills from the perspective of the students themselves. Specific to Macquarie University, law competitions are available to students enrolled in a law degree as a voluntary extra-curricular activity, completed as an adjunct to their studies. Macquarie University Law Society (MULS) is a student-run university organisation which annually co-ordinates each competition. A central purpose of MULS competitions is to foster the skill development of students. Thus adjudicators and judges are encouraged to provide detailed feedback at the end of each round, explaining the reasons for their decision and providing recommendations for improvement. Within this format, competitors are encouraged to adopt these recommendations in the next round in the competition. The majority of competitions operate in a round-robin fashion; thus all teams compete in several rounds and those with the highest scores progress to subsequent semi-finals and finals rounds. Based on anecdotal reports from prior Macquarie University competitors and MULS, of further interest is whether these competitions have an impact on student engagement with university studies and peers more generally. The five competitions run by MULS that were investigated by the present study were as follows:

- Mooting, as outlined above, which involves arguing a point of law in a hypothetical case before a simulated court. MULS offers three types of mooting competitions: first year mooting for first year

29 Wolski, above n 17, 57.
law students, junior mooting for second and third year students, and senior mooting for fourth and fifth year students.

- **Client interviewing**, which involves a pair of students conducting a hypothetical interview with a new client, using interpersonal skills to gather information relevant to the legal arguments that will need to be developed.

- **Trial advocacy**, which requires an individual student to present an opening statement, conduct an examination in chief, conduct a cross-examination and present a closing statement in a simulated criminal or civil trial against one other student.

- **Negotiation**, which involves two pairs of students conducting a hypothetical negotiation with each other, each aiming to secure the optimal outcome for their client.

- **Letter writing**, which requires students to write a succinct response to a client’s concerns.

It was hypothesised that students would view their participation in MULS law competitions as contributing to the development of their own practical legal skills, as specified by the TLOs and Macquarie University Graduate Capabilities framework. It was also hypothesised that participation would increase student engagement with the law school and peers. Finally, it was hypothesised that specific law competitions would be better suited to the development of particular skills. The present study sought to ascertain which competitions best facilitated which skills.

### A Method

#### 1 Subjects and Design

The study employed a within-subjects quasi-experimental design using online self-report questionnaires. The participants were 266 LLB students at Macquarie University. Participants were divided into control (non-competing students) and experimental groups (competing students), predetermined by their self-selected involvement in one of the seven legal competitions run by MULS. Incentive for participation in the study took the form of entry into a draw to win one of ten Westfield shopping vouchers valued at $100.

#### 2 Measures and Procedure

The self-report questionnaire was specifically designed to measure the perceived development of practical legal skills, based on the TLOs and Macquarie University’s Graduate Capabilities Framework. Participants were asked to rate their level of competency

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30 Macquarie Graduate Capabilities and Curriculum Map, above n 11.
31 Bachelor of Laws.
32 Kift, Israel, and Field, above n 10.
33 Macquarie Graduate Capabilities and Curriculum Map, above n 11.
for each skill on a 10-point Likert scale at three time points across the competition. As an additional variable, degree of engagement with peers and the law school was included in the questionnaire based on anecdotal reports from prior competing participants and MULS executive (see skills outline in Table 1). Ethics approval for the project was granted from Macquarie University Human Research Ethics Committee (HREC).

Table 1: Questionnaire Items and their Sources

<table>
<thead>
<tr>
<th>Legal Skill</th>
<th>Referenced from</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALTC’s TLO</td>
</tr>
<tr>
<td>1. Legal knowledge</td>
<td></td>
</tr>
<tr>
<td>2. Comply with ethical standards</td>
<td></td>
</tr>
<tr>
<td>3. Critical and analytical thinking</td>
<td></td>
</tr>
<tr>
<td>4. Problem solving skills</td>
<td></td>
</tr>
<tr>
<td>5. Research skills</td>
<td></td>
</tr>
<tr>
<td>6. Oral communication skills</td>
<td></td>
</tr>
<tr>
<td>7. Written communication skills</td>
<td></td>
</tr>
<tr>
<td>8. Teamwork skills</td>
<td></td>
</tr>
<tr>
<td>9. Self-management skills</td>
<td></td>
</tr>
<tr>
<td>10. Engagement with the law school and peers</td>
<td></td>
</tr>
</tbody>
</table>

Participants accessed the online questionnaires via email and social networking sites. They commenced the study once informed consent was provided, with the knowledge that their student number would be used to identify their responses across the three time points.

The first baseline questionnaire was completed one week prior to the commencement of the first round in each competition (see Appendix A). This questionnaire collected basic demographic information (name, age, gender, enrolled course and prior experience competing), as well as the Likert scale rankings to indicate levels of self-perceived ability in specific skill areas. In addition, participants were asked a series of open-ended short answer questions to investigate reasons for competing, anticipated benefits and links between competitions and courses.

The second questionnaire was completed by participants midway through the competition (after three preliminary rounds) and
contained the same set of Likert scale questions presented in the first questionnaire (see Appendix B).

The third questionnaire was completed at the conclusion of the competition and again included the Likert scaled questions (see Appendix C). In addition, a series of short answer questions encouraged reflection on the participant’s overall experience. These investigated: the perceived benefits gained; whether participants would encourage others to compete; the extent of engagement with peers and the law school; the impact on academic performance; and whether such benefits could be gained in other ways.

As the Letter of Advice competition did not involve progressive rounds, only two questionnaires were completed: at baseline and the end of the competition. These questionnaires replicated the first and third questionnaires outlined above.

The competition season ran approximately the length of the semester (13 weeks), with different competitions on offer in different semesters. The study was therefore conducted across two semesters, with participants only able to complete the questionnaires in relation to one competition (in the event they competed in multiple competitions).

B Results

1 Data Analysis — Demographic Variables

Participants were divided into two groups, predetermined by their self-nominated involvement in a legal competition run by MULS during semester (experimental group N = 230) or lack of involvement (control group N = 36). Ages within the sample ranged from 17 to 31, with a median age of 20 (SD = 2.91, see Table 2). More participants were female (N = 136) than male (N = 110), and 20 did not disclose their gender. In 2005, 68 per cent of law graduates responding to the Graduate Destination Survey were women. In the current study, females formed 57−66 per cent of the total sample population. Thus the current sample’s gender bias may be interpreted as reflective of the broader population bias in Australian law students.

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Table 2: Participant Number and Age Demographics for each Law Competition

<table>
<thead>
<tr>
<th>Competition</th>
<th>Number of Participants</th>
<th>Age Range</th>
<th>Median Age</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>First year mooting</td>
<td>47</td>
<td>17–22</td>
<td>18.73</td>
<td>1.15</td>
</tr>
<tr>
<td>Junior mooting</td>
<td>29</td>
<td>17–22</td>
<td>18.47</td>
<td>4.50</td>
</tr>
<tr>
<td>Senior mooting</td>
<td>29</td>
<td>20–25</td>
<td>22.21</td>
<td>1.48</td>
</tr>
<tr>
<td>Client interview</td>
<td>43</td>
<td>17–26</td>
<td>20.68</td>
<td>2.53</td>
</tr>
<tr>
<td>Trial advocacy</td>
<td>11</td>
<td>19–25</td>
<td>21.50</td>
<td>2.33</td>
</tr>
<tr>
<td>Negotiations</td>
<td>58</td>
<td>18–27</td>
<td>21.39</td>
<td>2.17</td>
</tr>
<tr>
<td>Letter of advice</td>
<td>13</td>
<td>19–27</td>
<td>21.44</td>
<td>2.79</td>
</tr>
<tr>
<td>Control group</td>
<td>36</td>
<td>17–31</td>
<td>20.00</td>
<td>3.29</td>
</tr>
<tr>
<td>Total</td>
<td>266</td>
<td>17–31</td>
<td>20.00</td>
<td>2.93</td>
</tr>
</tbody>
</table>

2 Data Analysis — Quantitative

Collected data were analysed using IBM SPSS® Statistics Version 19 software. Given that a limited sample of participants completed each of the three questionnaires (N = 54), a case study was conducted on these participants to measure their change in perceived skill throughout the competition. The control (N = 19) and experimental (N = 35) groups were compared using General Linear Modelling across the three time points. Assumptions of normality and homogeneity were met, and while the skills of both groups improved, the F-statistic indicated that the experimental group experienced a statistically significant difference in their perceived improvement compared to the control, $F(2,104) = 4.03$, $p = .02$. This indicated that overall, participants who engaged in a MULS competition thought they developed more advanced legal skills (see Table 1) than participants who did not compete while studying a law degree (see Figure 1). However, given the limited sample size, statistical power was moderate ($\beta = 0.64$) so these results, while statistically significant, need to be interpreted with caution. It is possible that an increased sample size may uncover an even greater perceived improvement in legal skills.

While there was no statistically significant difference in the scores between conditions at Time 1 ($p = 0.1$), from Figure 1 it may be possible that competition participation is particularly beneficial for students with lower self-perceived legal skills.
While data collected across all competitions indicated that participants noted an improvement in their overall skill development, two competitions demonstrated a statistically significant improvement in the experimental group when compared to the control. These were first year mooting $F(2,22) = 40.67, p < .005$, and junior mooting $F(2,106) = 31.74, p < .005$. No other competitions were found to have statistically significant increases in perceived skill development, but that was primarily due to the limited sample size.

The differences between each self-reported skill area within each competition were also examined. While all legal skills were reported to have increased over time for the experimental group, different skills increased at different rates within each competition. The mean difference between such time points was calculated, and overall the majority of skills improved across each competition. Specifically, mean differences greater than 2.5 points on the 10-point Likert scale were interpreted as indicative of a meaningful change. Overall, legal knowledge, compliance with ethical standards and engagement with the law school and peers were the most common skills to have been perceived as improving across all competitions (See Table 3).
Table 3: Skills that Meaningfully Increased Between Time-Point 1 and 3 for each Competition

<table>
<thead>
<tr>
<th>Competition</th>
<th>Legal Skill</th>
<th>Mean Difference</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>First year mooting</td>
<td>Legal knowledge</td>
<td>4.57</td>
<td>2.06</td>
</tr>
<tr>
<td></td>
<td>Comply with ethical standards</td>
<td>3.93</td>
<td>2.56</td>
</tr>
<tr>
<td></td>
<td>Engagement with law school &amp; peers</td>
<td>5.31</td>
<td>2.84</td>
</tr>
<tr>
<td>Junior mooting</td>
<td>Comply with ethical standards</td>
<td>2.60</td>
<td>1.81</td>
</tr>
<tr>
<td></td>
<td>Engagement with law school &amp; peers</td>
<td>3.20</td>
<td>3.77</td>
</tr>
<tr>
<td>Client interview</td>
<td>Legal knowledge</td>
<td>2.25</td>
<td>4.79</td>
</tr>
<tr>
<td></td>
<td>Comply with ethical standards</td>
<td>2.75</td>
<td>3.20</td>
</tr>
<tr>
<td></td>
<td>Engagement with law school &amp; peers</td>
<td>2.25</td>
<td>2.50</td>
</tr>
<tr>
<td>Trial advocacy</td>
<td>Legal knowledge</td>
<td>3.67</td>
<td>3.06</td>
</tr>
<tr>
<td></td>
<td>Comply with ethical standards</td>
<td>3.67</td>
<td>4.04</td>
</tr>
<tr>
<td></td>
<td>Problem solving skills</td>
<td>2.00</td>
<td>3.05</td>
</tr>
<tr>
<td>Letter of advice</td>
<td>Legal knowledge</td>
<td>3.50</td>
<td>3.54</td>
</tr>
</tbody>
</table>

3 Data Analysis — Qualitative

Within the experimental group, qualitative data were also collected to better understand the participant’s expectations and overall experience of competing. Qualitative data were collected during the first questionnaire (completed by N = 110) and the third questionnaire (completed by N = 89). Participant qualitative data were analysed by identifying and coding major recurring themes based on key words.

In the first questionnaire, participants were required to outline their reasons for partaking in a MULS competition. The most commonly
cited reasons were: to gain practical experience (mentioned by 50 per cent of participants); to develop new skills (41 per cent); for fun (18 per cent); to meet new people (15 per cent); and to consolidate and increase legal knowledge (12 per cent). Participants commented on wanting a ‘hands-on experience’ and recognised competitions as a means to be better equipped for legal practice.\(^{35}\)

Additional questions were asked in the third questionnaire. When reporting on the perceived benefits of competing, those most frequently singled out by respondents were: improved research skills (mentioned by 24 per cent of participants); made new friends (20 per cent); enhanced legal knowledge (17 per cent); increased confidence (16 per cent); and gained a greater understanding of the procedural aspects of lawyering (14 per cent). Participants spoke of ‘developing practical skills that are overlooked within the degree’ and ‘experiencing the practical reality of the legal profession’. Without exception, all respondents were able to cite a positive benefit of their involvement.

The influence of competitions on engagement was also assessed. The majority of participants reported experiencing an increased affiliation toward their legal subjects, MULS and/or other peers (95 per cent). A small minority of participants did not feel competitions improved their engagement with peers or the law school in any way (5 per cent). Common themes across responses included: opportunities to meet new people and make new friends; the opportunity to work with existing friends; and enhancement of teamwork skills.

Participants also commented on how competitions impacted on their academic performance. The majority of participants found that competing enhanced their understanding and appreciation of the law (mentioned by 25 per cent of participants), as well as enabling them to more readily apply the law to hypothetical problems (12 per cent). Participants reflected that competitions ‘acted as an integrated method of studying which was more engaging’ and ‘competing and my degree are interlinked in my education.’

**C Discussion**

As hypothesised, participation in MULS law competitions improved the student’s self-reported ratings of practical legal skills, as specified by the TLOs and Macquarie University Graduate Capabilities framework. This improvement was significantly higher than a comparative control group of non-competing law students. Existing literature has suggested that student participation in law-related competitions may improve their development of

\(^{35}\) One participant did not cite a positive reason for participating, stating instead that he or she competed because he or she was ‘bored’.
practical legal skills. Congruously, the present research provides empirical evidence suggesting that competing students perceive an improvement in their own skill development as a consequence of their participation.

Before discussing the obtained results, it is important to note several limitations within the current study. First, there was a strong likelihood of selection bias occurring within the sample population. Random allocation could not be utilised, given that competition participation was optional and predetermined by the students themselves. Thus the types of students who self-nominate to compete may systematically differ from students who do not elect to participate. It may be hypothesised that the former are ‘better’ students insofar as they are inherently more engaged, competent and confident. Furthermore the competing students who elected to participate in the present study may also systematically differ from those who did not. It may be postulated that students who were not confident of their skills may have not elected to participate in the study.

Secondly, not all participants completed the three questionnaires. Although the experimental design attempted to optimise participation retention (emailing questionnaires to students directly, constructing short questionnaires and providing an incentive), the experimental group suffered from a high drop-out rate, significantly more so than the control group. The reasons for this drop-out pattern are unclear, but a potential explanation may be that emails were overlooked during busier periods of the semester, particularly for competing student who had higher demands on their time. A second explanation may be that students who felt their skills were not developing optimally across the semester may have been more likely to withdraw from the study. As a result, the present results are based on a case study sample of the participants (N = 54) who completed all three questionnaires. Future research would benefit from significantly larger sample sizes, which would enable comparisons of perceived skill development between each competition.

These issues of self-selection bias and a high drop-out rate may hold implications for the validity of the present findings. The study used a within-subjects design, focusing on individual improvement, in an attempt to reduce this self-selection bias. However, it was unclear if the students who completed all three questionnaires significantly differed from those who dropped out. High drop-out rates for online studies are not uncommon, due to the ease with which participants may leave the study at any time and not be held accountable.

36 Gillespie, above n 16; Hammond, above n 14; Watson and Klarren, above n 25.  
37 Andrea Frick, Marie-Therese Bächtiger, and Ulf-Dietrich Reips, ‘Financial incentives, personal information and drop-out rate in online studies’ in U-D Reips and M Bosnjak (eds), Dimensions of Internet Science (Pabst, 2001).
In addition, the questions had low face validity, meaning participants may have been able to identify the hypothesis of the study, and been encouraged to provide socially desirable response patterns. Moreover, the self-report format requires advanced skill in reflective thought, which relies on a degree of personal insight.\textsuperscript{38} Self-report data are susceptible to distortion by egocentric bias, and participants may tend to view themselves in a more positive light.\textsuperscript{39} Alternatively, given that research consistently indicates that law students are highly self-critical,\textsuperscript{40} the self-report questionnaires actually may be an underestimation of true skill development.\textsuperscript{41}

While acknowledging these methodological limitations, the present research makes an interesting contribution to existing legal education literature in Australia. The results demonstrated a significantly higher improvement in the competing student’s perceived legal skills as compared with control students who completed a usual semester of their LLB. Of note, while participants across all competitions reported an increase in their own perceived skill development, two competitions in particular demonstrated a significant improvement in all ten skills measured. These competitions were first year and junior mooting. It must be acknowledged that a significantly reduced sample size for the other competitions may have influenced their statistical power and may explain their lack of statistical significance. However, a potential explanation for this pattern may be that younger and competition-inexperienced students felt they derived greater benefit from such competitions, compared with older, possibly more experienced participants. Thus targeting competition involvement toward younger and more inexperienced students may result in the greatest benefit.

Support was also found for the second hypothesis, that participation in competitions increased student engagement with legal subjects, MULS and peers. This was a significantly greater improvement in comparison with control group students who did not compete during their law studies. Notably, engagement was one of the three areas that consistently and significantly improved across time within all legal competitions. Furthermore, participant responses to the qualitative questions indicated that participation

\begin{thebibliography}{9}
\end{thebibliography}
in MULS law competitions increased engagement in the majority of cases. Intuitively, these results reflect the social and interactive nature of such competitions, which involve teamwork, competing against students across other year groups, interacting with MULS committee members, and receiving feedback from judges of various qualifications and backgrounds.

This potentially explains the consistent finding of prior research that students received competitions positively. Engagement is likely to correspond with enjoyment in that the opportunity to collaborate and interact with new and existing friends nurtures feelings of connectedness and creates a positive experience. To this end, a large proportion of participants cited ‘having fun’ and enjoyment as key motivators to participate.

Finally, the present study also sought to isolate the contributions made by those competitions which best facilitated the development of which skills. Three skills consistently improved at a significantly higher rate for the participants who competed compared to those who did not. These were legal knowledge, compliance with ethical standards and, as previously stated, engagement with the law school and peers. Interestingly, these three skills differed from those reported by Gillespie; however, his findings related to student-perceived advantages of mooting, whereas the present study drew from empirical data across multiple competitions. Further, the skills were categorised in slightly different ways in the two studies; for example the present study had two measures of communication skills: oral and written. It should also be noted that the skills identified by Gillespie did increase in the present study — but this improvement was not to the same extent as legal knowledge, compliance with ethical standards and engagement.

It is necessary to address the fact that legal knowledge could be considered the least capable of being described as a ‘practical skill’ of all those assessed in this study, especially as responses indicate that participants took ‘legal knowledge’ to mean an understanding of substantive law. This suggests that competitions also contribute to the development and consolidation of doctrinal knowledge as well as building important practical skills.

The link between an increase in student self-ratings of competence in complying with ethical standards and participation in law competitions was evident for those involved in first year and junior mooting, client interview and trial advocacy. This pattern suggests that competitions offer a valuable opportunity to practise following ethical guidelines. O’Shea argued in 2004 that students need to be taught an integration of both theory and ethics, which

42 Hammond, above n 14; Watson and Klarren, above n 25.
43 Gillespie, above n 16.
is best achieved through an examination of law in context.\textsuperscript{44} Law competitions arguably provide this context through a hypothetical scenario, which teaches an understanding of relationships between ethical rules and philosophical foundations such as those embedded in theories of social justice. Furthermore, Weisbrot suggested in 2004 that many professional complaints made in New South Wales against practising lawyers were not about poor understanding of doctrinal law but rather concerned lawyering skills and professional behaviour — especially communication with clients, management of client relations and files and proper handling of funds under trust.\textsuperscript{45} Given this pattern, the present study suggests that law competitions are capable of making a valuable contribution to the quality and professionalism of future lawyers.

Thus, overall, the results of the present study indicate that there are many valuable benefits to participation in university-based legal competitions. In particular, the capacity of competitions to foster the development of practical legal skills could assist in the transition between legal education and practice by helping to fill the widely recognised gap. This will, arguably, better prepare students for the profession as well as providing appropriate workplace expectations. The implication is that universities should increase access to, and engage more students in, high quality legal competitions. This may be possible through inclusion of competitions in the compulsory legal curricula or by increased funding and support to the extra-curricular activities of societies such as MULS. Importantly, as different competitions have been shown to differentially foster the development of particular skills, offering access to multiple legal competitions is ideal, as it will allow students to develop varying skills required in the future and in accordance with their career aspirations.

Given that the current study demonstrated a link between competition involvement and student-perceived skill development, the present results suggest that treating law competitions as components of substantive law courses will be of benefit to students. It would be of interest to investigate the contribution that external competitions make over and above similar exercises completed as a component of a substantive course — for example a moot during tutorials. It would also be of interest to further investigate the impact of including law competitions as a compulsory component of legal curricula. Issues that may potentially arise include the negative impact of competitiveness on learning, or a decrease in confidence for students who are unwilling to participate. Including an independent


measure of skill development, such as university grades or later career success, would also build on the validity of the current self-report findings. In addition, only Macquarie University law students were involved in the present study; future research could attempt to generate results from other universities so that the conclusions are more reliably generalisable.

The present study has demonstrated promising results regarding the benefits to competing in university legal competitions. Further areas for future research may be to assess the impact of competing on academic performance, particularly given the positive feedback obtained from qualitative data. The long-term implications of such competitions for students throughout their degree and upon entering the workplace would also be of great interest. Finally, future studies could also explore the impacts of making competitions compulsory, particularly in relation to engaging reluctant students.
Appendix A: Content of Questionnaire No. 1

<table>
<thead>
<tr>
<th>Name:</th>
<th>Student Number:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age:</td>
<td>Gender:</td>
</tr>
</tbody>
</table>

Please include subjects that you are completing this semester (include name and unit code)

<table>
<thead>
<tr>
<th>Competition Participation for 2011 (please circle):</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Semester One: Mooting Junior Mooting Senior Client Interview</td>
<td></td>
</tr>
<tr>
<td>Semester Two: First Year Moot Trial Advocacy Negotiations</td>
<td></td>
</tr>
</tbody>
</table>

Have you had any experience in competing? Please list past competitions and any placements.

1. What are your reasons for participating in competitions in 2011?
2. In what ways do you think competing with benefit you?
3. Do you see competing as separate from your degree?

For the following questions, focus on the competition you are currently competing in and answer based on how you feel at this stage in the competition (Answers will not affect your involvement in the competition, thus please be as honest as possible):

<table>
<thead>
<tr>
<th>Less competent</th>
<th>More competent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1  2  3  4  5  6  7  8  9  10</td>
<td></td>
</tr>
</tbody>
</table>

1. How competent is your legal knowledge at this stage of the competition?
2. How competent are you dealing with legal issues according to the ethical standards required of the profession?
3. How competent are you in critical and analytical thinking?
4. How competent are your problem solving skills?
5. How competent are your research skills?
6. How competent are your oral communication skills?
7. How competent are your written communication skills?
8. How competent are your teamwork skills?
9. How competent are your self-management skills? *ie coping with stress, managing conflicting priorities, time management, self-care*
10. How engaged do you feel with the law school and peers?
APPENDIX B: CONTENT OF QUESTIONNAIRE NO. 2

<table>
<thead>
<tr>
<th>Name:</th>
<th>Student Number:</th>
</tr>
</thead>
</table>

For the following questions, focus on the competition you are currently competing in and answer based on how you feel at this stage in the competition. (Answers will not affect your involvement in the competition, thus please be as honest as possible):

<table>
<thead>
<tr>
<th>Less competent</th>
<th>More competent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 2 3 4 5 6 7 8 9 10</td>
<td></td>
</tr>
</tbody>
</table>

1. How competent is your legal knowledge at this stage of the competition?
2. How competent are you dealing with legal issues according to the ethical standards required of the profession?
3. How competent are you in critical and analytical thinking?
4. How competent are your problem solving skills?
5. How competent are your research skills?
6. How competent are your oral communication skills?
7. How competent are your written communication skills?
8. How competent are your teamwork skills?
9. How competent are your self-management skills? *ie coping with stress, managing conflicting priorities, time management, self-care*
10. How much has competing contributed to your engagement with peers/ law school? *not much/a lot*
APPENDIX C: CONTENT OF QUESTIONNAIRE NO. 3

<table>
<thead>
<tr>
<th>Name:</th>
<th>Student Number:</th>
</tr>
</thead>
</table>

For the following questions, focus on the competition you are currently competing in and answer based on how you feel at this stage in the competition. (Answers will not affect your involvement in the competition, thus please be as honest as possible):

Less competent | More competent
---|---
1 2 3 4 5 6 7 8 9 10

1. How competent is your legal knowledge at this stage of the competition?
2. How competent are you dealing with legal issues according to the ethical standards required of the profession?
3. How competent are you in critical and analytical thinking?
4. How competent are your problem solving skills?
5. How competent are your research skills?
6. How competent are your oral communication skills?
7. How competent are your written communication skills?
8. How competent are your teamwork skills?
9. How competent are your self-management skills? *ie coping with stress, managing conflicting priorities, time management, self care*
10. How much has competing contributed to your engagement with peers/ law school? *not much/a lot*

1. List some of the benefits you feel you have gained from competing.
2. Based on your own experience, would you encourage others to compete?
3. Did competing increase your liking for studying law? Do you feel a greater affiliation towards the subject, your peers or MULS?
4. Do you feel competing has impacted on your academic performance and understanding of the law? How?
5. In general, did you agree with judge’s feedback and decisions?
6. Do you think the benefits of competing could be gained in another way/elsewhere?
MATCHED VERSUS EPISODIC MENTORING: AN EXPLORATION OF THE PROCESSES AND OUTCOMES FOR LAW SCHOOL STUDENTS ENGAGED IN PROFESSIONAL MENTORING

EILEEN S JOHNSON,* AMY TIMMER,** DAWN E CHANDLER† AND CHARLES R TOY††

I INTRODUCTION

In spite of the growing number of formal mentoring programs aimed at facilitating the transition from law school studies to law practice, as well as evidence suggesting that law students need to proactively seek out and gain information and support from legal professionals, little empirical research examines mentoring as a source of professional and personal development among law school students. In order to address this gap in the literature, an independent law school located in the United States teamed up with one of its educational partners, a major university in the area, to undertake a qualitative study of the impact and effectiveness of mentoring on law students by lawyers. In particular, the researchers compared traditional mentoring, which they defined as involving a long-term relationship between one law student and one lawyer, and episodic mentoring, which they defined as one-time sessions between a law student and a lawyer which could be repeated by that law student with many different lawyers.

Although this study was conducted with American students and lawyers, the findings are relevant to Australian readers for two reasons. First, legal mentoring programs in Australia and the US are similarly focused to provide guidance to the less experienced by seasoned professionals, so the findings are likely to be of interest globally. Second, it appears that Australian legal mentoring

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1 Thomas M Cooley Law School, Lansing, Michigan, USA.
2 Oakland University, Rochester, Michigan, USA.
programs also include both matched and episodic in nature, although episodic mentoring is a rarer and perhaps a more recent development facilitated by the opportunity to engage in mentoring by email. One factor that merits consideration is that the study of law is generally an undergraduate degree in Australia, while it is a graduate degree in the US. Thus, the participants in this study are likely to differ from typical law school students in Australia in terms of age, educational background, and work/life experiences. Readers are cautioned to keep this in mind when considering the applicability of these results to the Australian settings.

II THEORETICAL FRAME

A Divine Roots of Mentoring

Mentoring has no doubt existed since the beginning of human relationships, but as a professional development tool it is currently a topic of great interest, and has been applied across a multitude of settings and contexts. The term ‘mentoring’ can be traced back to Homer’s *The Odyssey*, in which Odysseus, as he was called away to the Trojan War, entrusts his son, Telemachus, to the care of Mentor. Mentor subsequently guides Telemachus on a journey to find his father and toward a deeper understanding of himself. There are, however, two manifestations of Mentor, one human and one divine. Powell noted that the figure of Mentor is that of a wise, gentle, elderly community leader but that this human Mentor never speaks directly to the young Telemachus. In fact, it is the goddess, Athena, disguised as Mentor, who guides Telemachus directly on his journey of self-discovery. Accordingly, the critical features that have come to be associated with mentoring — guidance, advising, introducing the


mentee or protégé to important individuals, and running interference when necessary — are all grounded in a divine rather than mortal figure, and the divine nature of a mentor’s knowledge rests on authority and power.\textsuperscript{6}

\section*{B Definitions of Mentoring}

Many researchers have described the difficulty in conducting and evaluating research on mentoring due to the varying definitions of mentoring, both across and within various disciplines.\textsuperscript{7} Jacobi, for example, identified 15 definitions of mentoring in educational, psychological, and management literature, and Kram identified as many as 37 different usages of the term.\textsuperscript{8} Among contested issues related to the mentoring relationship are the duration of the relationship, the level of involvement between the mentor and mentee, and the function of the relationship. Eby, Rhodes and Allen noted that it is important to distinguish between mentoring relationships and other types of relationships that involve power and authority. To this end, these authors distinguish mentoring from that of role-model and observer, teacher and student, advisor and advisee, supervisor and subordinate, and coach and client, based on the context, primary scope of influence, degree of mutuality, relationship initiation, relational closeness, interaction, and power difference.\textsuperscript{9} One must also distinguish between contextual definitions of mentoring, such as youth mentoring, academic mentoring, and workplace mentoring.

Smith stated that mentoring is fundamentally a ‘relationship between a caring and experienced professional reaching into the life and practice of a generally [though not necessarily] younger and less experienced colleague.’\textsuperscript{10} Effective mentoring is intentional (systematically undertaken and not left to chance), nurturing, insightful, permissive of mistakes and growth by the protégé, supportive and protective, and ultimately results in the transformation and growth of the mentee as an individual and professional. This definition of mentoring is consistent with that espoused by Aronovitz, who explained that ‘within the legal profession, mentoring means a

\begin{itemize}
\item \textsuperscript{6} Brenda J Powell, ‘Mentoring: One of the Master’s Tools’ (1999) 59 \textit{Initiatives 19.}
\item \textsuperscript{8} Maryann Jacobi, ‘Mentoring and Undergraduate Academic Success: A Literature Review’ (1991) 61 \textit{Review of Educational Research} 505; Kathleen Kram, \textit{Mentoring at Work: Developmental Relationships in Organizational Life} (Scott, Foresman, 1985).
\end{itemize}
voluntary, mutually beneficial relationship of professional growth, career development, and personal fulfillment that serves both the mentee as well as the mentor." Thus, most current definitions of mentoring describe such a relationship as one that involves care, guidance, nurturance, and protection, is intentionally developed, and offers reciprocal benefits to both mentor and protégé.

Research has begun to make headway in clarifying common attributes across mentoring relationships. For example, a recent review of 124 mentoring articles published over two decades in the management literature highlighted three core attributes: reciprocity (mutuality of exchange rather than a one-way relationship), regular/consistent interactions over time, and developmental benefits (partnerships that aid the protégé’s career and support the mentor in various ways). In an effort to distinguish mentoring that involves the aforementioned attributes from other types of mentoring such as peer or team mentoring, scholars have begun to refer to mentoring by a more experienced mentor of a less experienced protégé as ‘traditional mentoring’. For the purpose of this article, the construct of mentoring is confined to that which takes place between students exploring and embarking on a specific career and seasoned professionals within that career.

C Functions and Outcomes Associated with Mentoring

In addition to efforts to distinguish mentoring from other relationships and define it as a unique construct, the mentoring literature examines the functions that mentors provide and the outcomes associated with mentoring. For example, Kram’s seminal study of informally cultivated mentoring between senior and junior employees in two corporate settings provided the foundation for three decades of empirical research on the provision of mentoring functions by the more experienced mentor. These functions include career support such as sponsorship, visibility, role modelling, and coaching as well as psychosocial support such as friendship, acceptance, and confirmation. Numerous studies have identified positive effects associated with having a mentor, including subjective outcomes such as job and career satisfaction and commitment, and objective outcomes such as promotions and compensation. These

14 Kram, above n 8.
studies have been largely cross-sectional and conducted across diverse professions and contexts.\(^{15}\)

Although most of the mentoring literature to date is US-based, studies with participants of different nationalities, including Australian,\(^{16}\) Nigerian,\(^{17}\) Chinese,\(^{18}\) and Japanese studies,\(^{19}\) suggest that mentoring processes, quality, and outcomes have some consistency across jurisdictions. Australian studies include examinations of mentoring in health care,\(^{20}\) workplace mentoring aimed at indigenous populations,\(^{21}\) transitional mentoring for library and information professionals,\(^{22}\) and mentoring in a state police service.\(^{23}\) Our review of these studies confirms a relatively consistent understanding of the definition, processes, and outcomes of mentoring across national contexts. Furthermore, Hofstede’s work on national culture suggests a great deal of similarity between national cultures within Australia and the United States — a finding that suggests the results of research on mentoring are broadly generalisable across these national contexts.\(^{24}\)

### III MENTORING IN THE LEGAL PROFESSION

In spite of a sizeable body of literature on mentoring across a wide range of professions, the legal profession as a whole has been largely neglected as the subject of examination. In fact, while there has in recent years been a call for practising lawyers to serve as mentors for young and inexperienced lawyers, little empirical research has been conducted on the prevalence and success of professional mentoring.

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\(^{15}\) Tammy Allen and Lillian Eby, above n 9.


\(^{19}\) Mark Iain Bright, ‘Can Japanese Mentoring Enhance Understanding of Western Mentoring?: Young Researcher’(2005) 27 Employee Relations 325.


\(^{24}\) Geert Hofstede, Cultures and Organizations: Software of the Mind (McGraw-Hill, 1997).
in the legal profession.\textsuperscript{25} Arguably, the legal profession is higher-risk than most, in that lawyers are more likely to report being depressed, anxious, or facing some sort of addiction such as drugs or alcohol than their peers in other professions. These effects seem to stem from admission into law school and appear in many countries, including Australia.\textsuperscript{26} Mentoring can be viewed as a way to potentially mitigate these deleterious effects on individuals who embark upon a career in the legal profession.

Among the few published studies examining mentoring and the legal profession, Higgins conducted a study investigating the level of satisfaction at work among early career lawyers and its relationship to the number of mentoring relationships experienced and the amount and type of assistance received. Although Higgins concluded that a positive relationship exists between the number of ‘developmental relationships’ an early career lawyer experiences and subsequent job satisfaction, her results also demonstrated that receiving a high amount of psychosocial support from a single individual is also associated with higher work satisfaction.\textsuperscript{27} Higgins and Thomas, in examining multiple examples of what they term ‘developmental relationships’, examined the effects of the quality of the primary developer as well as the structure and quality of the constellation of developmental relationships on lawyers’ subjective (work satisfaction and intent to stay) and objective (promotion and retention) outcomes. These findings, however, are confounded by the fact that the authors did not distinguish between formal mentoring relationships and other types of developmental relationships within the work environment (eg, peer support, workplace friendships, and one-time encounters with a superior).\textsuperscript{28}

\begin{footnotesize}


\end{footnotesize}
According to Aronovitz, mentoring facilitates the transfer of valuable information and insight from seasoned lawyers to novice practitioners. He suggested that there are three ways in which law firms can facilitate the mentoring process: by creating a culture in which all lawyers mentor and learn from one another (a model described as ‘co-mentoring’ in the field of education); by training lawyers in the skills necessary for successful mentoring relationships and then recognising and rewarding outstanding mentors; and by establishing a structured mentoring program that is carefully designed and monitored. Indiano went further and stated that mentoring is not restricted to the office, and that the court system could do much to encourage mentoring. Furthermore, studies by Sonsteng and Camarotto provide evidence that observations of experienced lawyers by early career lawyers, and advice from them, were the most important factors in the development of several important skills, including: (1) the ability to obtain and keep clients; (2) understanding and conducting litigation; (3) counselling clients; (4) negotiating; and (5) diagnosing and planning solutions to legal problems. The authors contend that legal education as it is currently conducted in many law schools contributes little to the development of these critical professional skills. But even if such skills are taught and practised in law school, mentoring is an important adjunct to legal education for the development of interpersonal, ethical, and practical judgment skills as observed and practised in the ‘real world’.

While these articles are suggestive of the value of mentoring to lawyers, very little empirical research has been conducted to date. This study is intended to help fill this gap.

IV BACKGROUND OF THE STUDY

A The Call for Mentoring in the Legal Profession

In 2001, the United States Conference of Chief Justices (of state Supreme Courts) recommended, among other things, that judicial leadership promote mentoring programs for both new and established lawyers. In response, a number of states established mandatory and voluntary mentoring programs in order to help smooth the transition from law school to legal practice, and to allow new lawyers to learn about different practice areas as well as to benefit from the experience and expertise of practising lawyers. For example the State Bar of

29 Aronovitz, above n 11.
30 Carol Mullen, New Directions in Mentoring: Creating a Culture of Synergy (Routledge, 1999).
31 Indiano, above n 25.
Georgia and its Commission on Continuing Lawyer Competency implemented the Georgia Transition into Law Practice Program in 2005 in order to teach the skills, professional values, and judgment necessary to practise law in accordance with the highest ideals of the profession. During the mandatory year of the program, protégés attend programs that emphasise lawyer skills, and relationships with clients, other lawyers, the courts, and the public. However, despite the fact that the program has been replicated in other states and has gained international attention, the efficacy of this program has not been tested.

Other states have also implemented mentoring programs with some degree of perceived success. For example, Ohio pilot-tested a mentoring program in 2006 in which attorneys newly admitted to the practice of law in Ohio were paired with experienced and ethical professional attorneys. The new lawyer and mentor created a mentoring plan together based on a selection of suggested activities and topics, each of which was supported by curricular materials, discussion questions, and instructive articles. Program participants were surveyed and responses were ‘overwhelmingly positive’, so the Supreme Court approved a permanent, voluntary mentoring program for new lawyers beginning in 2008. North Carolina has also developed a one-year, voluntary mentoring program for new lawyers, and Illinois has a six-month mentoring program that matches new lawyers with mentors based on professional interests and personal characteristics. Currently, 34 state bar associations, including the District of Columbia, have implemented some form of mentoring program. It appears that all of the programs that have been designed and implemented involve pairing law students or new lawyers with practising lawyers, following the ‘traditional’ model of mentoring relationships.

At the 2007 National Conference of Bar Presidents, a number of states and counties informally reported on their success, or lack thereof, with their mentoring programs. At that time, many reported that the programs failed. Most said it appeared that there were plenty of enthusiastic mentor lawyers, but that the protégé lawyers failed to make time to meet with their mentors. During a work session at

35 Supreme Court of Ohio, *Lawyer to Lawyer Mentoring Program* <http://www.supremecourt.ohio.gov/AttySvcs/mentoring/default.asp>.
that conference,\(^{38}\) the group members also indicated that established-lawyer–new-lawyer mentoring relationships tend to fail because:

- neither party knows how to make it work;
- mentors do not want to be seen as potential employers;
- protégés do not see the benefit of the relationship;
- the parties fail to continue the relationship, even when it starts out well;
- newer lawyers prefer mentors who are closer to their age and who share a similar lifestyle;
- matching is difficult and administratively time-consuming;
- the parties believe it will require time they would rather spend another way; and
- new lawyers don’t believe they need the help.

**B Changing Career Contexts and Episodic Mentoring**

In addition to the difficulties with implementing traditional mentoring programs cited above, other contextual factors have resulted in alternative or new approaches to mentoring. The career context in which mentoring occurs has changed dramatically, constraining opportunities for long-term single mentoring relationships to flourish and limiting the time that would-be mentors have to dedicate to aiding their protégés.\(^{39}\) Introducing a critical turn to the mentoring literature, Higgins and Kram asserted that globalisation, changes in technology, altering organisational demography, and other trends have given rise to the need for an individual to seek out the assistance of multiple ‘developers’ who provide varying amounts and types of relational support rather than relying on a single mentor. Consistent with the notion of ‘boundary-less’ careers in the wake of externalisation of work and loss of long-term job security, in the current work climate the individual no longer anchors his or her identity to an employing organisation but proactively seeks out professional development opportunities formerly provided by an employer.\(^{40}\)

Taken together, the notions of the boundary-less career and ‘developmental networks’ — a group of individuals who take an active interest in and action to advance a protégé’s career — suggests that individuals entering the legal profession may not rely solely

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\(^{38}\) The work session was attended by Amy Timmer, who was also a speaker, and is one of the project researchers on this article.


upon a matched mentoring program but can experience unique opportunities associated with seeking out support from multiple individuals. Mentoring episodes are developmental interactions that occur during one or more occasions between individuals. Unlike traditional mentoring relationships that involve regular, consistent involvement between a single mentor and protégé, episodic mentoring involves episodes of mentoring, usually initiated by the protégé, with multiple mentors, each sought out for a particular area of expertise or support. It is no longer enough to simply require that early career lawyers find a mentor and work with that individual. First, the relationship must be considered dynamic, reciprocal, and flexible, and focused on clear objectives. As stated by Hamilton & Brabbitt, ‘the definitions of a mentor and mentoring must be focused on professionalism if the profession is to realize its ideals and core values.’

Second, the concept of mentoring episodes offers the opportunity to be mentored in a single session by more than one person, each chosen for specific skills, expertise, or support. Thus, the notion of episodic mentoring challenges some of the definitional attributes of mentoring, specifically the idea that mentoring must involve regular and consistent interactions over time.

While some consider episodic mentoring to be less desirable than traditional mentoring, the changing context of work and multiple demands on young professionals may actually create needs that are best filled through developmental networks and episodic mentoring rather than relying on traditional approaches to mentorship. Fletcher and Ragins observed that relational stances such as mutuality and co-responsibility combine with relational skills to create behaviours and processes that involve interdependency, reciprocity, fluidity, and mutual learning. These relational processes result in growth-fostering interactions or mentoring episodes that involve increased zest, empowered action, self-esteem, new knowledge, and a desire for more connection. This new understanding of mentoring — particularly the opportunity for episodes of mentoring, as opposed to relationships of mentoring — has significant implications for professional mentoring programs. As yet, however, little research has been conducted to investigate the efficacy of episodic mentoring compared to traditional mentoring. And despite the widespread call for the development and implementation of mentoring programs

41 Joyce K Fletcher and Belle Rose Ragins, ‘Stone Center Relational Cultural Theory’, The Handbook of Mentoring at Work: Theory, Research, and Practice (Sage, 2007) 373.
43 Haggard, above n 12.
45 Fletcher & Ragins, above n 41.
for new lawyers, only a relative handful of states have actually implemented formal mentoring programs. Of those that do exist, little evidence has been collected, beyond the anecdotal, to study and compare the efficacy of such programs. This pilot study is intended to begin to fill this gap in the knowledge base, and also to focus efforts at evaluating the efficacy of two models of mentoring — traditional and episodic — on specific outcomes including development of professional identity, and improvement of work–life balance among new lawyers, by starting those relationships while the protégés are still in law school.

IV Methods

Although, based on the literature review above, many questions can be asked about mentoring, this study focused on comparing the process and outcomes of two different approaches to mentoring law students: traditional matched-pair mentoring and episodic mentoring. The driving question for this study was: How does the experience of being mentored differ for students in a traditional matched-pair mentoring program compared with an informal series of mentoring episodes with a variety of attorneys?

A Sample

Sixty-seven students in their second or third year of law school who were also enrolled in a professionalism course at a large US law school were initially recruited as participants in this study. Students were then randomly assigned to one of two mentoring programs: matched-pair mentoring or episodic mentoring. Of the original sample, 59 students attended an initial workshop during which they were given information about the study and informed consent was obtained. Student demographic information obtained at this initial meeting indicated that 56 per cent were female and the average age was 29, within a range of 23–50 years of age. Students self-identified their ethnicity as Caucasian (50 per cent), African American or Black (22 per cent), Middle Eastern (8 per cent), Hispanic or Latino (7 per cent), Asian (5 per cent) and no response (7 per cent). Thirty-one per cent of the sample indicated that they were preparing for law as a second (or beyond) career, and had previous careers in construction, education, sales, business, engineering, and the justice system (police officer, child support officer, probation officer). Post-hoc analyses indicate that the two groups — matched-pair and episodic mentoring — were equivalent on all demographic variables, and that the sample was generally representative of the population of students attending law school in the United States in 2010. In addition, 25 volunteer mentors were initially recruited from the state bar association to serve as mentors for students assigned to the
matched-pair mentoring program. Fifty-six per cent of the mentors were female, 88 per cent self-identified as Caucasian, and they had an average of 16 years of practice experience, with a range of 2–20+ years.

B The Mentoring Program

The mentoring program took place over the course of seven months. It began with the initial training workshop in early November and continued until the end of May. Prior to the initial workshop, students who were assigned to the matched mentoring program were asked to rank the importance to them, in ascending order of preference, of up to five criteria for mentor-matching. Student survey responses indicated that the most important criterion on which they hoped to be matched with a mentor, based on weighted mean of responses, was area of specialisation. This was followed by the mentor’s prioritisation of career and family, and then by years of experience practising law. Of the 41 per cent of students who chose prioritisation of career and family as a criterion for matching, 14 (10 of whom were female) preferred a mentor who prioritised career success and 10 (6 of whom were female) preferred mentors who prioritise family. Gender and ethnicity were indicated as the most important criteria for less than 15 per cent of the sample.

Two half-day workshops were conducted — a morning workshop for students who were assigned to the matched mentoring program and the volunteer mentors, and an afternoon workshop for students who were assigned to the episodic mentoring program. An expert on mentoring was brought in to conduct the workshops and provide the students and the mentors with tips on initiating, developing, and maintaining a mentoring relationship (in the case of students matched with a mentor) or methods for initiating and engaging with mentors during mentoring episodes. In addition, the development of goals for the mentoring experience was discussed and students were encouraged to think through what they hoped to gain from their mentoring experience. Both groups were asked to focus the mentoring on professionalism in legal practice and on the development of the protégés’ professional identities, including how to balance work and home life, how to deal with unethical conduct in others, and how to make good career choices.

During the morning session, protégé–mentor matches were revealed, and the dyads met to introduce themselves and make plans for their first meeting. Those students whose mentors were unable to attend or who had not yet been matched with a mentor (there were fewer volunteer mentors than student participants initially) met with an associate dean of the school (also a project researcher) to discuss the next steps. The afternoon session focused on episodic mentoring and the consultant provided students with an understanding of the nature
of this form of mentoring as well as ideas for various ways to engage in mentoring episodes and to make contact with potential episodic mentors. Students in this program were, additionally, offered support meetings to take place on Friday afternoons with an associate dean (also a project researcher) and were given a list of coming events, such as bar association meetings, at which they might engage with episodic mentors. The weekly support group meetings with episodic protégés continued throughout the study. The project researcher who organised those meetings (which protégés could choose to attend or not) found that the meetings were a necessary part of an episodic mentoring program for some but not all participants. Those who benefited did so for three main reasons: (1) protégés shared ideas on how to set up mentoring episodes; (2) the meetings were a source of inspiration to others when success stories were shared, which helped motivate all protégés to continue to set up meetings with lawyers; and (3) the introverted protégés found the meetings to be a safe place to share their reluctance to set up meetings with lawyers they didn’t know, and try to overcome that reluctance. These meetings were not a planned part of the study, but the need for them became clear almost immediately; the researchers believe that, without them, some protégés assigned to the episodic mentoring condition might not have undertaken any episodes.

C Data Sources

At the conclusion of the two terms during which this pilot program took place, participant students were asked to complete a four-part survey designed to collect information on the nature, outcomes, and perceived effectiveness of the mentoring relationships as well as the professional identity development of the participant protégés.

Volunteer mentors who were matched with a protégé were asked to complete a similar survey, but it did not include questions about professional identity. Participants assigned to the episodic mentoring condition kept journals in which they recorded detailed information about their mentoring episodes including the date, name, and position of the mentor, a description of the episode, the nature of the activity or discussion, the contribution of the episode to the protégé’s career, professional identity, and personal growth, and any other noteworthy comments regarding the episode.

Because episodic mentoring is a relatively new approach to mentoring and because, based on the initial surveys, it appeared that participants assigned to the episodic mentoring program had very

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46 The development of a law student’s professional identity was of particular concern to the researchers, due to the conclusion of the authors of the Carnegie Report on Educating Lawyers, who noted the absence of this development in traditional law school curricula: William M Sullivan et al, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass, 2007) vol 2.
different experiences from those assigned to the matched mentoring program, seven participants in the episodic mentoring program were purposely selected (based on having either a very positive or a very negative perception of their experience) for individual interviews that followed a semi-structured protocol and were audio recorded and transcribed. The interviews were designed to elicit information about the participants’ general experiences (both positive and negative) with episodic mentoring, their perceptions of what makes a successful mentoring episode, the benefits and challenges of episodic mentoring compared to traditional mentoring, the extent to which the participants’ mentoring episodes impacted their professional identity and views on work/life balance, and suggested changes to the program for the future. Since a deeper understanding of the experience of the episodic mentoring participants was the intent of the interviews, rather than generalisability of results, purposeful selection was undertaken, and additional interviews were not scheduled because saturation was reached (the participants’ experiences began to converge and new information was no longer being revealed by the final interviews).

D Results

1 Methods of Connecting

Participants in episodic mentoring program reported on average a higher of number of encounters with mentors than did those in the matched mentoring program. Protégés as well as mentors in the matched mentoring program reported an average number of of or two meetings during the course of the study, whereas the protégés in the episodic mentoring program reported an average of three to four mentoring episodes. In the episodic mentoring program, however, it was sometimes difficult for protégés to report the actual number of encounters because they came to see that many different types of meetings could be considered an episode of mentoring. For example, one participant engaged with episodic mentors through Twitter by sending a request to give him their best career advice in 140 characters. As a result, this protégé had encounters with several practising attorneys in addition to many informal and spontaneous encounters that he considered episodes of mentoring. Participants in both programs also reported similar methods of communicating with mentors, the most common of which was in-person meetings followed by email, and then telephone contact, with a few reporting the use of texting. However, some participants in the episodic mentoring program used social media and other networking tools such as Twitter, LinkedIn, or Facebook to make contact with mentors and engage in mentoring episodes. Some of these encounters then led to face-to-face meetings, but this was not always the case.
2 Perceived Strengths

When asked to respond to items intended to assess the effectiveness of the mentorship program, participants in the two groups did not differ overall in their perceptions. The only survey item for which a statistically significant difference between the episodic and matched-pair groups was found was ‘demonstrated content expertise in my area of interest’ (p < .038). Here protégés in the episodic mentoring program were more likely to respond positively. This was initially surprising, since protégés in the matched mentoring condition were matched, whenever possible and requested, with a mentor with a particular area of specialisation. However, further analyses of the data revealed that protégés in the episodic mentoring program were often able to make multiple and purposeful connections with attorneys specialising in a particular area of interest.

When asked about the strengths of their mentoring program, protégés in the matched mentoring program reported positive experiences when they felt a personal connection to, and had interests in common with, their matched mentor; the matched mentor had professional expertise from which the protégé could benefit or learn; the matched mentor was accessible and communicated effectively and easily; they felt a sense of personal investment from their matched mentor; and the matched mentor was able to facilitate further connections or networking opportunities for the protégé. For example, one participant noted, ‘I feel like my mentor was actually invested in me. She cared about my academic and personal life, and she had an agenda set of things we were to discuss during our meetings’. Another noted, ‘My mentor was very approachable and willing to answer any questions I had. He seemed interested in things I was involved in and willing to openly share some of his experiences. He took an interest in my personal life as well and provided me with advice on particular career ideas I had.’ Other common themes that emerged from protégé response included ease of communicating with the mentor, the mentor’s willingness to be open and share information, and the ability to ‘click’ with the mentor on a personal and professional level.

Protégées in the episodic mentoring program perceived the strengths of their experiences to lie in the variety of contacts they were able to make; the variety of needs or topics that were the focus of mentoring episodes; improvement in their own ability to reach out to attorneys and non-attorneys as well as their ability to listen and learn from a variety of encounters; and the fact that episodic mentoring is flexible, can be less time-consuming, and one is free to search out multiple mentors and choose to pursue the relationship further or not, depending on the outcome of the encounter and the interest from both parties. One participant responded, ‘The best part about episodic mentoring is that you get to choose who you want to
engage in a mentoring episode with. It allows you to cover a broader range of skills and is more flexible than being randomly matched with someone. It also helps to work on your communication and networking skills’. Another noted, ‘I found I was more apt to listen carefully. Knowing the mentoring encounter might last only a few minutes, I found myself more focused on what the mentor had to say. I think it helped me become better able to extract the information I was looking for while at the same time being alert to the pearls of wisdom I might not have been specifically seeking.’

Additionally, several protégés in the episodic mentoring program spoke about the fact that the program ‘forced’ them out of their comfort zones and provided an impetus to reach out to others. For example one participant noted, ‘I was rather hesitant to engage prospective mentors at the beginning for fear of being turned away or being considered a nuisance. But over time, the episodic mentoring program allowed me to learn how to “feel out” whether a prospective mentor would be willing to engage with me.’ Another participant stated, ‘I am pretty introverted so reaching out was the difficult part for me. But what I found from my interactions was that it seemed like everybody was very willing to be as helpful as possible.’ Furthermore, some participants in the episodic mentoring program reported that, while initially discouraged that they were not assigned or matched with a mentor, they eventually came to appreciate the outcomes of the mentoring episodes and were ultimately happy that they had the opportunity to participate in the episodic mentoring program. For example one participant reported that, ‘I was hoping to be assigned to the matched mentor group so I wouldn’t have to worry about finding mentors. But I think the episodic mentoring was almost better because I realized that a lot of what I had been doing all along was episodic mentoring. It reminded me of something I read — like having a personal board of directors.’ And whereas participants in the matched mentoring program were more likely to focus on the networking opportunities that were facilitated by their matched mentor, participants in the episodic mentoring program focused on the fact that their own ability to develop professional networks and make connections had been improved.

3 Perceived Challenges

When asked about the challenges of their mentoring program, protégés in the matched mentoring program generally stated that there were few or no weaknesses if they had been successful in establishing a relationship with their mentor. Discussions about challenges tended to focus on difficulty with scheduling and difficulty on the part of either the mentor or the protégé in finding time to meet. For example one participant stated, ‘We met only once a month or so. I think it would have been better to meet more often but, at the same time, I
understand that it would be difficult to meet more often considering he had a family and other activities in which he was involved.’ In a few of the mentoring pairs, weaknesses in the relationship were seen when there was a failure to communicate specific goals or expectations for the relationship or when the protégé felt that the mentor did not have the area of specialisation in which he or she was interested. For example one participant noted, ‘Since neither of us really knew what to do at the meeting, we failed to set goals or really follow through with anything. Additionally, neither of us understood the dynamic of our relationship — it was like an awkward first date.’ Finally, there was some degree of intimidation reported by both protégés and mentors. For example, one protégé would have liked to have the opportunity to visit his mentor’s office and shadow him for a day but did not feel he could impose such a request on someone so busy, while one mentor reported feeling that, being a young attorney, he did not have much practical experience to share with his protégé. These challenges highlight the importance of ensuring that volunteer mentors have both the time and experience to effectively mentor early-career attorneys.

For participants in the episodic mentoring program, the most common challenge reported was the lack of accountability or motivation: many participants reported having difficulty reaching out to potential episodic mentors either because of shyness or introversion, not knowing where to find potential mentors, or because they perceived that there would always be a ‘next time’ opportunity that allowed them to pass on what might have been a fruitful mentoring episode. For example one participant noted, ‘One weakness of episodic mentoring is that it allowed me to pass on various opportunities that I didn’t necessarily feel comfortable with. Knowing that I had so many different opportunities, I found myself thinking there would always be a “next time”.’ In addition, many participants reported feeling a lack of engagement or follow-through as a weakness of episodic mentoring, and many assumed that if they had been matched with a mentor, they would have experienced a deeper relationship in which the mentor had a vested interest in them. Furthermore, the issue of trust and caution was raised frequently by participants in the episodic mentoring. One participant stated, for example, ‘There isn’t the traditional mentoring session so once you speak to someone you might not hear from him or her again. There also isn’t the opportunity to really get to know someone the way you would in a traditional mentoring situation.’ Another participant noted, ‘I still think you need a more traditional mentor who has a vested interest in your well-being and your success, and you have a trust level established with them so that they can tell you things that might be hard to hear.’ While most reported that they did not see it as a challenge per se, some participants nevertheless noted
that it is important to be judicious in accepting advice. Receiving contradictory advice was also an issue from participants engaging in episodic mentoring, and it was noted by several protégés in this program that one had to be able to sort through and reflect effectively on advice they were given. This can be seen in the example of one protégé who admitted to being easily influenced and who reportedly changed her entire career plan based on the advice received during a single mentoring episode. This challenge highlights the importance of providing initial training and continuing supervision of episodic mentoring: law students and early career attorneys may not have yet developed the ability to discern good professional advice from advice that should be disregarded, and may feel overwhelmed by seemingly conflicting advice from different sources.

4 Outcomes of Mentoring

Participants in both programs reported similar outcomes from their mentoring experiences. The most common outcome was reported to be exposure to mentors’ professional expertise, followed by improvement in the development of the protégé’s professional identity. Many participants, especially in the episodic mentoring program, reported increased confidence in their ability to fit into the profession and engage with other attorneys on a professional level. For most participants in the episodic mentoring program, these mentoring episodes were the first attempts they had made to make connections in the legal community as a professional, and represented a shift in their own professional identity. For example one participant stated, ‘My mentoring relationships let me know that I have much to offer the legal community. While I have a tremendous amount of learning to do, I feel that I belong in the legal community.’ Another participant stated, ‘I feel the advice given to me by a judge who served as an episodic mentor helped me to know more of what to expect as a young lawyer. Admittedly, it is rather intimidating to know that I will be across the courtroom from many seasoned attorneys who are skilled in their craft. However, with this mentor’s advice, I know better what will be expected of me in the early years of my career.’

Interestingly, participants in the episodic mentoring program frequently reported a sense of relief in learning from their mentoring episodes that it is not critical to focus on a particular legal specialisation, and many reported that a positive outcome of their episodic mentoring was coming away with a greater sense of who they wanted to be as a professional rather than what they wanted to specialise in. For example one participant stated, ‘My mentor helped me see the human side of law. They also helped me to see that good attorneys do not get involved in the senseless games I worry about. Really, my mentor helped me to start constructing a
solid framework for the way I want my career to be’. Another noted, ‘These meetings helped me to remember that approaching every situation with a lawyer’s mentality is not always the best approach — that there is a human element to what I am pursuing.’ Participants in the episodic mentoring were also twice as likely to report thinking about a change in legal specialisation as participants in the matched mentoring program. Based on participant responses, this appears to be a direct result of having had access to mentors across a variety of specialisations. For example one participant stated, ‘Episodic mentoring broadened my horizons a bit. One of my mentors advised me to look to other professions in which I can use my degree to secure a good paying job.’

Participants in both programs also reported that a positive outcome was discussing issues of work–life balance and learning from their mentors about how they negotiate this balance and what they would have done differently in retrospect. One participant in the matched-mentor program noted that working with her mentor ‘Helped me conceptualize the attorney I want to become. Through our relationship, I realized that I value family far more than work, and that working in a smaller firm may be better suited to me than working in a large, more competitive environment.’ A female participant recounted how one of her mentors advised her: ‘He was really helpful in giving me insight, telling me that I am going to be busy with school, work, having a new house, but to not forget to work on my relationship and keep it separate and important. That was good advice, especially coming from a male.’

While it was hoped that both mentoring programs would result in protégés engaging in community service, pro bono legal work, and political activity, this did not appear to be the case; when it was mentioned at all by either protégés or mentors in both programs, it was based on discussion of the importance of rather than actual engagement in such activities.

Overall, the outcomes of mentoring in both the traditional matched-pair and episodic programs were similar despite initial assumptions on the part of many participants that being assigned to a traditional mentor would result in better mentoring outcomes than engaging with episodic mentoring.

V DISCUSSION

The goal of this study was to explore the experiences of law students engaged in two different mentoring approaches: traditional or matched-pair mentoring and episodic mentoring. Not surprisingly, we found that matched mentoring sometimes worked well, and sometimes did not. We found the same to be true with episodic mentoring. Participants in the matched-pair mentoring program
who were able to establish a trusting and ongoing relationship with a mentor generally reported being very satisfied with their experiences, while those who reported being dissatisfied reported a failure to establish a true mentoring relationship, due primarily to either a lack of time and appropriate goal-setting (most common), or difficulty establishing a meaningful connection with the mentor. Participants in the episodic mentoring program had a wider range of experiences, and reported having positive experiences related to the range of exposure they had to a wide array of mentors reached through various methods, including telephone, in person, e-mail, and even Twitter. Those in the episodic mentoring program who reported negative experiences tended to struggle most with making the necessary connections and distinguishing episodic mentoring from general networking. However, both types of mentoring resulted in similar outcomes, especially in the areas of professional identity development, exploration of career options, and work–life balance. This finding challenges the assumptions participants had at the beginning of the study, that being matched with a traditional mentor would result in better outcomes as well as assumptions in some literature that ‘episodic mentoring is not ideal, but can be very helpful in the absence of a formal mentor.’ However, there were two significant differences between the two types of mentoring: administrative costs and emotional commitment to mentoring.

A Costs and Benefits

The advance preparation and administrative work involved in a matched mentoring program is an added cost. Not only does a matched program require more administrative work to establish and maintain, it also requires more work when a match fails, because another match must be found by the program administrator. Further, there seemed to be greater expectations of success at the beginning of a matched relationship, so the emotional let-down experienced by the protégé and/or the mentor when it didn’t work, and the possibility that both parties will therefore decline any future attempts at mentoring, is an additional detriment. Again, this finding highlights the importance of being careful to select volunteer mentors who have both the time and interest as well as experience in mentoring. When protégés are counting on and looking forward to a mentoring relationship and it does not work out, protégés can be left with a feeling of inadequacy and fear of further rejection. Thus, greater risk and cost, both administrative and emotional, is involved in operating a matched mentoring program as compared with an episodic program in which both protégés and mentors are free to establish and develop a variety of mentoring relationships.

47 Cutter, above n 44.
After initial training in ways to meet attorneys and make ‘cold calls’ to attorneys, a program administrator was not required to maintain the episodic mentoring program; therefore, less administrative cost was involved. Furthermore, when the mentoring episodes were not successful, less emotional cost was involved because there was neither the expectation of, nor the emotional investment in, a long-term relationship.

One cost of episodic mentoring that should be considered, however, is that of a weekly support group. This component, while not required of the participants assigned to episodic mentoring, seemed to be helpful and, for some participants, necessary to keep the protégés motivated to seek out the next mentoring opportunity. In the current study, the support group was led by the associate dean of the law school who recruited the participants because she felt that the episodic group needed encouragement and support. In particular, shy or introverted participants benefited from hearing the success stories of other participants when they shared their experiences at weekly meetings. However, support meetings could occur among the participants without an administrator being hired or utilised. As an alternative, lawyer groups and law schools considering this approach could build into the program a person who will organise, attend, and lead the meetings when necessary.

The greatest benefit of episodic mentoring was that successes were often unexpected by the protégés, and therefore a surprising delight. Participants attending the support group each Friday would often report things like, ‘I can’t believe this guy returned my email and now we’re going to meet!’ or, ‘I reached out to a lawyer who does exactly what I want to do for a living and now she’s going to help me find an externship!’ In reviewing the journals, we found that one protégé was in fact offered a job by his episodic mentor, and another was offered an externship, both after only one meeting. These results, especially when shared with other participants in the support group setting, provided encouragement to continue seeking out mentoring episodes. One benefit that might be experienced only by a matched mentoring pair is the development of a relationship that persists and may thus allow the mentor and protégé to work together on such things as community service, pro bono legal work, and political activity. Although these activities did not occur during this study, one advantage of matched mentoring is that specific goals and outcomes can be targeted. This is inherently a limitation of episodic mentoring, as its nature is a series of short, often single, mentoring episodes. One question worthy of further investigation is the extent to which episodic mentoring is likely to lead to such long-term mentoring relationships.
B Study Outcome

The project researchers found that it was much easier to identify potential mentors when they were asked to mentor for short episodes (for example one hour), and when they were asked by the protégé rather than the program administrator. Furthermore, mentors who were initially eager to offer long-term mentoring often had difficulty establishing a relationship with their matched protégé due to circumstances, including scheduling conflicts, time limitations, and poor interpersonal connections. As a result of this finding, the local Bar Association with whom the researchers partnered (along with the state bar) for this study now has an established episodic mentoring program for their less experienced lawyers and for law students. The ‘60-Minute Mentoring’ program came into existence due entirely to those lawyers’ participation in this study. They were so happy with the experience that they determined to make it a part of their bar programming. In addition, the law school has made 60-Minute Mentoring an assignment in its professional development course. As early as their second term of law school, students in this course are offered instruction in ‘cold calling’ lawyers, including the school’s alumni, to seek half-hour meetings, and are given suggested questions they can ask any lawyer that will contribute to their professional development. They are required to have at least one such experience every term during the first two years of their enrolment. They are also instructed in how best to maintain those relationships through occasional informative emails. Thus, in addition to receiving useful advice, many are establishing contacts with these lawyers that will endure into the first years of their law practice. And, as noted, sometimes those contacts become important sources of externships and employment.

C Methodological Limitations

The authors of this study acknowledge several methodological limitations that should be kept in mind when considering the extent to which the results are applicable to other settings. To begin with, participants in this study were recruited from a professionalism course. By its nature, this course attracts students who are highly motivated to succeed, and who are willing to take extra steps in their law education to achieve their goals. Thus, participants were not necessarily representative of typical law school students. It should also be remembered that this study was undertaken primarily as a qualitative investigation of participants’ experiences with two different mentoring programs. To that extent, quantitative data that are generalisable across different participants, programs, and settings were not collected. Thus, readers are cautioned to consider carefully the extent to which results of this study are applicable. In addition,
other factors that potentially could have had an impact on participants’ experiences with mentoring, including personality (for example, introversion vs. extraversion), the presence or absence of existing connections to the legal profession (for example, having family members or friends who are practising attorneys), and the existence or absence of personal support networks were not addressed in this study. The authors acknowledge additional research investigating the impact of these factors on law school students’ experiences with mentoring to be an important avenue for further investigation. Finally, the data collected for this study were primarily self-reported data; while the authors purposely selected a qualitative research method in order to capture participants’ experiences with mentoring, they acknowledge that this is an inherent limitation of the research. Additional research is needed to investigate the effectiveness of mentoring for law school students using measures such as objective, longitudinal outcomes of the mentoring process for the participants. Despite these methodological weaknesses, however, the authors believe that results have provided some insight into the experiences of law school students with two different forms of mentoring, and that these results may prove useful for institutions that are considering implementing some form of formalised mentoring process.

VI Conclusion

The purpose of this study was to address a gap in the existing literature on the effectiveness of mentoring for law students. While results of the study indicated that the outcomes of the mentoring programs did not differ substantially and each program was associated with different strengths and weaknesses, the costs and benefits of episodic mentoring outweighed that of matched-pair mentoring, especially when considering the time and effort lost when matched pairs did not work out. When law schools have the resources to operate a matched mentoring program that will result in a lasting match, then a successful mentoring program may be developed. The benefit of match-pair mentoring appears to lie in the ability to make successful matches and for the pair to develop and maintain an ongoing relationship based on well-established goals. In the absence of resources necessary to implement a successful matched-pair mentoring program, however, the episodic mentoring approach encourages practising attorneys to mentor law school students and early career lawyers on a limited basis without making a long-term commitment. This approach allows protégés to receive useful, succinct professional development advice while also expanding their network of contacts, and these contacts sometimes become important sources of externships and employment. As a result of this study, the local bar association with whom the researchers partnered (along with the state bar) now has an established episodic mentoring program,
the 60-Minute Mentoring Program, for law students and early career lawyers, and the law school involved in the study has made episodic mentoring an assignment in its professional development course. A limitation of this study was its relatively short duration. Future research might take a longitudinal approach in order to investigate the long-term impact of mentoring on career satisfaction, work–life balance, and ability to deal effectively with stress. Additionally, a quantitative approach comparing matched and episodic mentoring may be able to better identify specific program and outcome factors that differ between these approaches, as well as identifying causal direction and effect sizes.
READING LAW: MOTIVATING DIGITAL NATIVES TO ‘DO THE READING’

LIESEL SPENCER AND ELEN SEYMOUR*

Every writer in this field remarks upon the notorious inclination of lawyers to adhere to their old ways; the cultural resistance of the legal profession to changes of things considered fundamental; the psychological barrier which must be breached to raise the awareness of judges and lawyers of the technological engines of change and the imperative necessity to begin the process in law schools where new generations must learn the discipline of law with their hands on keyboards and their minds engaged with concepts of law and justice and not just a mass of data.

— Justice Michael Kirby, speech to High Court of Bombay

I INTRODUCTION

Students, or at least most students, do not come to classes having read the set passages of textbooks and other reading material allocated as preparatory reading for that class. Part II of this article considers whether and why reading is important for the ‘digital native’ generation of law students; Part III canvasses the question whether it is the job of the law academic to motivate law students to do their reading; Part IV explores the reasons for student non-compliance with set reading; and Part V suggests ways in which law teachers can reconcile intergenerational differences on the value of

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prescribed law school reading, using specific motivational strategies to initiate and sustain a ‘virtuous circle’ of reading behaviour.

A common conversational theme in any gathering of law teachers is the problem of students who do not do preparatory reading.\textsuperscript{4} This complaint is not limited to law teachers.\textsuperscript{5} An article by Spencer (reporting on a modest quantitative and qualitative survey of first-year law students) identified assertions made in the literature as to the causes and cures of law students who do not ‘do the reading’.\textsuperscript{6} These assertions, in summary, are: that law teachers who want students to comply with set reading loads have to make sure that those loads are realistic both in size and difficulty; that it is properly part of the role of the law teacher to catalyse student motivation to read; and that while intrinsic motivation to read is a desirable end goal of the study of law, there is a place for the timely and judicious use of extrinsic motivational strategies to train students in the habit of ‘doing the reading’. The results of Spencer’s survey tended to confirm these claims from the literature as to why students do not read, and how lecturers might address this.

The current crop of law students are, in large part, drawn from the generation variously labelled the ‘digital native’,\textsuperscript{7} ‘net’, ‘Google’ or ‘millennial’ generation.\textsuperscript{8} This generation comprises those born after 1980\textsuperscript{9} — which describes the majority of law students in most Australian law schools. Digital natives, because of their lifelong immersion in technology, are claimed to learn differently from ‘digital immigrants’ or those born before 1980. Of course those born before 1980 include the majority of law lecturers. Digital natives, whose ‘brains might already be different’,\textsuperscript{10} prefer to receive information fast, to parallel process, and to multi-task.\textsuperscript{11} None of these characteristics can be found in the traditional process of reading


\textsuperscript{6} Spencer, above n 4, 203.

\textsuperscript{7} Marc Prensky, ‘Digital Natives, Digital Immigrants’ (2001) 9(5) \textit{On the Horizon} 1, 1; see also Marc Prensky, \textit{Don’t Bother me Mom — I’m Learning} (Paragon House, 2006).


\textsuperscript{9} Prensky, ‘Digital Natives, Digital Immigrants’, above n 7, 3.

\textsuperscript{10} Ibid, 4.

\textsuperscript{11} Ibid, 3.
law textbooks, cases or articles, which requires focused, sustained reading with few if any distractions.

Teaching university students who do not do the reading before class is not a new problem for lecturers. This article considers barriers to reading and remedial motivational strategies specific to law students of the ‘digital native’ generation. Although there is some debate as to the actual extent to which the digital native generation does learn differently, this article does not seek to engage in discussions of cognitive psychology. Rather, the purpose is to demonstrate that there are tools, with which the digital generation as a rule are already familiar, which may be utilised by the academic in the task of motivating students to do the reading.

Many of this generation are comfortable with information presented via technology, but combine this with a lack of a realistic assessment of their ability to ‘read like a lawyer’ and ‘[evaluate] the relevance, accuracy or authority of the information’. Many are time-poor, compounding the challenge of motivating them to complete law school reading. The compensatory behaviours of lecturers further undermine student motivation to choose to devote time to reading. Students perceive that they can pass a unit without reading, and that doing the reading is a thankless task when lecturer behaviour and class content and assessment do not explicitly reward a choice to do the reading. This choice by students not to do the reading might be colloquially described as setting up a ‘vicious circle’.

Reluctance to read is also partly driven by the gap between student confidence and competence. Digital familiarity does not automatically translate to information literacy, and this cohort of students is liable to an ‘over-assessment of ability ... usually partnered with an inability to accurately identify how that deficiency might be addressed, and a negative view of the need for library/resource instruction’. Capitalising on ‘digital familiarity’ to engage this

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14 Bohl, above n 8, 3.
17 Bates, above n 15, 3.
18 Bennett, Maton and Kervin, above n 13, 779.
19 Bates above n 15, 3.
generation of students and develop their reading skill will require the law teacher to go further in presentation of reading materials than merely prescribing digitised pages.

A generationally tailored approach to motivating law student reading should focus on rigorous review of the content and format of compulsory reading, and how it is integrated with teaching and assessment, followed by the implementation of appropriate strategies to motivate students to read. The hypothesis of this article is that a self-reinforcing ‘virtuous circle’ can be achieved if we set a reading load in a format and content compatible with the students’ learning preferences, check they have read it, align set reading with teaching and assessment, reward students for doing the reading, and impose consequences for not doing the reading.

II THE PEDAGOGICAL, PROFESSIONAL, AND INSTITUTIONAL IMPORTANCE OF READING FOR LAW STUDENTS

If teaching academics are going to expend thought, energy and time on encouraging law students to read, we first have to be certain that reading, in the ‘digital age’, is still important. Reading is given a place of importance on the premise that it has multiple roles: in the process of learning at university; and in the development of a law graduate with the professional skills and knowledge to be ready for employment. Australian law schools also have to consider the importance of student reading skills to the attainment by students of Threshold Learning Outcomes for Australian Law Schools (and in some law schools, to the attainment of graduate attributes), and to the standing of law degree programs under the Australian Qualifications Framework.

A The Pedagogical Importance of Reading — a Prerequisite to Learning

The first impulse of an academic on being asked to consider whether reading is still important may be outrage — what, after all, is a university for if not to produce widely read, well-educated men and women? ‘Widely read’ and ‘well-educated’ are synonymous in most academic minds. Academics generally adhere to an ‘ingrained assumption’ that the ‘old ways’ of paper-based textbook and casebook reading, as a means for the acquisition of knowledge and skills, are still indispensable. It is not enough, however, to lead an ‘unexamined teaching life’ and justify continuing adherence to

20 Hobson, above n 2, 2.
21 Kirby, above n 1.
traditional content and format of law school reading loads simply because it is ‘the way it has always been done’. Law academics may be merely imposing their own values as a measure of success without evaluating contemporary pedagogical relevance, unless we critically interrogate the relevance of the skill and habit of ‘book-learning’ to the current generation of law students.

This current generation, the ‘digital natives’, has some specific learning preferences, styles and characteristics. Prensky’s assertion is that their ‘brains might already be different’ and that they prefer to receive information fast, to parallel process, and to multi-task. Our task as law teachers for this generation is to reconcile the traditional style of law school reading with the realities of our current crop of law students.

If curriculum design does not integrate technology into the ‘reading list’ and classroom practice, this generation of students is less likely to undertake some or all of the reading. A student who does not, or perhaps will not, read will therefore rely on lectures and scraps of information and ideas scavenged from tutorial conversations. Prior to digital education technology, many law students also ‘scavenged’ the outline of a subject, relying on ‘nutshell’ or cram/summary books. The effect of this scavenger approach to learning without reading is two-fold. From a content perspective the full background and context of the subject area will not be grasped. Reading before a lecture enables the student, familiar with the basic structure and content of the subject area, to progress to the next level of understanding — for example moving from the acquisition of building-block facts (knowledge) to application of those facts to other contexts. The quality of engagement in tutorial discussions similarly depends on whether the student has done the set reading beforehand. A community of inquiry, so valued in teaching pedagogy as a means to facilitate deeper understanding, is difficult to establish if the community has only two-thirds of the requisite core attributes: that is, having the social and teaching presence but insufficient cognitive presence.

23 Ibid, 3.
It is hard to engage in erudite discussion of material you have not read, or contrast the implications of theories with which you are not familiar.\textsuperscript{28} Aside from participation and depth of learning in class, student performance in assessment is also adversely affected by a failure to do the course readings.\textsuperscript{29}

Law students scavenging knowledge fail to acquire a sufficient depth of knowledge against which to assess, understand and apply the law, and fail to acquire the necessary skills to update their knowledge with disciplined and sustained reading and research. Reading at the level to gain entry to university is one thing; acquiring university-level, law-specific reading skills is another. These skills require continual practice for improvement, and this improvement is not obtained by gleaning fragments of information.

A further risk of the ‘scavenger’ approach to learning law is the risk that, from digital sources of unverified quality, students acquire only a ‘Wikipedia’ standard of uncritical, unreflective knowledge.\textsuperscript{30} If law teachers are proactive in setting digital (technology-based, non-paper) content in readings, we control the quality of at least some of the digital legal sources students are learning from, and model discretion in selecting reliable sources and identifying and discarding inappropriate sources. This generation of students is comfortable using technology but lacks discretion in evaluating digital material,\textsuperscript{31} therefore part of the role of the contemporary law academic is to nurture in our students the ability to be ‘discerning scavengers’ of digital sources. For example students researching for an assignment on Federal income tax might cite the New South Wales tax legislation if their underlying research paradigm is the ‘google’ approach. The law teacher’s critical role in this scenario is to teach students to evaluate the currency, quality and relevance of the results of research and the validity of the research methods, in place of the student’s tendency to view all search results as equal.

B Reading as a Prerequisite for the Legal Profession

Rethinking our approach to motivating students to ‘read law’ is intended to create work-ready graduates. Work-ready graduates

\textsuperscript{28} ‘Chutzpa aside, you can’t intelligently discuss what you haven’t read’: Neil Thomason, ‘Philosophy Discussions with Less B.S.’ (1995) 18(1) \textit{Teaching Philosophy} 15, 15.

\textsuperscript{29} This issue receives somewhat skimpy coverage in the literature, however what literature there is supports the assertion that reading/class preparation impacts upon student performance: Spencer, above n 4, 190–1; see also Hill, above n 4, 462–4.

\textsuperscript{30} Normann Witzleb, ‘Engaging with the World: Students of Comparative Law Write for Wikipedia’ (2009) 19(1) \textit{Legal Education Review} 83, 84 discusses this fear, but the focus of the article is on using Wikipedia effectively.

\textsuperscript{31} Bates above n 15, 4; see also Bohl, above n 8, 2.
require professional reading capabilities — recognising that while practising lawyers still have to undertake reading of depth, volume and complexity, the format of the reading is changing. Legal offices and courts\(^{32}\) are increasingly ‘paperless offices’ to varying extents.\(^{33}\)

The Hon Michael Kirby, then of the High Court of Australia, noted as early as 1999 the ‘increasing use of evidence in electronic form’ in Australian courts. His Honour described Western Australian Full Court proceedings of ‘an appeal concerning a negligence claim against a major accounting firm’ wherein ‘all the judges and barristers [were] robed and wigged in the traditional way … [but were] all … engrossed in video-screens controlled by keyboards and laptops that would have astonished Dickens, the articled clerk of earlier times’.\(^{34}\)

The ‘cultural resistance of the legal profession’ to technological change (per Justice Kirby’s quotation at the start of this article), might equally be applied to the pedagogical resistance in some circles of the law teaching profession to embracing technology in the law curricula. This article does not suggest that reading at law school can or should be replaced; rather, that as law teachers we need to overcome our ‘psychological barrier’ and teach the discipline of law to a new generation of law students ‘with their hands on keyboards’ (or tablets). Use of technology should not be equated with ‘dumbing down’ of law school content, but with preparedness for the legal workplace.

Ongoing education or ‘lifelong learning’ is also part of professional practice.\(^{35}\) Students will need to be able, with skill and discernment, to use legal text through whatever medium it is conveyed. They will in addition require an internally motivated habit of updating their own knowledge through various text types and media. Both law-specific reading skills and the intrinsic motivation to use these skills to update knowledge are relevant and necessary skills for a student’s future professional life.

C The Institutional Importance of Reading

The Threshold Learning Outcomes (TLOs) for law degrees in Australia are guidelines endorsed by the Council of Australian Law

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32 See for example the Federal Court of Australia ‘E-Courtroom’ online courtroom used by judges and registrars to assist with the management and hearing of some matters before the Federal Court of Australia or Federal Circuit Court of Australia <http://www.fedcourt.gov.au/online-services/ecourtroom>.


34 Michael Kirby, above n 1.

Deans. Australian law schools have to adhere to the regulatory and quality assurance policy of the Australian Qualifications Framework (AQF).\textsuperscript{36} In the language of the Australian Qualifications Framework (AQF), the TLOs represent what a Bachelor of Laws graduate is expected ‘to know, understand and be able to do as a result of learning’.\textsuperscript{37} The TLOs are intended to take the general principles and criteria for relevant qualification levels (for example Level 7 Bachelor degrees) of AQF, and articulate these into individual disciplines.\textsuperscript{38} The Learning and Academic Standards Project for the Bachelor of Laws Project 2010\textsuperscript{39} set out the TLOs for the LLB (further updated March 2013). The TLOs had to be drafted to ‘meet concurrent requirements from the Australian Government, the Council of Australian Law Deans, the relevant law admitting authority and [individual] institutions’.\textsuperscript{40} It is therefore instructive to consider whether and how reading skills, and motivation to complete reading, are incorporated into the TLOs, as they reflect a consensus as to the importance of reading as a skill for law graduates.

While there is inevitably a relationship between students being motivated and skilled readers and the acquisition of all the TLOs, TLOs 3, 4 and 6 are of particular relevance. Also relevant are the ‘Notes’ attached to the TLOs document, which provide guidance as to how to interpret the TLOs.

\textit{TLO 3: Thinking Skills} prescribes that LLB graduates will be able to (a) identify and articulate legal issues; (b) apply legal reasoning and research to generate appropriate responses to legal issues; (c) engage in critical analysis and make a reasoned choice amongst alternatives; and (d) think creatively in approaching legal issues and generating appropriate responses. The Notes to TLO 3 state:

Law graduates should be able to examine a text and/or a scenario (for example, a set of facts, a legal document, a legal narrative, a statute, a case report, or a law reform report), find the key issues (for example, unresolved disputes, ambiguities, or uncertainties), and articulate those issues clearly as a necessary precursor to analysing and generating appropriate responses to the issues.\textsuperscript{41}

The Notes further state that the LLB graduate will be able to critically analyse, evaluate and respond to the legal material.

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\textsuperscript{37} Sally Kift, Mark Israel and Rachel Field, \textit{Bachelor of Laws Learning and Teaching Academic Standards Statement} (ALTC, 2010).

\textsuperscript{38} Ibid, 3.

\textsuperscript{39} Ibid.

\textsuperscript{40} Ibid, 5.

\textsuperscript{41} Ibid, 17.
**TLO 4: Research skills** requires that ‘graduates of the Bachelor of Laws will demonstrate the intellectual and practical skills needed to identify, research, evaluate and synthesise relevant factual, legal and policy issues.’ The Notes elaborate on ‘intellectual and practical skills’ to include the ‘ability to read, comprehend, and paraphrase a range of legal and non-legal documents’.

Together, TLO 3 and TLO 4 explicitly require that a law graduate be able to read, and read at a high level of skill, many different legal text types. This high-level, discipline-specific skillset requires sustained reading practice over the course of the LLB.

**TLO 6: Self-management** requires that ‘graduates of the Bachelor of Laws will be able to: learn and work independently, and reflect on and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development’. The Notes reference an ability to ‘manage their study and time autonomously and effectively’ and to ‘reflect critically on the extent of their learning’. This demonstrates the imperative for law teachers to develop in students the intrinsic motivation to read, and the self-directed habit of updating their own knowledge.

At the level of the individual university, reading skill may be expressly listed as a *graduate attribute* of the graduates of that institution. Many universities now have a generic set of ‘graduate attributes’, with individual degree programs adding specific attributes. The University of Western Sydney, for example, lists among its generic graduate attributes ‘communicates effectively through reading, listening, speaking and writing in diverse contexts’, while the School of Law attributes add to this a law-specific graduate attribute, ‘Communicates effectively, persuasively and appropriately through reading, listening, speaking and writing, especially in professional legal contexts’. (Email from Dr Susan Armstrong to Liesel Spencer, 15 October 2013.)

Reading skills and the motivation to read are, therefore, imperative for successful learning, future professional life, and for complying with institutional and regulatory requirements such as TLOs. The study of law was referred to for centuries as ‘reading law’ for a reason. The student of law was expected to learn largely by ingesting case reports and statutes. Addressing prospective law students in 1919, Allen advised, ‘the following characteristics are of decided advantage in the law … [the] nature of a student, to keep in touch with the progress of the common law, with changes in the statutes, and with decisions of the courts, along with one’s own special practice’. Despite the modern focus on other skills required of law

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graduates (such as TLO 5: Communication and Collaboration), the study of law still requires reading and the acquisition of legal knowledge (TLO 1: Knowledge). Law teachers have a complex job to do. Our students still have to acquire the traditional skill of reading legal materials. They also have to acquire more modern skill priorities, for example collaboration and teamwork. The law teacher in all likelihood attended university in a more traditional format. Our law students now, the ‘digital generation’, are cohorts with a different set of characteristics. Law teachers therefore have to devise ways in which to motivate students to read, taking into account the fact that modern students are visual and multimedia inclined, while still producing law graduates with legal knowledge and legal reading skills.

### III Is It Our Job to Motivate Students to Do the Reading?

University law teachers might understandably question whether motivating students to complete readings in preparation for classes is properly to be considered as part of the role of an adult educator. The traditional view was that it was the lecturers’ role as experts in their field to impart as much relevant, up-to-date content as they could in a two-hour lecture to a passive audience of students. It is tempting to take a ‘minimalist approach’ and see student motivation as being neither the job nor the problem of teaching staff. This temptation is compounded by the popular consensus that an academic career focused on teaching and learning, rather than, or at the expense of, focus on research activity, is ‘not the easy or guaranteed way to promotion and tenure’, and that expending time and effort on strategies to motivate students to complete reading is against self-interest. University is voluntary — students who do not find their subjects sufficiently interesting to address themselves to set reading tasks might be better advised to reconsider their choice and ‘take up something else’.

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46 Doyle, above n 24, 30.


48 Weimer, above n 5, 176.

reading, should university teachers take on the responsibility of trying to alter that choice, or step back and allow students to learn the importance of reading via the experience of failure?\footnote{50}

There are practical and personal matters to consider. Motivated, prepared students improve job satisfaction for the teacher.\footnote{51} Walking into a classroom with the knowledge that attempts to initiate a stimulating discussion, based on the set readings, will be greeted by ‘blank stares’,\footnote{52} is not a recipe for a satisfying teaching career.\footnote{53}

It may be posited that some teachers in this position are making a default choice because their teaching skill-set does not include adequate tools for motivating students.\footnote{54} These motivational skills may be lacking because the teacher does not see it as within his or her role to be concerned with student motivation, and therefore to acquire motivational skills or because the teacher never acquired them as part of their early-career mentoring and induction process as a junior teaching academic. Motivational strategies, which require adaptation to the use of technology in the classroom and in the reading list, might be traumatic for an academic from the ‘digital immigrant’ generation.

University teachers, therefore, face classrooms full of ‘increasingly less mature and more dependent learners’\footnote{55} while themselves often lacking either the will or the ability to initiate positive change in student motivation and preparedness. It is not an attractive prospect to contemplate a career spent teaching in these conditions. For reasons of self-preservation and job satisfaction, then, it is argued that university teachers should make it their business to be armed with and use tools for motivating students to read and prepare — to ‘step up’ and bridge the gap between the real and ideal\footnote{56} student. Doyle describes the outcome of this approach: ‘my own frustrations as a teacher were greatly reduced years ago, when I accepted that my job was to teach the students who were sitting in my class, not those I wished were sitting there’.\footnote{57}

\footnote{50}Susan Armstrong and Michelle Sanson, ‘From Confusion to Confidence: Transitioning to Law School’ (2012) 12(1) \textit{QUT Law and Justice Journal} 21.
\footnote{51}Barbara Hofer, ‘Motivation in the College Classroom’ in Wilbert McKeachie (ed), \textit{Teaching Tips: Strategies, Research, and Theory for College and University Teachers} (Houghton Mifflin, 11\textsuperscript{th} ed, 2002) 119.
\footnote{52}Sara Coffman, ‘How to Get Your Students to Read What’s Assigned’ (2009) 23(6) \textit{The Teaching Professor} 3, 3.
\footnote{55}Weimer, \textit{Learner Centred Teaching}, above n 5, 96.
\footnote{56}Doyle, above n 24, 84.
\footnote{57}Ibid.
First-year students, in particular those coming straight from school, do not arrive in our classrooms (with the odd exception) equipped with self-motivation or a fully developed sense of identity and purpose.\textsuperscript{58} School leavers are still developing their identities, trying on ‘possible selves’,\textsuperscript{59} looking for role models and seeking a valid basis for self-respect and self-esteem.\textsuperscript{60} They have not, for the most part, been out into the professional workforce and have not therefore had the chance to make properly informed career choices. It is part of the ‘work’ of university, for students to acquire an internalised sense of purpose, vocation and identity.\textsuperscript{61} Ideally graduates will then go out into the professional workforce able to take responsibility for their own workload and time management, as self-motivated adults.

If this view of the broader business of university study is accepted, it alters the ‘job description’ of the university teacher. The teacher is a medium for developing a set of skills broader than the knowledge-base of their particular subject. The quotation (popularly attributed to Yeats), ‘education is not the filling of a pail, but the lighting of a fire’, embodies this ‘big picture’ concept of the role of the university teacher\textsuperscript{62} embodies this ‘big picture’ concept of the role of the university teacher. Knowledge specific to particular professions goes ‘out of date’ fast, in some instances before our students even graduate. Legal content is subject to frequent small changes, with new cases and legislation, and the occasional seismic shift where whole areas of the law are extensively changed.\textsuperscript{63} In many areas of practice, the doctrinal law learnt at law schools rapidly ceases to be current, perhaps even before graduation. This context of rapid change has driven law schools’ shift from teaching content to teaching law students requisite legal skills.\textsuperscript{64} ‘Filling the pail’ of student knowledge cannot be the only role we perform if the pail is (excusing the dubious metaphor) leaking, or we make ourselves obsolete and redundant.

How, then, is the university teacher to set students on the path to being independent and self-motivated? How can we ‘light the fire’ of intrinsic motivation? It is useful to view the teacher as

\textsuperscript{58} Bette Erickson, Calvin Peters and Diane Strommer, \textit{Teaching First-Year College Students} (Jossey-Bass, 2006) 119.
\textsuperscript{59} Borkowski et al, above n 54, 84.
\textsuperscript{60} Donald Bligh, \textit{What’s the Use of Lectures?} (Jossey-Bass, 2000) 64.
\textsuperscript{61} Erickson, Peters and Strommer, above n 58, 119.
\textsuperscript{62} The quotation is popularly, but perhaps mistakenly attributed to Yeats: Robert Strong, ‘Advice on Lighting Fires’, The Huffington Post (online), 13 September 2012 \textltt{http://www.huffingtonpost.com/robert-strong/advice-on-lighting-fires_b_1882075.html}.
\textsuperscript{63} The impact of the \textit{Civil Liability Act 2002} (NSW) (and equivalent acts in other jurisdictions) illustrates one such ‘seismic shift’, in torts law.
a catalyst for student motivation, with motivation the ‘product of
good teaching, not its prerequisite’. In the context of our ‘job
description’ as teaching academics, ‘good teaching’ means we are,
among other things, the initiators of the habit of pre-reading. Writing
on procrastination in doctoral students, Kearns and Gardiner note
the ‘procrastinator’s assumption’ that ‘motivation leads to action’,
when in fact ‘action leads to motivation leads to action’. Translated
to motivating students to complete university reading assignments,
the role of the teacher is to catalyse the action of pre-reading in the
students so that the ‘virtuous circle’, or chain reaction of ‘action,
motivation, action’ is set off. The logical catalyst to set off this chain
reaction in the ‘digital native’ student population is to set reading
that meets them on familiar technological turf.

IV Why Don’t Students Do the Reading?

If reading is central to the study of law, and it is part of the role
of the law academic to motivate students to complete set reading,
the next issue to consider is why so many students don’t do their
reading.

The literature points to two broad categories of explanation for
why students don’t read assigned material and prepare for classes.
The first category might be described as ‘competing activities and
priorities’, the second as ‘perceived lack of value in reading and lack
of consequences for non-reading’. This discussion will focus on the
latter category — the perceived lack of value in undertaking reading
(which is presented in a traditional law school content and format),
and the lack of consequences for non-reading. Lack of perceived
value and lack of consequences propagate the ‘vicious circle’ of
student non-reading.

A The Perceived Lack of Value in Reading

For digital native students the transition from multimedia to
text-based information can be a challenge. Students today are less
accepting of the authority of lecturers, and less likely to trust that
the set reading material is relevant. Faced with a large volume
of textbook pages to read, and a lack of trust that the reading is
relevant, law students struggle to be motivated to complete set pre-
reading. If they are school leavers, they have also just been delivered

65 John Biggs, Teaching for Quality Learning at University (Open University Press,
66 Hugh Kearns and Maria Gardiner, Time for Research: Time Management for PhD
Students (Flinders Press, 2006) 8; see also Bligh, above n 60, 57–9.
67 Bohl, above n 8, 775.
68 Tracy McGaugh, ‘Generation X in Law School: The Dying of the Light or the
unprecedented responsibility and autonomy for their own study schedules. For some of these students, appropriate scaffolding into legal thinking and the discipline of regular reading will be required to support the development of sophisticated reading skills. If a student does not attain a passable level of self-mastery in these areas, underperformance or failure is the likely result. (A colleague observed on this point that the failure itself is sometimes a motivator for more diligent reading in subsequent attempts at the failed subject.) Where students do not fail outright but manage to scrape a passing grade, it is still questionable whether they are properly equipped for professional life after graduation.

Reading loads which, in content or style, are not compatible with the learning preferences of the ‘digital native’ law students, can act to predispose students to fail to complete the reading. Setting students up to be predisposed to failure with a traditional law school reading list decreases students’ intrinsic motivation — failure undermines the sense of ‘autonomy, competence and relatedness’ that is vital to student psychological wellbeing. Success is motivating; conversely, failure is demotivating. Viewed within the context of self-determination theory, a reading load that does not value the digital generation’s learning approach, can result in ‘amotivated’ students. Students who are ‘amotivated … go through the motions, lacking intentionality because they do not value an activity, feel competent to complete it satisfactorily, or believe it will yield the desired outcome’.

71 Conversation with Dr Michelle Sanson, then Senior Lecturer, School of Law, University of Western Sydney.
74 Kearns and Gardiner, above n 66.
75 Larcombe, Malkin and Nicholson, above n 73, 80.
76 Ibid.
B Lack of Consequences for Non-reading, or the ‘Cycle of Dependency and Irresponsibility’

The literature points to lack of consequences for non-reading as a significant influence on student motivation and reading. Doyle used student consultation to confirm suspicions as to why students were not doing reading and preparation, and was informed by one student that they ‘feel confident the teacher will always review the important points in the textbook during lectures’ and by another student that lecturers would ‘discuss any important information included in the reading during class lectures’. Erickson et al attribute this in part to academics having resorted to emulating the style of high school teachers, because (particularly in first year) students have become accustomed to relying on ‘instructors’ oral text’, class handouts, or ‘gloss of assigned readings’. Weimer is equally blunt: ‘the main reason students come to class unprepared is that they don’t see what difference it makes’. Students perceive that they will be able to do passably well in the subject without spending their valuable time reading and studying the texts, relying instead on attending classes and perusing lecturers’ summary notes. The response of lecturers to students who have not done the reading can be to summarise the main points for students, or to give students time to scan the reading for themselves, but this is reinforcement of the undesirable behaviour — ‘if used often, such strategies may discourage out-of-class preparation’. According to Robertson, writing in 1968, this ‘spoon-feeding’ had resulted in ‘student passivity’, even at Oxford and Cambridge. Thus law students can obtain at least passing grades without acquiring learning outcomes related to reading and intrinsic motivation. This passivity is the opposite of what Kirby calls for in the opening quotation: students with ‘their minds engaged with concepts of law and justice and not just a mass of data’. Law teachers can accidentally create passivity in students, a ‘spoon-feeding’ mentality, with our response to student reading or non-reading.

Weimer calls this inadvertent behavioural conditioning a ‘cycle of dependency and irresponsibility’ which can be stopped with ‘predictable logical consequences and with consistent coherence between faculty words and deeds’. Despite being told that ‘they

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77 Weimer, above n 5, 105.
78 Doyle, above n 24, 67.
79 Ibid.
80 Erickson, Peters and Strommer, above n 58, 122.
81 Wilbert McKeachie, in McKeachie (ed) above n 51, 182.
83 McKeachie, above n 81, 46.
84 Robertson, above n 12, 282.
85 Weimer, above n 5, 107.
will understand more if they come to class prepared’ students still arrive in class unprepared, because ‘in all too many classes, there are absolutely no consequences that students experience when they come to class not having done the reading’. These observations are a logical extension of other aspects of the leadership role of the lecturer. Students detect inconsistencies between lecturer’s stated expectations and what is actually asked of them, and in most instances choose the less onerous option. Thomason also refers to academics’ inadvertent reinforcement of non-reading as a ‘cycle’ fostered by a genuine desire to do one’s job well and nurture students: ‘professors must often substitute their strong reading skills for the students’ inadequate ones … this produces a vicious cycle: inadequate student preparation, commendable professorial clarification, even less student preparation’.

An informed approach to catalysing the habit of reading in law students therefore has to demonstrate to students the value of reading, and to impose consequences for non-reading.

V Toolkit for Law Teachers: Suggested Strategies to Motivate Student Reading by Incorporating Digital Technology

A law teacher of the ‘digital immigrant’ generation, reconciled to the need to incorporate non-traditional text and digital content into the reading list, will benefit from practical guidance and suggestions on how to achieve this. This part of the article offers such suggestions to catalyse student reading habits, together with reflections on teaching behaviours that sustain student motivation to read. The methodology underlying this section is a hybrid of literature review, personal experience, and suggestions derived from the professional development training undertaken by the authors, in implementing ‘blended learning’ materials into the law curriculum at our institution, the University of Western Sydney. Each teacher of law is the best-placed expert as to their own teaching context, to select which motivational tool is best suited to their topic, cohort and teaching style. As with any teaching innovation, the laboratory of the classroom will provide feedback. It is suggested that law teachers experiment for themselves with one or two motivational strategies at a time to see what is most effective in their teaching context.

86 Ibid, 105.
87 Thomason, above n 28, 16.
88 In this context what is meant by ‘blended learning’ is the partially online delivery of teaching and assessment.
A Social Interaction as a Motivator

Students are motivated by social interaction, and the traditional study group has value for meeting social needs in addition to the need for reading, discussion and revision of university work. Beyond study groups, socialising can be used to motivate reading through integrating social media technology into the curriculum, such as through the use of well-moderated online discussion forums, Twitter hashtags and other forms of ‘microblogging’. One of the authors of this article has experimented with ‘live Tweeting’ by students during classes (almost all students now have ‘smart phones’ enabling them to participate in this activity), with the responses able to be displayed live via a data projector. This technique was quite successful in fostering engagement, discussion and debate. Ongoing engagement after class with topics can also be achieved by use of social media interactivity. A lecturer can act as a digital curator linking through social media sites articles, including mainstream media articles, on real life examples of issues being studied in class, and rewarding students with recognition and praise if they do the same. A colleague is experimenting with the use of ‘Instagram’ in the teaching of an elective. Students take photographs of examples of the subject matter for a particular week, tagging their uploads onto Instagram. The experiment has resulted in reportedly high rates of student enthusiasm and engagement with the elective. This is not a replacement for doing the prescribed reading, but a motivational strategy to engage students and excite curiosity about the content of the subject.

B The Reading Load: Content and Format

Constructing a reading load requires a determination as to what content is critical, and decisions as to how best to present that content. An example of using this process to making reading content suitable for ‘digital natives’ is to reconsider the cases prescribed for reading, and to pick out cases that lend themselves better to the dynamic properties of digital teaching tools. It is surely a given that not all information needs to be read in order to be understood. Many of us are familiar with the concepts of different learning styles; some people are visual, others are aural or kinaesthetic learners, or some

combination of the three, depending on content and circumstance. A study by DeVito indicates that first-year students in particular learn better when exposition (traditional lecturing or textbook) is supplemented with images, and show further improvements in learning when exposition is supplemented with stories.

Consider one of the most familiar cases, *Carlill v Carbolic Smoke Ball Company*. It is often one of the first cases law students read at law school, and remembered by many lawyers long after leaving law school. It has many of the dynamic properties that enhance student engagement. The visual and aural elements of the case are strong. The name of the case is arresting and easy to recall. Many textbooks and/or lecturers have shown law students the iconic advertisement from the case. The concept of a smoke ball is visually memorable irrespective of life experience, as is the purported cure of the smoke ball. All these aspects come together to create a memorable case and memorable outcome of a binding unilateral offer. Although the case may be a standout among cases, it does demonstrate visual, image-and-story based learning in a way many students first encounter and long remember, but are perhaps ‘cheated of’ thereafter. After the excellent introductory visuals of carbolic smoke balls, for many students there is no follow-up act — only slabs of printed cases and legislation.

Content can be presented in a range of modes. Law teachers can create vodcasts and podcasts that capture the essence of a case or principle. Vodcasting can provide a visual narrative through the use of animated flowcharts, or even stick people characters through simple, inexpensive software such as Explain Everything app. One aim might be to create visual hooks to draw the student deeper into the story of the case and provide memorable imagery, as *Carbolic Smokeball* does. Each area of law will have cases or principles that lend themselves to digital re-imagining, and the academic need not be gifted in art or technology. For example the universality of the difficulty of resolving the capital/revenue distinction can be

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94 [1892] EWCA Civ 1.

95 There is a website that styles itself as ‘carbolicsmokebalco: Lawyer gifts’ that is testimony to the enduring affection for this case <https://www.carbolicsmokeball.com>.

effectively illustrated by two overlapping circles, one of orange, and one of red.\textsuperscript{97}

Another approach is to set up, and allow students to participate in, online discussion forums, whether embedded in university online learning platforms\textsuperscript{98} or an external social media platform such as Twitter, Tumblr or blogs. A well-crafted reading load can use these as a means of integrating core content in a style compatible with the digital natives’ preferred learning style. To give an example, a student reading a case, whether from a PDF online, or a more traditional casebook, may still ‘parallel process’ if the tools are available. A student can immediately pose questions based on their readings on targeted online discussion forums. This latter format of teaching has been shown to be pedagogically useful if well moderated.\textsuperscript{99} To be successful, moderation by a lecturer need not be concurrent but must be consistent, predictable and appropriate. It is useful to arrange discussion forums by topic or teaching week rather than simply open one forum and expect students to participate on a wide range of topics. First-year students may need higher levels of lecturer participation, but later-year students may value and enjoy the process of answering other students’ queries. These digital tools are not suggested as a replacement for reading the cases, but rather as an introduction to, and motivational catalyst for, doing and continuing with the reading.

Much of the core law school content is still in written form, whether that written form is in a paper book or an electronic book. Indeed, while increasingly scholarly literature including books, journals, and case and statute law is moving online in electronic forms,\textsuperscript{100} much of it is still only a digital rendering of the traditional printed page, at best offering a limited number of hyperlinks to other related parts. Therefore, if we assume a digital native has the characteristics suggested by Prensky, offering an e-book that recreates the written (and multiple) words of cases, legislation and journal articles onto a screen will not increase student commitment to doing the reading.

\textsuperscript{97} Lord Denning MR \textit{Heather (Inspector of Taxes) v P E Consulting Group} [1973] Ch 189, 216 likened the distinction to ‘the difference between red and orange where everyone can tell the difference except in the marginal cases and then everyone is in doubt’.

\textsuperscript{98} See further on the use of online discussion to facilitate engagement Greaves and Lynch, above n 90.

\textsuperscript{99} Ibid. While peer participation in discussion forums is valuable, it is the view of the authors that teacher moderation is also important as a form of quality control and to avoid the situation of ‘the blind leading the blind’.

\textsuperscript{100} Christine L. Borgman, \textit{Scholarship in the Digital Age: Information, Infrastructure and the Internet} (MIT Press, 2007). Statutes and case law are found in particular through free platforms such as the Australasian Legal Information Institute <http://www.austlii.edu.au/> and its equivalent sites in jurisdictions overseas, but also through proprietary databases.
What is required to engage this generation of students is to go further in presentation of reading materials than merely digitised pages. Technology incorporated into the set reading list offers more innovative content than a PDF of a case, but it can be hard for ‘digital immigrant’ academics to consider these innovations as anything more than ‘technology for technology’s sake’. Academics might also fear that the digital presentation of reading will facilitate shallow student engagement with the core content — that it will be a showy substitute for cases, legislation and secondary materials. The alternative mindset a law academic might adopt is to consider a hyperlink to a video, a flowchart or graphic, or a cartoon as a valuable addition to the reading list — a supplement rather than a replacement. These tools fit in with this generation’s preference for parallel processing and multitasking, thus keeping them engaged. The second function of these tools is as a genuine explanatory tool of the content — this is more than a ‘gloss’ or introductory hook. This approach recognises the value of visual teaching aids, which research has shown to be a powerful pedagogical tool, particularly for early-stage law students.

C Making Connections Between Preparatory Reading, Teaching and Assessment

Students may fail to undertake reading because they do not see the value or relevance of the reading and the connection of the reading to their classes. Lowman observes that ‘motivating students to complete homework problems before class is easier than with reading assignments because the work is so clearly connected to class content, and what students know they will be asked to do in exams’. If we set reading without clearly communicated objectives for doing so, then do not refer to the reading in classes (or only refer to it obliquely) students may feel cheated. The meaningless ‘busywork’ often inflicted on students in primary school, and to a lesser extent high school, has made students understandably suspicious. If we fail to demonstrate the value of what has been read, through incorporation into teaching and assessment, we have confirmed these suspicions that it was just ‘reading for reading’s sake’, and the content not ‘worth learning’. This is not an issue

101 Scott DeVito, above n 93.
102 Ibid.
103 Doyle, above n 24, 42.
105 Ibid, 239.
107 Doyle, above n 24, 67.
108 Borkowski et al, above n 54, 81.
limited to the current generation of students, but is part of an overall picture of building and sustaining law students’ motivation to read.

D Vocational Relevance as a Motivational Tool

Technology integrated into the classroom encourages students to practise the real-life skills of finding legal solutions through the devices they use every day, showing them that these devices are not just for entertainment but can also be an educative and professional tool. This is more than ‘clicking on links’, but involves the use of, for example, the AustLII app for ‘smart devices’ to locate relevant legislation. Practitioners increasingly access online relevant cases, legislation, and forms, subscribe to news feeds, and receive information relevant to their matter in PDF and HTML form. Educational technology allows students with the characteristics described by Prensky to read multiple legal sources in parallel — skipping between content as attention is drawn to different parts of the law. This can further facilitate understanding of the interconnectedness of different aspects of the law and the realities of legal practice, wherein client’s problems are seldom confined neatly to a single issue in one area of the law. Vocational relevance also attaches to teaching students to update their knowledge of the law via technology. Content (and demonstrated understanding of content) is only part of the reason reading is important. The current generation of law students needs to be able to use screen-based technology to find, update and apply the law in order to be employable after graduation. One of the authors of this article has found that students may be motivated by this form of active reading, using technology to search for, refine and apply current law, as a vocational skill. Academics might consider deliberately referring in class material to a superseded legislative provision, then modelling the process of discovery, correction and comment on significance of changes such as grandfathering provisions in tax legislation.

E Consistency and Follow-through to Sustain Motivation

If a lecturer has reviewed the reading list and embraced digital teaching tools to facilitate student engagement, is that then enough? Will student motivation to read, once catalysed or initiated, be sustained regardless of what the lecturer does next? The trap here is a variation of the ‘Carbolic Smokeball’ situation referred to above — enticing content with inadequate follow-through. Compounding the situation, a lecturer may (with the best of intentions) ‘rescue’ students from the consequences of not doing the reading, as discussed above.
Bligh prescribes ‘contingency plans’ in the event that students do not do the reading, as otherwise ‘the lecture will fail’. Perhaps, however, the lecture should be allowed to fail. If the lecturer has fulfilled their side of the preparation responsibility, but the students have not, then having a ‘contingency plan’ just reinforces the students’ decision not to do the reading. Lecturers will otherwise be trapped in Weimer’s ‘cycle of dependency and irresponsibility’.

Academics may baulk at the idea of allowing a lecture or seminar to ‘fail’ in circumstances where students have failed to do the reading. They may worry that students will see a failed lecture as a reward (time off, or a holiday) rather than a ‘punishment’ or consequence of not reading, and continue in the same vein until they fail an assessment task. Moreover, most universities measure the teaching quality of their staff through formal student feedback. Students dissatisfied with the ‘failed lecture’ approach may mark the lecturer harshly, particularly in circumstances leading to student failure, or cast aspersions on the academic’s teaching skills. Negative feedback can have direct consequences for the work security and promotion prospects, as well as work satisfaction, of the academic.

Another option for consistently responding to student reading behaviour is to set problem questions prior to seminars or tutorials. Students who are able to demonstrate that they have attempted the set problems before class (ascertained by sighting the homework) are immediately rewarded by being permitted to stay in the class and receive the opportunity to further build upon their knowledge. Students who have not completed the set problems are encouraged to leave the classroom and use the allocated time to complete the homework, whereupon they may return to the class. This method has been effective in encouraging student reading, allowing for increased class participation and avoiding the temptation to summarise the key reading. It also offers the academic an opportunity, when sighting homework completion, to spot systemic misunderstandings of specific topics and focus class time on the topic.

F The Lecturer as Translator or Mediator of Text: a Healthier Paradigm

‘Rescuing’ or shielding students from the consequences of the undesirable behaviour of failing to do their reading, can take the form

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109 Bligh, above n 60.
110 Weimer, above n 5, 107.
111 Some of the difficulties this presents for academics were analysed in Elfriede Sangkuhl, ‘The Use of Student Feedback on Teaching to Evaluate Academics’ Teaching in Higher Education in Australia’ (2012) 18(5) International Journal of Learning 95, 95.
112 Per conversation with Dr Elfriede Sangkuhl, School of Law, University of Western Sydney, regarding teaching techniques used in Taxation Law, 20 July 2012.
of the lecturer diligently extracting and condensing into digestible form the salient points of the reading during face to face time. This role for the lecturer as a mediator or translator of the reading is of itself not necessarily inappropriate, unless undertaken in conjunction with a lack of consequences for students who do not fulfil their role and responsibilities in the learning process. What the literature and experience bears out is that, like an overzealous parent, lecturers can effectively ‘do the homework’ for students and in so doing, condition students not to expend their time and energy on doing it for themselves.\(^\text{114}\)

A more appropriate place for the role of translator of readings might be the lecturer posting a targeted discussion board question. This prompts students to ask questions on the prescribed reading topic as it occurs to them, rather than later on, when they may have forgotten they even had a question. It is important to note that lecturers are not necessarily required to answer questions immediately as they are posted on discussion boards, and other students should be encouraged to put forward their own responses to posted questions — whether a further question or attempted answer.

Lecturers may use class time to answer any unanswered discussion board queries, whether as a springboard for the lecturer’s own consideration of the topic or as a source of group work. The lecturer can address the posted questions in class. The authors of this article have used this as an opportunity to demonstrate research techniques, using a data projector to show students how to find the answers to their questions via AustLII or library-based commercial e-resources. Student feedback on these live research demonstrations is uniformly positive, perhaps because of the engagement generated by contextual learning of research skills.

Alternatively or in conjunction with the discussion board, a short podcast that provides guidance to students as to what might be expected in a particular topic, or which acts as an overview for a topic, may be used. A mini-lecture style podcast can be used to free up the lecturer in-class to focus on applying, expanding or consolidating the basic knowledge the student brings to class.

The discussion board activity or podcasts prior to class are a healthier form of ‘translation’ by the law teacher, than having unprepared students turn up and passively absorb a lecture. Ideally the discussion board and/or podcasts catalyse interest and provide a scaffolded introduction to the week’s reading, to motivate students to complete the full set reading prior to class.

\(^\text{113}\) Carlos Gonzalez, ‘Extending Research on ‘Conceptions of Teaching’: Commonalities and Differences in Recent Investigations’ (2011) 16(1) Teaching in Higher Education 65, 73.

\(^\text{114}\) Spencer, above n 4, 195.
VI Conclusion

Motivating our law students to ‘do the reading’ is of pedagogical, professional and institutional importance. It is hard to justify continuing dogged adherence to the traditional style and content of the set reading load in the face of a radical generational shift in learning styles, coupled with the perennial problem that a significant proportion of students don’t do the set reading. Lecturers (often the same people who set the reading load in the first place) then compensate for this lack of reading by condensing the vital points during teaching time and supplying comprehensive lecture notes as a ‘gloss’ on the reading. These compensatory behaviours allow students not to develop the habit and skills of law school reading. The students proceed either to fail altogether or to pass their subjects without having done the reading or acquiring necessary professional skills and learning outcomes. In later-year subjects, they treat with understandable contempt the description of set readings as ‘compulsory’, and so the vicious cycle continues.

Academics ought to seize an opportunity created by technology to take, not an axe, but a magnifying glass to the reading list and also to their own (perhaps unexamined) assumptions about compulsory reading lists. To continue in the established model, practising self-deception, lacks authenticity. Most importantly, the reading load has to be made accessible for the ‘digital native’ generation of law students, via the considered incorporation of technology into law school pedagogy and curriculum. Teaching academics armed with a revised reading load can then apply motivational strategies to jog students from their reading avoidance, followed by the careful incorporation of reading and digital technology into classes and assessment. This order of operations is important, as we lose credibility as teachers if we communicate to students that the reading is (really) compulsory, motivate them to do the reading, and then deliver the course in the same format that convinced prior cohorts that compulsory reading material could be safely dispensed with. The reward for this is a more satisfactory teaching experience facilitated by increased student engagement and positive teaching evaluations, via the initiation of a ‘virtuous circle’.

Authenticity’ is here meant in the sense of ‘doing what is necessary in the important interest of learners’: see Caroline Kreber, Velda McCune and Monika Klampfleitner, ‘Formal and Implicit Conceptions of Authenticity in Teaching’ (2010) 15(4) Teaching In Higher Education 383, 393.
I INTRODUCTION

Technology and social changes are moving legal education towards a crossroads, disrupting traditional modes of delivery, pedagogy and educational business models. Stakeholders such as law schools, law societies, accreditation bodies, quality assurance regulatory agencies and the judiciary face challenges presented by new modes of delivery of legal education and the potential for new non-university providers.

The United States Department of Education meta-study of the peer-reviewed literature indicated blended methods of instruction to be slightly more effective than face-to-face on-campus instruction and online approaches, both of which were equivalent in outcomes.¹

This article presents the results of a survey of Australian law schools (the Law Associate Deans (Learning and Teaching) survey) revealing the widespread adoption of blended learning approaches incorporating elements of both distance education and e-learning. These approaches are mostly used as a supplement to on-campus, face-to-face instruction. Blended approaches are consistent with modern learning theory and the growth of online education.

The Law Associate Deans (Learning and Teaching) survey results indicate that e-learning is pervasive in Australian law schools. It is argued that more systematic law school policies, support and course-wide practices are warranted as law schools continue their adoption of e-learning methodologies. E-learning in a small number of law schools predicts practices that may evolve across the sector as more law schools provide students with flexible blended learning options. Law schools are yet to meet the challenges of mobile learning, data analytics and Massively Open Online Courses (MOOCs).

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II FRAMEWORK

When considering the innovative use of technology reported in Australian law schools, it is important to distinguish between distance learning, e-learning and blended learning. Similarly, a distinction should be drawn between synchronous and asynchronous communication.

Distance learning was defined by Keegan as covering ‘the various forms of study at all levels which are not under the continuous, immediate supervision of tutors present with their students in lecture rooms or on the same premises, but which, nevertheless, benefit from the planning, guidance and tuition of a tutorial organization’.  

Distance learning dates back to mid-nineteenth century Europe and the United States and has been typically based on technologies such as printed text and audiovisual correspondence courses and, later, radio and television.

E-learning has been defined by Sangra as ‘an approach to teaching and learning, representing all or part of the educational model applied, that is based on the use of electronic media and devices as tools for improving access to training, communication and interaction and that facilitates the adoption of new ways of understanding and developing learning’. E-learning builds on distance learning through the use of Internet technologies for the delivery of content and by the construction of learning communities using both asynchronous and, to a lesser extent, synchronous, communication and collaboration technologies. For the purpose of this article, e-learning and online education are treated as equivalent concepts.

Blended learning according to Torrisi-Steele, ‘broadly refers to the use of technology with face-to-face teaching’.

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Synchronous communication is a real-time event enabling two-way communication (for example, a telephone conversation, a lecture, tutorial, chat session or videoconference). No distinction need be made between physical or virtual presence, given the current state of communication technologies. All are examples of instantaneous communication.

Asynchronous communication involves a temporal time shift between delivery and receipt of information (for example, a discussion board, recorded lecture, email, Facebook post and tweets).

Typically, in distance and e-learning approaches, students and teachers are separated by place and time. Consequently, learning often occurs in an asynchronous setting. In an on-campus environment, learning may occur in a synchronous setting: a lecture, seminar, moot or through discussions in informal settings. The synchronicity of the on-campus experience may be replicated in an e-learning environment using video conferencing software such as Adobe Connect, Blackboard Collaborate, or Zoom.us.

Blended learning challenges the purpose, boundaries and practices of both synchronous and asynchronous learning and teaching events. Appendix 2 outlines typical teaching activities, types of communication and examples of associated technologies. The table is not intended to be an exhaustive statement of all available options.

Various Australian studies have looked at the concepts of blended learning, enhancing student learning, e-learning and student motivation, and many examples of innovative practice have been reported in this journal. This article, however, reports on the first comprehensive survey on the nature and extent to which Australian law schools currently engage with distance learning, e-learning, and blended approaches to legal education.

A Methodology

Implementing a mixed method design, a combination of forty interviews and email discussions were conducted with Associate Deans (Teaching and Learning) or equivalent staff at 34 Australian law schools and the Law Extension Course between October 2011 and May 2012. These 35 entities are collectively described as ‘law schools’.

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7 Ibid.
9 HE12-039 Human Research Ethics approval.
10 Administered by the New South Wales Legal Profession Admission Board.
The mixed method design enabled an institutional ethnographical mode of inquiry into law school approaches to e-learning.\textsuperscript{11} We wanted to know two things. Firstly, how were law schools using a variety of technologies to support their teaching and learning? Secondly, how were teaching practices and traditions evolving in response to the opportunities and challenges of technology? Associate Deans (Teaching and Learning) were assumed to have broad oversight of e-learning within their law school and to be best placed to respond to questions on these topics. This was supplemented by interviews with academics cited by the Associate Deans (Teaching and Learning) as having advanced e-learning skills within the same law school. The methodology follows a positivist tradition by identifying software applications and counting the instances of their use in different law schools.

The approach remains interpretive and qualitative in seeking to understand e-learning related developments in law schools. The study is limited by the extent to which the Associate Deans (Teaching and Learning) were cognisant of the various developments happening within their law school. While they were aware of policy developments within the school, they were not always aware of all the technology-enabled teaching and learning innovation that may be happening in their school, especially in large campus based settings. Associate Deans’ (Teaching and Learning) perceptions of what may be important and occurring within their respective law schools may not necessarily match what is published in the literature as emanating from their schools.

Further information was sought from academics who were perceived by interview participants as innovators due to their use of interesting or novel technology. Some respondents were using e-grading software, video conferencing systems, audience response systems, animations and virtual worlds such as Second Life. Others were using more active learning methods that were supported through particular technologies. Some had developed sophisticated uses of problem-based learning and peer review, which represented significant departures from the more traditional approaches employed in law schools. Some, but not all, of the academics’ innovations appear in literature related to legal education and technology.

The interviews were semi-structured and designed for depth.\textsuperscript{12} Set interview questions were supplemented with freeform questions to further explore the information provided. The questions represented a starting point for a conversation about the developments in the


\textsuperscript{12} Tom Wengraf, \textit{Qualitative Research Interviewing} (Sage Publications, 2001) ch 1.
participant’s law school. Interviews were not recorded but notes were
taken and verified through subsequent email with the participants.
The set interview questions were as follows.

**Section 1: Technical information**
1. What learning management system is used in your law school?
2. What other enterprise level systems are used for teaching in your
   law school?

**Section 2: Practice**
3. What proportion of staff make use of the Learning Management
   System in their teaching?
4. What features of the Learning Management System are commonly
   used in teaching?
5. Have any strategies for mobile learning been initiated?
6. Does the school or university have any policy or strategy for online
   learning?
7. What impediments exist within your school from adopting mixed
   mode delivery including on-line learning?

**Section 3: Good Practice exemplars**
8. Are there any staff with innovative on-line practice that should be
   showcased?

III  RESULTS

A summary of the results on each of the set interview questions
is presented in Appendix 1.

**A  Learning Management Systems**

The use of a Learning Management Systems (LMS) in the
Australian higher education sector is now mainstream. In total,
32 law schools used an LMS: 15 used Blackboard Learn, 12 used
Moodle, 2 used Desire to Learn, 2 used WebCt, and there was one
in-house system. Most law schools (27) indicated that 100 per cent
of staff use the central LMS.

Most law schools operate within a framework of institutional
policies that require an LMS presence for all courses. Law schools
have adopted three categorical responses to imposed institutional e-
learning frameworks.
- Mandatory course LMS websites with limited standard information
  required by the University, but not used by academics to any
  significant extent (25 schools).
- Optional usage with varying content across units with low levels
  of academic use (2 schools).
- Mandatory LMS websites with high usage by academic staff and
  students (5 schools).
An LMS is predominantly used for the delivery of course materials. Most universities pre-populate each LMS course website with course outlines and default layouts. Other tools such as electronic assignment submission, online assessment, discussion forums, blogs and wikis were used to a limited degree. A large number of schools use discussion forums (21), with a slightly smaller number using assignment submission, online surveys and tests. Several years ago the predominant use of a central LMS was to distribute PowerPoint slides, subject guides and other essentially print-based learning resources and readings to students. There now seems to have been some shift towards the greater use of e-learning communication tools in the sector.

B Lecture Capture Systems

A little over half of Australian law schools used some form of lecture capture software which included the function of recording and archiving lectures. Echo 360 dominates lecture recording software for survey respondents. This type of software is designed to support a traditional campus-based lecture paradigm. The ability to produce, edit and store learning experiences online has seen lectures begin to move from the lecture hall to the academic’s desktop, or simply being abandoned altogether.

Lecture capture systems are currently used predominantly in larger, campus-based universities in metropolitan regions. The systems capture video and audio, or just audio. These systems are a simple bolt-on to traditional teaching techniques rather than any systematic redesign of learning and teaching approaches to better suit emerging e-learning practice.

Law schools in distance universities rely much more on asynchronous online communication with students. These law schools have developed learning materials that both accommodate and support independent learning.

Only a handful of regional law schools reported using synchronous online instruction. The ability to conduct online tutorials is supported by software such as Blackboard Collaborate, Adobe’s Connect and more recently Zoom.us. This type of software supports live face-to-face interactions over the Internet, such as tutorials, presentations, discussions and moots.
C Podcasts

In response to student pressure, podcast recordings of lectures are now commonplace, despite some staff resistance and anecdotal suggestions of the decline in student attendance at lectures.\(^{13}\) Significant numbers of students choose not to attend lectures and want to work asynchronously at a time that suits them. Basic course materials are now provided online in all but a few law schools. The model often consists of simply making available existing documents and podcasts of live lectures via the LMS rather than designing a course specifically for the Internet and mobile learning. The degree of interactivity in repurposed content delivered via the Internet may be at a very low level of sophistication and instructional design.

D e-Grading

Five law schools reported using e-grading systems. Two law schools reported using the features of the LMS, two reported using Grademark and one used ReMarksPDF. The potential cost savings associated with e-grading workflows have not yet resulted in widespread adoption of these technologies.

E Data-Matching

A significant use of data matching software to help prevent and detect plagiarism was reported. A total of 20 universities use plagiarism software. Most universities used Turnitin. Some use SafeAssign as part of their Blackboard LMS subscription. None reported using Urkund.

F Other Software Tools

There is small usage of other software tools. These tools have specific purposes, for example to support the development of digital resources, increase communication and collaboration, sustain document repositories and support online assessment.

Many pedagogically exciting innovations are taking place within the law schools that responded to the Law Associate Deans (Learning and Teaching) survey. There were examples of the development of online assessment databases; use of videoconferencing software to

assist advocacy classes online; use of e-grading software to support feedback to students; development of portfolios and simulated e-learning environments for students to use more problem oriented curricula; and use of animations and simulations.

G Mobile Learning

Only two law schools reported having considered strategies for introducing mobile learning. Thirty law schools indicated they had no strategy for mobile learning. There is no evidence of any comprehensive review of mobile-specific design issues, building mobile development options into content development processes, development of associated policy, or strategies for deployment in the majority of Australian law schools. Quinn observes:

All e-learning strategy requires a vision of the larger performance ecosystem ... in which the overall picture of e-learning, performance support, content models (greater integration), mobile (broader distribution), social learning, and more are considered ... At the end, the goal is to have a coherent environment, in this case for learning. That is, a solution is desired that blends the technologies to match the right learning outcome to the right delivery medium.\(^\text{14}\)

There is considerable scope for improvement in the way Australian law schools approach mobile learning.

H Policy

Few Australian law schools have developed policies or practices based on pedagogical principles designed specifically for use of technology supporting blended or e-learning. Twenty law schools reported no policy. Ten adopted the university policy. Four had a school policy consistent with the minimum elements of university policy. Four law schools had a policy extending beyond that of the university. Four participants were unsure of whether their law school had any relevant policy.

Comments made in responses to the Law Associate Deans (Learning and Teaching) survey revealed gaps between policy, implementation and practice as perceived by those at different levels of university structures — Pro Vice-Chancellor (Teaching and Learning), Faculty Associate Deans Teaching and Learning, School Teaching and Learning Committees and individual academics. There

are many non-transparent layers. The gap appears to widen, moving down the university structure with increasing levels of disinterest.

I What Impediments Prevented the Adoption of Blended Learning?

Respondents, when asked the question ‘what impediments exist within your school from adopting mixed mode delivery including on-line learning?’, identified six broad categories of impediments:

- **Workload implications:** Two explanations were given. First, existing workloads were high and there was insufficient time and human resources to move to a mixed mode or online delivery of the law course. Second, time is needed to produce quality mixed mode or online courses.

- **Career priorities:** There were only two comments acknowledging that careers are still built on research outputs rather than teaching scholarship and performance. Tied to this view was a comment acknowledging that existing workload models may not adequately accommodate the work needed to produce and deliver mixed mode or online law courses.

- **Commitment to existing practices:** There was a mix of comments in this category indicating several possible reasons for not transitioning to blended and online delivery. Reluctance to change was expressed by respondents, reflecting the age of the academic, a conservative attitude among law academics and a perception that current face-to-face teaching is more effective than a blended mode and/or online delivery. Reluctance to change was expressed more frequently than commitment to any particular learning and teaching pedagogy.

- **Law academics’ knowledge and skills:** The comments indicated a lack of knowledge and skills relating to the technologies available to deliver mixed mode and online courses. There was also a lack of knowledge of how to best use these technologies in pedagogically effective ways, let alone in effective blended modes and online teaching practices. This lack of knowledge related to technology, curriculum renewal and teaching effective practices.

- **University policy and infrastructure:** The respondents’ comments point to a range of issues including: ineffective technology infrastructure, lack of appropriate support staff, university and school policies that do not assist in the transition to mixed mode or online delivery of law courses, and a lack of local champions to lead the transformation of the school. Comments indicated a university, faculty and school issue, namely that existing policies and procedures established for face-to-face teaching settings may actually interfere with the transition to mixed and online teaching.
- **Student knowledge and skills:** Only one comment raised the possibility that students may have insufficient technical skills to participate in mixed mode and/or online learning. Far more comments indicated lack of staff knowledge and skills.

The respondents’ comments regarding impediments to the adoption of mixed mode or online delivery of courses point to implications at individual, school-based and institutional levels.

The literature indicates some positive correlation between age and reluctance to utilise technology, but there are numerous counter-examples. Respondents identified workload and limited time as a significant impediment to the adoption of mixed mode delivery and on-line learning. Consistent with the literature, staff assumed workloads may increase with the adoption of any new technology. The pressure for change is happening in a climate where factors such as budget constraints, declining Australian Tertiary Admissions Rank (ATAR) entrance requirements, larger class sizes, and demands for research output are seen as increasing workloads and pressure on law academics.

At the school level, there appears to be a lack of champions to support and illustrate new blended or mixed modes of delivery. There is a philosophical and practical divide between face-to-face, on-campus delivery and blended or e-learning in the minds of many academic staff interviewed. A little under 50 per cent of comments focused on staff workload issues and a commitment to more traditional practices, for a wide range of reasons. Workload at the school level does not appear to be recognised in a way that supports school and institutional change toward a broader adoption of mixed mode delivery and online learning. Strategic intervention may be required at both the institutional and school levels to enable the advances of early adopters to be replicated by their colleagues with the necessary support structures and training being provided.


17 Baiyun Chen, ‘Barriers to Adoption of Technology-Mediated Distance Education in Higher-Education Institutions’ (2009) 10(4) Quarterly Review of Distance Education 333.

University policy, infrastructure and support remain issues to be addressed. Policy grounded in on-campus, face-to-face teaching methods may limit exploration and adoption of new practices that challenge student expectations of what learning means at a university. Staff expectations of teaching practices and university requirements in terms of workload and teaching practices for academics may also be diverging. Some respondent comments point to the inadequacy of current teaching technology support and training to assist law academics in using new teaching technology at their computer desktop.

J Law School Identified Good Practice Exemplars

Australian law schools report pockets of innovation in the use of e-learning in individual courses and across entire programs. Respondents were asked to identify the most significant use of online technology in their respective schools. What emerged from this was that most development work appears to be isolated to a few individual staff who demonstrate exemplary examples of blended and e-learning.

In terms of audio-visual e-learning exemplars, there is now the use of animation, art, puppets, video resources, and teleconferencing in Australian law schools. There have been extensive online developments in assessment, problem based learning, and the use of video in teaching.

20 Ambelin Kwyamullna uses her own art in indigenous law courses.
22 Felicity Wardhaugh uses practitioner video resources to support case studies and simulations in Civil Procedure; N Lemont et al, ‘Video annotation for collaborative connections to learning: Case studies from an Australian Higher Education context’ (unpublished book chapter). The Media Annotation Tool allows students to annotate video for reflection, making video active and collaborative.
23 Margaret Stephenson integrates an international, intercultural dimension into teaching and learning in her Law and Indigenous Peoples course through the innovative use of video-conferencing technology. Les McCrimmon teaches Advocacy using Collaborate based online synchronous classes.
IV Analysis

Having obtained a snapshot of practice in Australian law schools, it is useful to reflect on:

- how technology is altering legal education;
- whether it is useful to compare the outcomes of face-to-face learning, e-learning and blended learning; and
- future predictions surrounding learning analytics including MOOCs and the transformations that may be necessary in the not so distant future.

25 Geoff James uses online problem-based learning for Equity and Trusts law. The content of the unit is studied through analysis of 15 problems. There are no formal lectures, but students may attend problem analysis sessions on campus and online using Blackboard Collaborate. Each peer support group has its own discussion forum and access to an online classroom. Students organise themselves in peer support groups. The class online discussion acts as a continuous, asynchronous, multi-topic learning resource.


27 Des Butler’s blended learning program was developed, including instruction on theoretical and philosophical underpinnings of legal ethics, together with Entry into Valhalla, an online suite of modules featuring self-test quizzes and machinima scenarios depicting legal dilemmas confronting the members of a fictional law firm. The project website includes a detailed resources manual and instructional videos. (<http://www.olt.gov.au/system/files/resources/Butler_D_QUT_Fellowship_report_2011.pdf>). Brian Cambourne’s innovation in assessment engendering authentic experiences to instill strong professional skills in forensic accounting and evidence law students via experience in authentic courtroom simulations. Segrave, Holt, Cybulski, O’Brien and Munro have developed goal-based, role-play digital simulations (e-Simulations) for educating the professions. The e-Simulations are designed to enhance student learning in a range of professions and are delivered in multiple blended-learning contexts, with online student tracking for assessment and evaluation.

28 Stephen Colbran’s Australian Law Postgraduate Network demonstrates a collaborative method for supervision of higher degree students by encouraging a community of practice across institutions within the specific discipline of Law.

How Technology is Altering Legal Education

Steven Laster, Chief Information Officer at the Harvard Business School, observed in the May/June 2012 edition of Educause:

These are interesting times for higher education and its supporting technologists. Never before has higher education been more expensive, and never before has technology been so well positioned to profoundly impact the future of teaching, learning, and organizational sustainability.

The stage is set for technological innovation and potential disruption to standard university operating models, which, for some universities, may become unsustainable. James Flynn observes that ‘the educational world is particularly susceptible to disruptive innovation because it relies heavily on communication and technology’.

Imagine if a university law school with a well-recognised brand, or co-branded with a recognised law firm, offered law courses, leading to both qualification and accreditation, at a substantial discount and delivered in a flexible manner via the Internet. This would pose a significant risk to other law schools’ operational and financial models. It would have a profound impact on law schools, as academics and students now perceive them. Academics should not assume, for example, that a law degree from a university will forever remain the standard admission qualification for the legal profession.

The nature, location, flexibility, and context of learning and teaching are evolving and changing. The cost of a law degree may fall if new competitors enter the market for legal education and pressure sees reduction in the length of qualifications required to enter the profession. It is possible to obtain an Australian law degree in two and a half years in some law schools, including summer and winter terms. United Kingdom admission requirements have reduced substantially in recent years, prompting additional study for admission in Australia. There is a similar pressure in the United States. Changes in the way academics believe students learn, and emerging technologies available to teaching staff and students, are potentially disruptive to traditional patterns of legal education. Traditional approaches focus on face-to-face delivery of standard oral lectures and tutorials in the same physical location. Social changes in education combined with new technology place pressure on legal academics to reflect on their teaching, the way their students

33 ‘For many, two years is plenty’, The Economist (New York), 31 August 2013, 31.
learn, and community expectations of the role of a university — that of a law school in particular.

Table 1 categorises some of the disruptive elements affecting learning and teaching practices in Australian law schools.\textsuperscript{34} We have chosen a couple of longstanding disruptive technologies as well some of those technologies forecasted\textsuperscript{35} as changing the landscape of higher education in the not too distant future.

**Table 1: Disruptive Elements**

<table>
<thead>
<tr>
<th>Disruptive Technologies</th>
<th>Disruptive Social Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internet connectivity</td>
<td>Digital natives</td>
</tr>
<tr>
<td>e-Learning</td>
<td>Time shifting</td>
</tr>
<tr>
<td></td>
<td>Transition from content delivery to collaboration and engagement</td>
</tr>
<tr>
<td>Social media and networking</td>
<td>Collaboration across time and location</td>
</tr>
<tr>
<td>Digital resources (eg online primary and secondary materials, eBooks) changing the nature, functions and physical design of law libraries</td>
<td>The desire for physical and virtual collaborative learning spaces. Do academics and students really need a library with hard copy books?</td>
</tr>
<tr>
<td>Massively Open Online Courses (MOOCs)</td>
<td>Linking current and past learners in a stream of lifelong learning. University partnerships with online educational technology providers</td>
</tr>
<tr>
<td>The rise of learning ecosystems over one-size fits all Learning Management Systems</td>
<td>Demand for student-designed (tailored) learning</td>
</tr>
<tr>
<td>Learning Analytics increasingly associated with Teaching and Learning Standards</td>
<td>Measurement and accountability</td>
</tr>
</tbody>
</table>


1 Internet Connectivity

A person who was has grown up with digital technologies from an early age may be categorised as a digital native. The term was first used to distinguish between digital natives and digital immigrants. The latter refers to people born before the general introduction of digital technology transitioning to adopting technology. More recently, Marc Prensky has proposed the concept of ‘digital wisdom’, which he defines as:

a twofold concept, referring both to wisdom arising from the use of digital technology to access cognitive power beyond our innate capacity and to wisdom in the prudent use of technology to enhance our capabilities.

Those who have grown up using digital technology for communication and interaction may work and learn in fundamentally different ways from those who grew up before digital technology became ubiquitous. The traditional in-person lecture or tutorial teaching paradigm that is very familiar to digital immigrants may no longer be as useful to digital natives, who may have little time or need to attend lectures, and who are more likely to want to access the Internet for relevant resources. Internet-based materials are flexible, available 24/7, and avoid the cost and time of transport to a lecture venue, but above all may potentially lead to the advantages of ‘digital wisdom’ identified by Prensky — enhanced access to data, enhanced ability to plan and prioritise, enhanced insight, and enhanced access to alternative perspectives.

2 e-Learning

Albert Sangra, after conducting an extensive literature review and a Delphi survey of expert opinions, proposed the following inclusive definition of e-learning.

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39 The Delphi survey uses a process of iterative group facilitation. The objective is to produce group consensus. For guidelines on using the Delphi survey see F Hasson, S Keeney and H McKenna, ‘Research guidelines for the Delphi survey technique’ 32(4) (2000) *Journal of Advanced Nursing* 1008.
E-learning is an approach to teaching and learning, representing all or part of the educational model applied, that is based on the use of electronic media and devices as tools for improving access to training, communication and interaction and that facilitates the adoption of new ways of understanding and developing learning.  

E-learning has matured from a platform for content delivery to one involving online collaboration and communication. This transformation has broadened the scope of when and how students learn and the approaches to education available to academics. Universities have slowly moved from content delivery to more active learning designs supported by different models of communication and collaboration. This represents a significant disruption to university academics, many of whom are digital immigrants focused on the development of the discourse and content within their legal specialisation. However, some law schools have fully embraced the opportunities presented by e-learning. In such environments, there are no on-campus students. All students and staff are geographically separated. All materials are electronic and publicly accessible through iTunesU. Instruction and collaboration is conducted entirely by mobile e-learning methods.

3 Social Media and Networking

Digital natives and older digital immigrants use internet-based applications such as Wikipedia, Blogger, Facebook, Twitter, YouTube, WordPress and LinkedIn on a daily basis. In 2012, the total time spent on social media in the USA increased by 221 billion minutes. In Australia in 2012, ‘average users are now spending 14 minutes out of every hour online using social networks’.

Web 2.0 applications challenge law academics to make greater use of student activity beyond the ‘classroom’. It allows for students to contribute to class through the development and sharing of content. It provides opportunities for academics to use more imaginative

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41 For example, the CQUniversity law program is entirely cloud based.


44 Web 2.0 websites include dynamic and collaborative elements, eg social media, blogs, wiki. The term Web 2.0 was created by Darcy DiNucci in 1999: see Paul Graham, ‘Web 2.0’ (November 2005) <http://www.paulgraham.com/web20.html>.
forms of assessment, even though the prospect of more sophisticated forms of cheating appear ever present.\textsuperscript{45}

4 Digital Resources

While governments develop policies to increase access to higher education, the cost of higher education is increasing around the world.\textsuperscript{46} HSBC reports that Australia is the most expensive country for higher education.\textsuperscript{47} This has been the case since 2009. Costs have risen 166 per cent during that period.\textsuperscript{48} While these reports focus on international students, they are a proxy for the actual cost of higher education for domestic students, particularly in disciplines such as law, with relatively low levels of subsidy. The Grattan Institute Report, \textit{Mapping Australian Higher Education}, states that 83 per cent of the cost of a law degree is paid by domestic students.\textsuperscript{49} Part of the problem is that the cost of education — including tuition, ancillary fees, books and study materials — has increased to the point where it may be difficult for students from lower socio-economic groups to afford it.\textsuperscript{50} The Australian Scholarship Group estimates the year course costs for law will rise from $9,792 per year in 2013 to $15,545 in 2023. The Australian Scholarships Group Cost of University study, compiled by the not-for-profit organisation, considers a range of variables including university fees, transport, computers, study placements and rent to determine the true cost of a university education.\textsuperscript{51} There is a risk that the current business

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} Jeffrey Young, ‘MOOC Provider Will Use Typing Patterns to Verify Student Identities’ (2013) 59(19) Chronicle of Higher Education, 00095982, 1/18/2013.
\item \textsuperscript{47} HSBC, ‘Australia most expensive country for international study, but the tide may turn’, (13 August 2013) <http://www.hsbc.com.au/1/2/about/news/13/130813>.
\item \textsuperscript{49} Andrew Norton, \textit{Mapping Australian Higher Education} (Grattan Institute, 2013) 52.
\item \textsuperscript{51} Australian Scholarships Group, ‘The cost of a university education to jump by 50 percent (regional)’ (Media Release, 26 February 2013).
\end{itemize}
\end{footnotesize}
models for higher education may fail due to high cost and associated
debt accumulation by students, a dependence by institutions on
student debt, and potential limitations on what future governments
may be prepared to fund and what graduates may be capable of repaying.

Consequently, a number of projects both in Australia and
elsewhere have been designed to provide open educational resources.
At least two universities in Australia are now openly providing their
legal educational resources online and free to the public at large
through iTunes U — CQUniversity and LaTrobe University. This
open access approach presents several opportunities and challenges
to law academics, especially those in traditional on-campus settings.
Increasingly, law content and instructional material may become
more readily available free of charge. For law students, the quality
of their education experience may become less concerned with
delivered content and more concerned with the performance and
quality of support provided by legal academics and other students as
they solve legal problems collaboratively.

5 The Rise of Learning Ecosystems

Universities exist in an era of the institutional LMS, which provide
the means by which content is delivered, students and academics
interact and assessment is undertaken and recorded. Content provided
free through public spaces such as iTunesU, YouTube and other
Internet applications combined with freedom to communicate through
social media makes the world of the legal academic increasingly
complex. With the emergence of LMS, academics had a brief moment
of thinking that they could control the sociotechnical network of
the classroom. Now, the world is again becoming more open, more
distributed and more akin to an ecosystem in which a complex array
of Internet applications may be available to students. Those students
may strive to achieve and demonstrate learning outcomes using
these Internet tools very differently from the way academics initially
envisaged. Achieving and adequately demonstrating the learning
outcomes of a subject or program of courses is what counts from
a quality assurance standpoint. Academics may need to provide

52 Flynn, above n 31, 156.
53 For example the entire law program at CQUniversity is publicly available through
iTunesU. Numerous law courses are available on iTunesU, Coursera and EdX.
54 A modification of the organisational development term ‘sociotechnical system’
looking at the interaction between people (academics and students) and
technology, in the context of the classroom. See E Trist and K Bamforth, ‘Some
social and psychological consequences of the longwall method of coal getting’
(1951) 4 Human Relations 20.
55 See Tertiary Education Quality Standards Agency, Information Sheet: TEQSA’s
sites/default/files/TEQSAs_Approach_to_Quality_Assessments_web_121112.pdf>.
pluralistic and active learning opportunities using multimedia and collaborative approaches. These additional options may become necessary professional teaching skills for future law academics.

In a differentiated market, some universities may retain historical teaching methods, while others may strive to make the learning experience more personal in a virtual class comprising possibly thousands of students. Only a small proportion of these students may seek to submit assessment and attain accreditation.56 The learning experience may become personalised by including optional refresher materials and optional extension materials.57 In this scenario, the question becomes: how do universities keep track of, interact with and support so many students? Learning analytics, discussed later in this article, provides a potential solution to this issue.

B Face-to-face Learning, e-learning and Blended Learning

The argument as to the relative merits of e-learning and face-to-face teaching has been topical for some time.58 In 2010 the US Department of Education released a revised report entitled Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies examining recent experimental and quasi-experimental studies contrasting blends of online and face-to-face instruction with conventional face-to-face classes. The study concluded that blended approaches incorporating modern online learning applications, including multimedia and collaborative Internet technologies, may achieve better outcomes than purely face-to-face approaches.59 Online learning by itself was found to be equivalent in effectiveness to conventional classroom instruction.60 These findings would suggest Australian law schools


57 See for example Peter Norvig, ‘The 100,000-student classroom’ (February, 2012) TED <http://www.ted.com/talks/peter_norvig_the_100_000_student_classroom.html>.


59 For examples of where online and multimedia applications are reported to have had positive impacts on learning see: Des Butler, ‘Entry into Valhalla: Contextualising the learning of legal ethics through the use of Second Life Machinima’ (2010) 20 Legal Education Review 87. See also Des Butler, ‘Air Gondwanda: Teaching Basic Negotiation Skills Using Multimedia’ (2008) 1 Journal of the Australasian Law Teachers Association 14.

60 US Department of Education, above n 1, xi.
should consider incorporating e-learning as part of a blended approach to learning and teaching.

When academics explore blended learning approaches, it is possible that learning outcomes for students may improve irrespective of which delivery mode is used. It is possible, for example, that academics may learn to improve face-to-face teaching from their experiences with online learning, and vice versa.

Appendix 2 focused on the use of different technology and its associated timing for teaching and learning. However, face-to-face, distance, online and blended learning assume and reflect differences in our understanding of learning, which in many ways are now merging with supporting technology. These differences are reflected in the various approaches Australian law schools have adopted for legal education.

As set out above, the results of the Law Associate Dean (Learning and Teaching) survey indicate that Australian law schools are moving down the path of blended learning to varying degrees, using a variety of technologies. Results indicate that 32 law schools use an LMS, 23 use lecture capture systems, 11 use synchronous communication, 5 use e-grading, and 3 use document repositories. The subsystems within the LMS (for example discussion forums and quizzes) are used to varying degrees by law schools. Open-ended survey comments indicated that the adoption of blended learning approaches is hampered by workload implications, career priorities focused on research, commitment to existing practices, academics’ lack of knowledge and skills, university policy and infrastructure, and uncertainty concerning student knowledge and skills.

Course or program innovation in the blending of e-learning into on campus activities and/or the development of fully online learning techniques is dominated by universities that cater for large percentage cohorts of external students — for example CQUniversity, CDU, Deakin, RMIT, SCU, and UNE.

While it can be the case that any learning experience may be inferior, recent studies and the Law Associate Deans (Teaching and Learning) survey suggest that e-learning, especially as part of a blended learning approach, may be better than pure face-to-face teaching.

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62 For example, televisions can now access the Internet, and device functionality is merging.

63 US Department of Education, above n 1, xi. For a discussion of this topic see Diana Oblinger, above n 58.
C Future Predictions — Learning Analytics and MOOCs

Little mention was made in the Law Associate Dean (Teaching and Learning) survey responses, or the survey interviews, of data analytics and Massively Open Online Courses (MOOCs) despite the attention these topics have received in tertiary teaching nationally, internationally and in the media.64

1 Learning Analytics

Learning analytics is ‘the measurement, collection, analysis and reporting of data about learners and their contexts, for purposes of understanding and optimizing learning and the environments in which it occurs’.65 Learning analytics holds the promise of knowing more about our law students as they study law. It is not science fiction that one day law students may obtain help from a digital tutor, designed to support them with the application to case law of approaches such as IRAC66 or its many variants. Learning analytics affords the ability to monitor large numbers of students and create individual education experiences. Australian law schools are yet to explore the potential of learning analytics.

2 Massively Open Online Courses (MOOCs)

Learning analytics is well suited to Massively Open Online Courses (MOOCs) — courses that are online, are free, offer learning materials that may be modified, reused and distributed to others, and reach massive communities.67


66 The term MOOC is said to have been coined by two separate individuals: Bryan Alexander (http://infocult.typepad.com/infocult/2008/07/connectivism-course-draws-night-or-behold-the-mooc.html) and Dave Cormier (http://davecormier.com/eddblog/2008/10/02/the-ckc08-mooc-connectivism-course-14-way/) and this label was loosely posted to a course (CCK08) organised by George Siemens and Stephen Downes. See <http://davecormier.com/eddblog/2008/10/02/the-ckc08-mooc-connectivism-course-14-way/> 2 October 2008.
In the Australian context a MOOC based on a differentiated services model has so far been tried in a legal subject offered by uneOPEN — Rural Legal Practice. While subject content is free, premium services are offered at a price. One-on-one video tutorials cost $150 per hour. Group video tutorials (minimum of four, maximum of 10 participants) cost $35 per person, per hour. A student may select a challenge exam, pay a fee of $495, pass and obtain credit, through advanced standing, in a UNE law degree.

As academics make learning resources in the study of law more publicly available, there is an opportunity for learning communities, not directly enrolled in University courses, to collaborate and learn together about aspects of the law. MOOCs provide an avenue to participate informally in an online course using the open educational resources a university provides for a particular subject or course.

The Law Associate Deans (Teaching and Learning) survey and subsequent interviews revealed that the vast majority of Australian law schools have not considered undertaking MOOCs as a form of instruction or community engagement exercise. The potential for Australian law schools to embrace MOOCs is an area which warrants further research.

V Conclusion

Most Australian law schools use an LMS as part of a blended learning strategy irrespective of whether they teach on-campus or off-campus students. The primary use of the LMS is to distribute learning resources to students, and to a lesser extent to communicate with students through discussion forums or other basic tools such as announcements. Teaching predominantly consists of lectures and tutorials, although lectures may be recorded and viewed later, and PowerPoint slides and audio files distributed to students electronically. The Law Associate Deans (Learning and Teaching) survey indicates that this model of on-campus face-to-face teaching in the law curriculum is being transformed through the use of educational technology towards more active learning.

Some law schools are extending their markets (or market share) by moving to more flexible arrangements that better suit the lifestyles and requirements of their students. New online markets challenge existing academic working conditions, technology infrastructure, teaching practices and support for students. E-learning is changing legal teaching as academic staff seek to use the ‘best’ of both face-to-

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68 An example of this approach is UNEOPEN, How does UNEOpen work? (2013) <https://www.uneopen.com/app/about/a_id/17>.

69 An example of this is CQUniversity’s law degree, which is publicly accessible via iTunesU.
face learning and e-learning, and explore how both approaches may be effectively blended together.

The debate as to whether face-to-face learning is better than online learning overlooks the underlying merits of teaching content and the potential for blended approaches. There is no persuasive evidence to support the proposition that any unblended approach is better than another. To the contrary, as discussed above, research suggests that both face-to-face and online strategies are equally valid and effective, with a blended combination of both having slightly better student learning outcomes. It is more important to know the conditions under which students achieve the outcomes stakeholders want them to achieve, irrespective of whether they are in a face-to-face class, e-learning, or a blend of both. The quality of education provided to students is what is important.

The landscape of Australian higher education has changed and is evolving at a disconcerting rate. Universities are looking for alternative models of teaching and learning to better suit the needs of their stakeholders. By contrast, law schools are relatively slow to adapt. The legal profession has a strong sense of individualism and conservatism. Lawyers, law academics and judges often develop their reputations on the basis of their individual performance and contributions to the profession. Conversely, law students may demand more collaborative approaches to learning. New models of teaching and learning law challenge traditional assumptions and require more collaborative and interactive approaches.

While there is some encouraging developmental work in face-to-face and e-learning throughout the sector, the Law Associate Deans (Learning and Teaching) survey indicates that e-learning practice is generally simplistic and lacking a systemic strategy of scholarship and development of teaching practices designed to move the entire law discipline forward.

The needs of the current generation of students, which has grown up not knowing a world without the Internet and social networking, may not be adequately met with current instructional designs used in many law schools. These students are accustomed to having an Internet presence, building their own social and learning groups and working in e-learning environments that profile their personal needs, push information in a form that best suits them as individuals, and are increasingly visual, interactive and collaborative in nature.

New digital learning resources that are easily shared and distributed across law schools are a start. Sharing the costs of developing these resources and the development of open access resources may become increasingly important.

Individual creativity and innovation in teaching within law schools is evident from the Law Associate Deans (Learning and Teaching) survey. However, systemic course level change remains
relatively rare. Few law schools have signature program pedagogy or reputations for teaching excellence either in blended or on-line modes. While the teaching excellence of many individual academics is evident from the survey, it appears most law schools would benefit from greater attention to the development of educational design and digital resources across entire law teaching programs. Systematic law school wide approaches to integrating technology into teaching may be necessary for law schools to evolve beyond the basic online presence mandated by university management.

The future role of technology in law teaching remains uncertain but it is clear that e-learning is already pervasive in Australian law schools.
APPENDIX 1
LAW ASSOCIATE DEANS (LEARNING AND TEACHING)
SURVEY SUMMARY AND KEY FINDINGS

What learning management system is used in your law school?

Learning Management System

Blackboard Learn 9.x: 15
Desire2Learn: 12
Other: 2

Total: 30
What other enterprise level systems are used for teaching in your law school?
The chart illustrates the use of lecture capture technologies by Australian law schools. The technologies include:

- **Echo 360 (Lectopia)**: 14 institutions
- **Camtasia Relay**: 2 institutions
- **iLecture**: 1 institution
- **eLive**: 1 institution
- **Edustream (Audio capture)**: 1 institution
- **In-house lecture recording system**: 3 institutions
- **Management group work**: 1 institution

The chart shows a clear preference for Echo 360 (Lectopia) as the most widely used technology for lecture capture.
What proportions of staff make use of the LMS in their teaching?

- 27% make use of the LMS in 100% of their teaching.
- 1% make use of the LMS in 95% of their teaching.
- 1% make use of the LMS in 80% of their teaching.
- 3% make use of the LMS in unspecified percentages.
What features of the LMS are commonly used in teaching?

- Discussion forums: 21
- Assignment submission, tests, quiz, surveys: 16
- Distribution of learning materials: 12
- Study guide, course outline: 12
- Announcements: 6
- Audio recordings of lectures: 6
- Video recordings of lectures: 5
- Blogs: 1
- Online tutorials: 1
- Management group work: 1
Have any strategies for mobile learning been initiated?

- No strategy in place: 30
- School has a strategy: 2
Does the school or university have any policy or strategy for on-line learning? [May I have a copy or reference to this policy or strategy]
What impediments exist within your school from adopting mixed mode delivery including on-line learning?
Responses may be grouped under the following headings:

Workload Implications
- The primary impediments are human capital — staff face very heavy workloads (14 hours contact on average) and it is difficult to find the time to introduce electronic teaching methods or to train staff in the systems.
- Staff ‘buy in’ often with anxieties of increased workload.
- Lack of human capital — very heavy workloads.
- Size of the student cohort makes online education unmanageable — email and discussion boards have serious workload implications.
- Limited time to develop or redevelop quality online resources/product.

Career Priorities
- Pressure to focus on research outputs rather than teaching. Money and career is built on research.
- Good online instruction demands considerable time commitment not always recognised in institutional workload models. There are both perceived and real workload issues.

Commitment to existing practices
- Most difficult is the ‘mind share’ — with contestability, budgetary crises, declining ATARs and other issues, I understand that it can be difficult to find the brain space to care about these issues and to focus on re-skilling and re-orienting teaching practice. While we have to be careful about being ageist, the number of late-career academics, the failure of universities to renew staffing, can contribute to a certain reluctance to try new teaching methods or to engage with the future. While not all baby-boom generation academics are hostile to technology (we have to admit many are), there is a real need for digital natives to join staff who understand the way that today’s students engage with knowledge and relate to each other through networks.
- Lack of skills and training.
- Conservatism — not seen as a need or desirable.
- Reluctance to teach online (either in blended mode or fully online).
- Reluctance to move from a traditional delivery culture.
- Tension between online learning and technology versus a reduction in attendance at lectures.
- Significant change management issues and resistance.
- Face-to-face is the expected model. There is a pedagogical view that the traditional lecture model is superior. The culture is against
technology. The mission is an integrated clinical education with an emphasis on face-to-face in class learning.

**Law Academics knowledge and skills**
- Some staff have a resistance to change dependent on age — the older they are the more resistant. Older colleagues do not use technology.
- Staff are set in their ways and time poor. Tradition is a barrier.
- Varying levels of competence using new technologies.
- Varying levels of competence in teaching using the new technologies.
- Lack of skills in instructional design.
- Lack of understanding of what is effective online teaching and learning.
- We lack the pedagogy and don’t know how to use it. We have no background in online learning on what works and what does not work. We are not aware of the affordances.
- Staff resistance to new technology.

**University policy and infrastructure**
- No major driver or champion.
- Official approval processes for changes in units is too long.
- The effectiveness and stability of the relevant technology.
- Practical support provided at the School level – few if any School support staff and/or integrators.
- University policy restricts exploration and development of online/blended practices e.g. online assessment.
- Lack of technology resources.
- Limited pedagogical advice/support often centrally located hub and spoke models are ineffective. Support is needed in the School. Competing demands on limited resources.

**Student knowledge and skills**
- What we may reasonably expect from our students in terms of access to technology and the Internet — e.g. mature age students with no prior tertiary experience, with little or no computer skills in regional and remote locations with limited Internet access and bandwidth.
### APPENDIX 2

**TEACHING ACTIVITY TIME DIFFERENTIALS**

<table>
<thead>
<tr>
<th>Teaching activity</th>
<th>Asynchronous</th>
<th>Synchronous</th>
</tr>
</thead>
<tbody>
<tr>
<td>Content delivery</td>
<td>Text/Print/Books</td>
<td>Lecture</td>
</tr>
<tr>
<td></td>
<td>Radio</td>
<td>Echo 360&lt;sup&gt;76&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>Television</td>
<td>Tutorial/Seminar</td>
</tr>
<tr>
<td></td>
<td>Vodcasts/Video</td>
<td>Chat (Text)</td>
</tr>
<tr>
<td></td>
<td>Adobe Presenter&lt;sup&gt;70&lt;/sup&gt;</td>
<td>Video conferencing</td>
</tr>
<tr>
<td></td>
<td>Techsmith Camtasia&lt;sup&gt;71&lt;/sup&gt;</td>
<td>Adobe Connect&lt;sup&gt;77&lt;/sup&gt;</td>
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<tr>
<td></td>
<td>PDF and ePub</td>
<td>Blackboard</td>
</tr>
<tr>
<td></td>
<td>iBook (iBook Author)&lt;sup&gt;72&lt;/sup&gt;</td>
<td>Collaborate&lt;sup&gt;78&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>Animation</td>
<td>Skype&lt;sup&gt;79&lt;/sup&gt;</td>
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<tr>
<td></td>
<td>Podcasts</td>
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<tr>
<td></td>
<td>Garageband&lt;sup&gt;75&lt;/sup&gt;</td>
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</tbody>
</table>

<sup>70</sup> See [http://www.adobe.com/au/products/presenter.html].
<sup>71</sup> See [http://www.techsmith.com/camtasia.html].
<sup>72</sup> See [http://www.apple.com/au/ibooks-author/].
<sup>73</sup> See [http://www.youtube.com].
<sup>74</sup> See [http://www.whatisrss.com].
<sup>75</sup> See [http://www.apple.com/au/ilife/garageband/].
<sup>76</sup> See [http://echo360.com].
<sup>77</sup> See [http://www.adobe.com/au/products/adobeconnect/elearning.html].
<sup>78</sup> See [https://www.blackboard.com/platforms/collaborate/overview.aspx].
<sup>79</sup> See [http://www.skype.com/en/].
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[^80]: See <https://drive.google.com/>.
[^82]: See <http://www.problogger.net/archives/2005/02/05/what-is-a-blog/>.
[^87]: See <https://support.google.com/drive/answer/2424384?hl=en>.
[^88]: See <https://quip.com/>.
[^89]: See <https://twitter.com>.
[^90]: See <http://www.keeppad.com/Products/TurningPoint/>.
[^93]: See <https://www.linkedin.com>.
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\(^{95}\) See <https://mahara.org>.
\(^{96}\) See <https://www.dropbox.com>.
\(^{100}\) See <http://www.remarkspdf.com>.
\(^{102}\) See <https://www.blackboard.com>.
\(^{103}\) See <https://moodle.org>.
\(^{104}\) See <http://www.desire2learn.com>.
\(^{105}\) See <https://weblearn.ox.ac.uk/portal>.
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SPECIAL ISSUE — THE PAST, PRESENT AND FUTURE OF CRITICAL LEGAL EDUCATION IN AUSTRALIA
SPECIAL ISSUE — THE PAST, PRESENT AND FUTURE OF CRITICAL LEGAL EDUCATION IN AUSTRALIA

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Foreword — Special Issue

This special issue comes at a time of expanding scholarship into the impact of contemporary economic and managerial practices on the tertiary sector in Australia. Debates about this subject have been going on over a considerable period of time — beginning, perhaps, with the Dawkins reforms of 1988. However, as the market focus of tertiary education has intensified, workloads have escalated and concerns about changes to governance and impacts on the quality of research, teaching and assessment have become more pervasive. Greater scholarly attention to these issues within law has been triggered in part by conversations which have opened up as a result of Margaret Thornton’s generative book *Privatising the Public University: The Case of Law*.

In this special issue, six contributions from a range of authors engage with the impact of these processes on the past, present and future of critical legal education.

The first two articles focus on the increasing marketisation of legal education, offering a critique of the ways in which law schools are compelled to be simultaneously the same and yet different to attract students in the international market. In their article, Margaret Thornton and Lucinda Shannon extend Thornton’s arguments about the features of legal education as a ‘product’ within a global marketplace through a detailed analysis of law school web sites. They argue that marketing and branding the law degree as a consumer good filled with prestige and glamour conflicts with both articulating the civic role of law and the public responsibilities of law schools.

Paula Baron writes in direct response to Thornton’s analysis of the commodification of legal education as presented in *Privatising the Public University*. Baron adds an important perspective on additional issues including neoliberalism and individual well-being. She analyses the paradox of law schools both deploying the rhetoric of choice and participating in the trend to standardisation, and critiques discourses within the University which Baron argues act both to veil and reinforce dominant ideology.

Kathy Bowrey provides a critical history of journal ranking in law in Australia, offering an insider’s perspective on the processes of resistance, negotiation and co-optation that she argues surrounded the implementation of journal ranking in law. She argues that law

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2 Ibid 37.
was ultimately drawn into a process of research assessment that significantly eroded its autonomy and ran counter to the interests and will of the discipline and its representatives on the Council of Australian Law Deans. She goes on to consider the impacts of law being drawn into this form of audit culture. Her contribution offers a wealth of detail about how the discipline of law and many individual academics were drawn into participating in a system of research assessment that they individually and collectively sought to resist. It therefore offers both a rare insight into the processes by which such changes can be implemented in the face of resistance and a valuable object lesson for those who might wish to resist other forms of audit culture.

Frank Carrigan follows with an historical account of efforts to integrate critical legal education into the teaching of law in Australia and the barriers to the full realisation of this goal. Carrigan argues that law schools have succumbed to the market focus of contemporary tertiary institutions by providing a legal education which is impoverished by its single minded focus on marketable skills at the expense of a wider critical and philosophical approach to understanding law and legal institutions. His focus is on presenting a history of law schools which attempted to implement innovative and critical curricula for the entire law degree. His account sets out the project such schools embarked upon and the internal and external pressures which led to the demise of their integrated programmes of critical study.

In the fifth article, Gabrielle Appleby, Peter Burdon and Alex Reilly map the history of important changes in Australian legal education over the past 20 years, with a focus on the influence of the profession on legal education. Using Thornton's account of contemporary law schools ‘jettisoning the critical’ in the quest for market success as a stepping off point, they put forward a vision of what a legal education with a rich focus on critical thinking might look like. Their writing is motivated by and describes particular experiences in a particular law school. They ask where spaces for critical pedagogy might be created and argue that even in the context of current constraints it is possible for legal academics to teach in ways that are consonant with their values and pedagogical philosophies. They then set out some of the ways they are seeking to undertake this project in the environments in which they teach, in both elective and compulsory courses.

The sixth and final article in this special issue we have authored ourselves. In our article, we seek to open a conversation about how legal academics might resist undesirable economic and managerial reform. Our article begins with an outline of the literature

investigating academics’ experiences of neoliberal ‘reform’ as well as the research about academic resistance to neoliberalism, which reveals an extensive degree of discouragement and despair and a limited amount of resistance. We ask whether conceptualising the academic role as fundamentally grounded in integrity and adopting a conception of the academic as an activist might offer one potential place from which resistance might emerge. We go on to consider what strategies might be adopted by legal academics who wish to contest neoliberal approaches in the hope of inviting others to join a wider conversation about how the project of resistance might develop.

Conversations about the future of critical legal education—however this expression is to be interpreted—are very much needed. We hope that this special issue will incite such conversations. Some may begin with debate over the role and realities of the past, since there is no single narrative of the past of legal education in Australia. Historical visions of the role of the University and the law school clearly can operate as sources of resistance to current and future change, but they are open to contention. We might ask whether there was a point in the past which was obviously preferable to the present and, if it was, for whom and to what ends? We believe this special issue will contribute to these debates.

Similarly, we believe that this issue is unlikely to lay to rest debates about the relative role of legal skills and critique in legal education. Rather, we hope that readers will continue to think about these issues in fresh ways that are not dictated by the debates of the past. The case studies included in this issue provide the potential for legal academics in other contexts to determine what inspiration they might be able to draw from them for innovation, critique or resistance in their own institutional settings, with their particular values and teaching approaches, responding to the unique constraints and opportunities they confront.

Mary Heath & Peter Burdon
‘SELLING THE DREAM’: LAW SCHOOL BRANDING AND THE ILLUSION OF CHOICE

MARGARET THORNTON* AND LUCINDA SHANNON**

I INTRODUCTION

In a little over 20 years, the number of law schools in Australia has tripled — from 12 to 36. The catalyst for this revolutionary change occurred in 1988 when by a stroke of the pen the then Minister for Employment, Education and Training, John Dawkins, declared all Colleges of Advanced Education (CAEs) to be universities. The intention was to increase school retention rates and enhance the calibre of the Australian workforce so that Australia might be more competitive on the world stage. Despite the transformation of the tertiary sector, government funding was not proportionately increased.

Indeed, such phenomenal growth could not be sustained from the public purse. To generate additional revenue, the Dawkins reforms heralded a shift away from free higher education to a user-pays regime in which students themselves assumed partial responsibility for the cost of their education. While initially resisted, the new regime was quickly normalised. Public acceptance was ensured by, firstly, eschewing the language of fees and referring to the charge euphemistically as a ‘contribution’ (the Higher Education Contribution Scheme or HECS); secondly, setting the initial cost for domestic undergraduate students at a modest AU$1800 per annum across the board; and, thirdly, making HECS repayable only when a graduate reached a certain income threshold. Of course, once a fee

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** Former Research Assistant, ANU College of Law, Australian National University.
2 The number of universities increased from 16 to 34 in four years. See Simon Marginson and Mark Considine, The Enterprise University: Power, Governance and Reinvention in Australia (Cambridge University Press, 2000) 28–29.
3 Free higher education was introduced by Prime Minister, Gough Whitlam, in 1974. For discussion, see Marginson and Considine, ibid 56–7.
regime is put in place, it is inevitable that fees will be ratcheted up, and disciplinary differences soon emerged, with law being charged at the top rate. The shift from an élite to a mass system, supported by a user-pays philosophy, dramatically changed the character of legal education.4

CAEs were formerly teaching-only institutions which generally did not include professional programmes, but once they had become universities they were anxious to legitimise their new-found status by offering professional degrees. As universities had been largely deregulated,5 they were free to choose what courses they wished to offer — with the exception of medicine. To boost the knowledge economy, it was hoped they would offer courses with clear career paths. Law was a popular choice. In addition to attracting well-credentialed students, university administrators believed that a law degree required few resources. Indeed, it was a longstanding myth that law could be taught “under a gum tree”.6 The persistence of this myth ignored the notable pedagogical shift that had occurred in legal education away from the large-lecture model of course delivery (the ‘sage on the stage’) to an active learning model of small-group discussion, critique and interrogation of legal knowledge — a superior pedagogical model, but one requiring substantially more resources.

Many new law schools was established in the early to mid-1990s, not only in the new universities (for example, Southern Cross, Western Sydney and Victoria) but also in the ‘third generation’ universities established in the 1960s (for example, Flinders, Griffith, and La Trobe). The parlous financial situation in which all the law schools soon found themselves compelled them to take in more and more students to meet budgetary shortfalls. This set in train an endless spiral and caused them to espouse once again the outdated but cheaper pedagogies that had so recently been cast aside. Income generation and cost cutting became the primary concern of law deans everywhere.

In a volatile climate beset with risk, a law school, particularly a new school, could not passively wait for students to apply for admission. Through a range of marketing tools and the creation of a distinctive ‘brand’, law schools set out to woo student/customers and persuade them to choose their institution over others. This article examines the ways in which Australian law schools present

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4 For a thoroughgoing analysis of the transformation that occurred, see Margaret Thornton, Privatising the Public University: The Case of Law (Routledge, 2012).
5 The Commonwealth Tertiary Education Commission was abolished in 1987 and transferred to the Department of Education, Employment and Training. See Marginson and Considine, above n 2, 31.
themselves to the world as attractive and desirable in a competitive market. The first port of call for prospective customers is likely to be the law school website, on which we propose to focus.

While purporting to present themselves as distinctive, law schools tend to emphasise similar things in their advertising. Attractiveness and desirability are construed in terms of consumerism with advertising often redolent of a tourist brochure. The student who undertakes a law degree is promised employability, prestige and wealth; he or she is also assured of a glamorous and fun-filled career. As a result, the serious and difficult aspects associated with the study of law are sloughed off, as well as the centrality of justice and critique. But first a word about competition policy in legitimating the pre-eminent role of the market in reshaping the legal academy.

A Competition Policy

In accordance with the values of social liberalism, the prevailing political philosophy extols the role of the market, rather than the state, as the arbiter of the good. Freedom for the individual within the market is the fundamental social good according to neoliberal guru, Friedrich Hayek, as it fosters competition. The philosophy of Hayek, which was applied to universities by his colleague, Milton Friedman, assisted by Rose Friedman, underpins the commodification of higher education in Australia and is particularly relevant to legal education. Friedman was of the view that students who enrolled in professional courses should not be the recipients of public funding because it was assumed they would subsequently earn high incomes. The loan system that Friedman advocated, which would be repayable throughout the taxation system, was precisely the one that was implemented in Australia.

Competition, however, is by no means peculiar to higher education, for it is an inescapable dimension of the ‘market metanarrative’, which permeates every aspect of contemporary society. Competition became an official plank of Australian government policy with the Hilmer Report in 1993. In accordance with the philosophy of

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9 Friedman, *Capitalism*, above n 8, 105.
Hayek and Friedman, competition policy endorses the view that the operation of the vectors of supply and demand within a free market is the best way for society to generate greater efficiencies in production as well as a superior outcome for consumers. In other words, the effect of the marketising reforms required universities to reposition themselves as the ‘simulacra of business’.12

Prior to the Dawkins reforms, Australian law schools had been largely immune from competition. For decades there was only one law school in each State, but the landscape was to change irrevocably. The proliferation of law schools has inevitably meant increased competition for ‘market share’, particularly for top-performing students. Competition also means that some schools will succeed while others will founder. To date, however, no Australian law school has been compelled to close. This is because the most vulnerable — the regional universities — are generally located in marginal electorates. It is nevertheless within a competitive social Darwinist environment that law schools operate, perpetually haunted by the possibility of third-ratedness and non-success. As the now classic work of Ulrich Beck has established, risk is the inescapable corollary of entrepreneurialism and the production of wealth.13

The ideological underpinnings of the transformed environment have been secured by the emergence of a new marketised language in which it is accepted that students are ‘consumers’ or ‘customers’ in a ‘higher education market’ and universities are ‘higher education providers’ delivering a ‘product’. Like consumers generally, the consumers of higher education are expected to exercise choice as to which law school ‘product’ would best equip them with the means of realising their dreams. To the student/customer/consumer, legal education is the ‘bridge to [the] displaced meanings’ of an idealised future career.14 That is, legal education is understood as the pursuit of knowledge not for its own sake as articulated by John Henry Newman, one of the most famous theorists of the idea of the university,15 but because of what it promises. But how are students to know which law school to choose?


15 John Henry Newman, The Idea of a University, edited with introduction and notes by IT Ker (Clarendon, 1976 [1852]).
B The Standardising Imperative

While there is a modicum of diversity in Australian law schools, there is simultaneously a propulsion towards homogeneity which constitutes a particular marketing challenge, as sameness is anathema to the ideology of choice. The imperatives in favour of sameness are not mere abstract exhortations but prescripts emanating from the profession and the state, underpinned by the rhetoric of competition at the international level.

Firstly, as a professional discipline, law is subject to the requirements of the admitting authorities. Acceptance of the ‘Priestley Eleven’, the eleven compulsory areas of knowledge necessary for the accreditation of a law degree, is regarded as non-negotiable by all Australian law schools — a factor that straightaway ensures a significant degree of sameness in the curriculum. Secondly, the state itself is playing an increasingly interventionist role in ensuring the curricular and pedagogical standardisation of higher education through auditing and accountability mechanisms. The most notable recent instance is the Australian Qualifications Framework (AQF), which is designed to ensure consistency in the provision of all tertiary and vocational qualifications. For law schools to be compliant, the AQF requires distinct learning outcomes for the LLB, LLB Honours, LLM (coursework) and JD programs. Thirdly, the contemporary trend in favour of the international ranking of universities further encourages sameness and entrenches stratification. League tables assume that universities, like football teams, all compete on a level playing field regardless of differences in aims, age, resources and student catchments. Hence, if a wealthy private American Ivy League university is No 1, the aim is to emulate its characteristics in the hope of elevating one’s own institution in the global rankings, whether that is appropriate for a public university in Australia or not. League tables, with their obsessive focus on rankings, also reinforce

17 In response to the Bradley Review into higher education, the Government set up the Tertiary Education Quality and Standards Agency (TEQSA) in 2011. TEQSA is charged with ensuring compliance with the Higher Education Standards Framework. See <http://www.teqsa.gov.au/>.
the tendency to see higher education as ‘a product to be consumed rather than an opportunity to be experienced’.  

Competition policy and the market embrace both emphasise the division between older and newer law schools. While the former have substantial positional goods emanating from their age, wealth and status, often as the sole provider of legal education in a State for as long as a century, the latter, with none of these benefits, are struggling. However, such differences are discounted on a supposedly level playing field. The move to standardise, referred to as isomorphism by Marginson and Considine and, perhaps more evocatively, as McDonaldisation by Ritzer, is a way of describing how the creation of an identical product is required with only a frisson of difference, a surface variation, to set it apart for the purposes of marketing. As students are not ‘reliable long-term clients’ but ‘fickle customers who may be difficult to attract and retain’, law schools must purport to offer something special. While sameness is accepted as a tacit criterion, it is difference that is marketed.

II MARKETING AND THE ILLUSION OF CHOICE

At its simplest, marketing is ‘the provision of information to help people make decisions’. Possessing the means to access information to inform their choices, individuals supposedly become autonomous rational actors in accordance with the prevailing ethos of neoliberalism. But this faith in the idealised freely choosing consumer to which the dominant market paradigm subscribes is questionable. Bauman contends that choice is the ‘meta-value’ of a consumer society and that it enables the evaluation and ranking of all other values. He suggests that the conjunction of the discriminating consumer and the market as the purveyor of free choice are essentially myths that nourish each other. Marketing does not simply disseminate information; it actively works to ‘create’ the appearance of difference and to encourage favourable associations.

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22 Marginson and Considine, above n 2, 176.
24 Thornton, Privatising, above n 4, 43.
25 George Ritzer, ‘Enchanting McUniversity: Toward a Spectacularly Irrational University Quotidian’ in Dennis Hayes and Robin Wynyard (eds), The McDonaldisation of Higher Education (Bergin & Garvey, 2002) 19, 20.
29 Ibid.
with a product. Vast resources are mobilised by big business in the construction of a product’s uniqueness through advertising and branding.\textsuperscript{30} Despite the asymmetry between business and individual consumers, the presence of ‘different’ products transforms choice into what Holt terms an act of ‘personal sovereignty’.\textsuperscript{31} The products being chosen then become authentic resources in the establishment of the consumer’s identity.\textsuperscript{32} Nevertheless, the promotion of the ‘cult of difference and choice’ effectively obscures the marked similarity between goods and services.\textsuperscript{33} Thus, while commonplace products such as washing powders all perform basically the same function, each manufacturer aims to persuade consumers that their product possesses some unique quality. This paradox of sameness and difference is similarly exemplified in the marketing of legal education.

\textbf{A Branding and the Aesthetic of Work}

Law schools may claim to be ‘excellent’, ‘the best’ or ‘world class’ but such claims alone are unlikely to entice well qualified applicants.\textsuperscript{34} In any case, Readings effectively demolishes the concept of excellence as the ‘watchword’ of the contemporary university.\textsuperscript{35} While no one can be against excellence, no one really knows what it is, because it not only lacks a fixed standard of judgment,\textsuperscript{36} it lacks cultural content altogether.\textsuperscript{37} Excellence, then, is a pre-given in the marketing of legal education, but there needs to be some additional feature that is distinctive, or an element of ‘niche marketing’ to create a unique identity or ‘brand’. The need or desire for branding has emerged as a result of increased competition in conjunction with consumer choice.

At its simplest, a brand is a name, mark or symbol which denotes a particular seller’s product or service.\textsuperscript{38} A successful brand will involve a product with a recognisable identity and represent a particular set of values that is important to the consumer. Even if the claims made are spurious, as has long been the case with myriad prophylactic products, consumer perception is the key to a successful

\textsuperscript{32} Ibid 83.
\textsuperscript{33} Bauman, above 28, 59.
\textsuperscript{34} Ariens, above n 26, 337.
\textsuperscript{35} Bill Readings, \textit{The University in Ruins} (Harvard University Press, 1996) 21.
\textsuperscript{36} Ibid 24.
\textsuperscript{37} Ibid 38.
\textsuperscript{38} Peter Doyle, \textit{Marketing Management and Strategy} (Hemel Hempstead, 2001) 166.
brand. Hence, as Temple argues, branding as a route to success is an illusion.\textsuperscript{39} Law schools must therefore work hard to associate their product with the idealised futures imagined by prospective customers. Branding is not merely about uncovering the ‘essence’ of an institution; it is also about creating certain associations with the brand in accordance with the dominant ideology of the consumer culture.\textsuperscript{40}

Professional credentialing is an ever-present consideration in law school marketing.\textsuperscript{41} Even if students elect not to practise law, the majority like to qualify for admission ‘just in case’. But advertising a law degree requires much more than the promise of credentialism. It also requires access to professional labour markets — but not any job. Zygmunt Bauman argues that the consumer society has radically altered the perception of work, which has shifted from production to consumption.\textsuperscript{42} Rather than providing security and a stable identity of the kind associated with modernity, work is now expected to produce an aesthetic of pleasure through excitement, adventure or happiness. The line separating work and life is thereby corroded. This aesthetic of pleasure, which is a mark of the contemporary culture of ‘youthism’,\textsuperscript{43} can be discerned as a leitmotif in law school advertising, where law schools increasingly represent themselves as the gateway to a satisfying and fun-filled career. No consumer exercising free choice would choose a boring job ‘devoid of aesthetic value’, as Bauman points out.\textsuperscript{44} Needless to say, repetitive and routine work, which may characterise a great deal of the work undertaken by junior associates in large law firms,\textsuperscript{45} is accorded short shrift in advertising material. Potential students must be tempted and tantalised by the idea that a law school can make their dreams come true.\textsuperscript{46} Branding, therefore, is less about the consumption of a product than about ‘the social relations, experiences and lifestyles such consumption entails’.\textsuperscript{47}

\textsuperscript{40} Holt, above n 31, 80.
\textsuperscript{41} Cf Ariens, above n 26, 329.
\textsuperscript{42} Bauman, above n 28, 34.
\textsuperscript{44} Bauman, above n 28, 34.
\textsuperscript{45} The Chief Justice of NSW, Bathurst CJ, was compelled to resile from a controversial reference to new recruits in corporate law firms as ‘mindless drones’, which he replaced with ‘mechanical drones’. The retention of the word ‘drone’ is nevertheless salutary. See Chris Merritt, ‘Bathurst rethinks “drone” attack’, The Australian (Sydney), 11 May 2012, 33.
\textsuperscript{46} Helen Haywood, Rebecca Jenkins and Mike Molesworth, ‘A Degree will make your Dreams come true: Higher Education as the Management of Consumer Desires’ in Molesworth et al, above n 12, 184.
\textsuperscript{47} Melissa Aronczyk and Devon Powers, ‘“New Branded World” Redux’ in Melissa Aronczyk and Devon Powers (eds), Blowing up the Brand: Critical Perspectives on Promotional Culture (Peter Lang, 2010) 7.
The time spent at law school studying law is frequently glossed over in advertising, being represented merely as a means to an end — a mere blip between the reality of the present, the receipt of a testamur and the realisation of the dream. It is the campus culture rather than the content that receives attention in marketing because it comports with the prevailing aesthetic of pleasure. Inger Askehave likens the rhetoric of advertising in the student prospectus to that of the tourism industry.\(^48\) An example from Southern Cross Law School illustrates the point: ‘Embrace the sun, sand and surf. Study law this summer at Byron Bay or the Gold Coast’.\(^49\) The ‘vibrant campus culture’ was what appealed most of all to two University of Western Australia alumni, according to the Law School website.\(^50\) There is no advertence to the fact that intellectual engagement with new ideas requires effort and commitment, or that law students will have to spend hours reading.\(^51\) Neoliberal rhetoric in conjunction with a consumerist mentality has contributed to an ‘intellectual shift from engagement to passivity’ in higher education generally.\(^52\) Student/consumers expect their ‘service providers’ to ensure that they pass the course with minimum effort. The point was made by numerous academics interviewed for Privatising the Public University.\(^53\)

B Websites

In the marketing of legal education, promotion of the idealised work/lifestyle mix is found in most contemporary media.\(^54\) Universities produce a range of physical materials in the form of glossy brochures highlighting attractive features of the campus or student life. Professional and academic staff, students and alumni engage in various forms of direct marketing through events such as open days, information nights and university fairs at home and abroad.

However, as the impact of the Internet is deep and far-reaching, it requires special consideration. The nub of Marshall McLuhan’s famous aphorism ‘the medium is the message’ is that the use of

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\(^{52}\) Joanna Williams, ‘Constructing Consumption: What Media Representations Reveal about Today’s Students’ in Molesworth et al, above n 12, 172.

\(^{53}\) Thornton, Privatising, above n 4.

any communications medium has an influence far greater than its content.\(^{55}\) One aspect of the Internet’s potency is derived from the fact that it is made up of ‘all or at least most media that have come before it, with writing ubiquitous in the driver’s seat.’\(^{56}\) The webpage holds great potential because the message can be conveyed in a range of formats in the one place. For many students, a visit to the homepage of a university or faculty will be the first campus ‘visit’,\(^{57}\) and the global reach of the Internet may be especially useful in attracting full fee-paying international students. Prospective students can view video clips of student testimonials, take a virtual tour of the campus and the law school, find out about the course and career options, and read online brochures together with the profiles of lecturers and successful graduates. Websites allow users to navigate this content in a way that is relevant and interactive,\(^{58}\) which enhances an individual’s ‘relationship’ to the brand in question.\(^ {59}\)

It takes significant resources to produce a high-quality website which incorporates a range of media and creates a unified and compelling statement, but not all websites are created equal. For instance, some law school websites contain only written text, with a few pictures and the university crest. The information contained on these websites relates mainly to course content and structure rather than an attempt to lure students with powerful imagery and the promise of opportunities. The ‘success’ of online branding depends on a cluster of rational and emotional values that enable the consumer to recognise the ‘promise experience’.\(^{60}\)

Websites may be the ‘virtual face’\(^{61}\) of an institution but the divergence in quality has implications for a law school’s ability to harness effectively the language and imagery of the aesthetic of work. Hence, a lack of resources may limit a school’s ability to sell itself as a pathway to a bright future. However, there is no necessary correlation between the amount expended on marketing and students’ choice of university. An investigation by the *Times*


\(^{56}\) Ibid 38.


\(^{59}\) Simmons, above n 58, 553.

\(^{60}\) Chris Chapleo, Maria Victoria Carrillo Durán and Ana Castillo Díaz, ‘Do UK Universities communicate their Brands effectively through their Websites?’ (2011) 21:1 *Journal of Marketing for Higher Education* 25, 30.

Higher Education of universities in the United Kingdom found that despite the significant increase in expenditure by nearly a quarter, they suffered a 7.4 per cent fall in applications the following year. It is notable that the new universities (post-1992) were among the biggest spenders on advertising, while those belonging to the Russell Group, the most prestigious, were the lowest. As might be expected, Oxbridge attracts students regardless of marketing expenditure, while large sums spent by the new universities will not necessarily prove to be a wise investment. While the international marketing of Australian undergraduate law degrees has been limited because of the largely municipal nature of the law degree, the globalisation of legal markets is inducing a change. The full fee income received from international students is the main reason they are being targeted, despite the curricular and pedagogical challenges posed by diverse student cohorts.

III LEGAL EDUCATION AND THE ‘GOLDEN TICKET’ TO EMPLOYMENT

Perhaps unsurprisingly, law school marketing is strongly correlated with the vocational aspects of legal education. Vocationalism is described by James as ‘the set of statements about legal education produced by law schools and by legal scholars which emphasise the importance of the teaching of legal skills and prioritise employability as an objective of legal education.’ The development of commercially focused law programs, the emphasis on applied skills for the ‘real world’ and the marketing of law schools as a branch of the legal profession are salient features of law school websites as schools strive to build a brand that can tap into the consciousness of prospective students lured by élite careers. The emergence of the global law firm as a key stakeholder in the educational enterprise and the demands of the global new knowledge economy more generally have become key selling points for law schools. Although precise data are not available, a 2010 survey by Graduate Careers Australia revealed that only 43.7 per cent of law graduates started work in


64 Nickolas John James, ‘Why has Vocationalism Propagated so Successfully within Australian Law Schools?’ (2004) 6 University of Notre Dame Australia Law Review 41, 44.
law firms. While some law school websites advert to a wide range of possible careers, the overwhelming focus is directed towards conventional private legal practice.

A The Commercial Focus

A symbiotic relationship between law and business is not new but it has been accentuated with the neoliberal embrace in which the market has become the measure of all things. Understanding the marketability of the commercially oriented law school requires an interrogation of the drivers of law school behaviour, including the pressures that students and the legal services market place on law schools. This encourages law schools to stress their strengths in commercial, corporate and taxation law. The commercial orientation, as well as providing a pathway to practice, demonstrates to the corporate legal labour market the ‘marketability’ of a law school’s graduates.

The elite corporate firms, including the emergent global conglomerates that evince a particular interest in Asia, represent the most desirable destinations for law graduates and there is an attempt to shape the curriculum accordingly. Sydney Law School, for example, offers specialised post-graduate courses in areas such as Law and Investment in Asia or US International Taxation. Other law schools are careful to show that commercial specialisation is one of several core areas on offer. Alumni profiles often showcase individuals who have risen in the ranks of top-tier law firms or have pursued high-flying international corporate careers as a means of emphasising the accessibility of such careers to the graduates of a particular law school.

67 A study of law school websites in the UK found a similar orientation. See Broadbent and Sellman, above n 51, 60.
68 Eg, Deakin Law School: Welcome from the Dean and Head of School, Professor Mirko Bagaric: <http://www.deakin.edu.au/buslaw/about/>.
69 A flurry of amalgamations occurred between super-elite London-based and Australian firms in 2012. They include Allens Linklaters, Ashurst, Norton Rose, Clifford Chance, DLA Piper and King & Wood Mallesons. See, for example, Alex Spence, ‘Asia the prize as City lawyer seals deal’, The Times (London), 29 June 2012, 39.
Employment with an élite law firm is prized by students, both for its high earning potential and the glamorous and youthful lifestyles held out in the firm’s own marketing materials. As a result, student/consumers may place pressure on law schools for more commercial options, to the detriment of critical or social justice approaches. Nevertheless, as a concession to the sense of altruism that many students retain, law school websites may link social justice initiatives with the pro bono programs of commercial firms. Students, conscious of their HECS (now FEE-HELP) debt and wooed by the luxurious offices and prestige of the super-élite global firms, are inclined towards those law schools which position themselves as conveyor belts to these and other large firms. Invariably, these law schools are likely to be the oldest and most prestigious in a State.

B Skills, Experiential Learning and the ‘Real’ World

One of our aims has always been to have graduates known for what we call ‘real world readiness’.

In the new knowledge economy, it is ‘know-how’ rather than ‘know-what’ that is valued. This shift in favour of applied knowledge is clearly discernible in the law curriculum as law schools include more practical skills in the curriculum. In the United States, the global financial crisis has induced a scathing attack on law schools for favouring esoteric scholarship over the training of ‘practice ready’ graduates. The view is that the American law degree, the JD, not only takes too long, it is too expensive and contains insufficient ‘useful knowledge’. As the Australian LLB/JD is a prerequisite for admission to practice and does not entail a separate Bar exam, there

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73 Thornton, Privatising, above n 4, 71.
74 For example, Sydney Law School’s social justice page for undergraduate students outlines a range of initiatives that students can take part in, many of which are accomplished through partnerships with large law firms: Sydney Law School Social Justice Program: <http://sydney.edu.au/law/fstudent/undergrad/social_justice_program.shtml>.
76 OECD (Organization for Economic Co-operation and Development), The Knowledge-Based Economy (OECD, 1996).
is a greater consciousness of the needs of the profession, but the neoliberal turn has accentuated the desirability of practical skills over theoretical and critical knowledge.\(^78\)

Accordingly, a salient theme in law school marketing is the provision of skills through experiential learning and contact with the ‘real’ world. Sally Kift argues that in developing skills for practice, ‘experiential learning is the best (and possibly the only effective) way to prepare students’.\(^79\) Experiential learning is also often understood as the centrepiece of progressive education as it engenders an active rather than a passive approach to learning.\(^80\) However, law schools market experiential learning not so much because it will result in better lawyers but because it accords with the market’s demand for graduates with ‘job ready’ skills — that is, the neoliberal imperative which favours ‘know how’ over ‘know what’:

Experiential learning is a high priority for UniSA Law. We aim to develop not only students’ knowledge in Law, but also their practical skills so that they are job ready when they graduate.\(^81\)

External placements and clinical legal education are the main ways in which experiential learning is undertaken. Clinical legal education is usually accomplished through either a partnership with a local legal centre or, in cases where the law school is perhaps better resourced, through a legal centre run by the law school itself. While law schools attempt to show these clinical experiences as an aspect of their ‘unique’ brand of legal education,\(^82\) experiential and skills-based learning is widespread and its validity is rationalised using a common theme of access to the ‘real’:

Working on real cases with real clients you will be under the expert supervision of our legal practitioners at one of Monash Law School’s two community legal centres.\(^83\)

…a unique opportunity for law students to apply their studies to actual legal practice with real clients.\(^84\)

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\(^{78}\) Thornton, *Privatising*, above n 4, esp 59–84.


\(^{82}\) For example, Newcastle Law School provides its students with a legal clinic called ‘Law On the Beach’ which consists of free legal advice for the public provided by students under the supervision of a lawyer. The unique setting, with its appeal of sun and sand, is intended to appeal to young people who may be otherwise denied access to legal advice: [http://www.newcastle.edu.au/school/law/unlc/law-on-the-beach.html](http://www.newcastle.edu.au/school/law/unlc/law-on-the-beach.html).


\(^{84}\) Newcastle, above n 82.
The relationship between the ‘real world’, practical legal skills and law school ‘uniqueness’ is best encapsulated in the QUT online advertisement entitled Real Graduates.\(^{85}\) This consists of testimonials from three graduates employed by large corporate law firms. Each testimonial begins with the graduates smiling reassuringly into the camera and holding up a sign that reads ‘REAL’. Each graduate goes on to detail their story and extol the virtues of QUT’s unique practical, skills-based focus, which prepared them for the workforce and made them attractive to employers. This is part of QUT’s broader branding strategy, which positions the institution as ‘a university for the real world’ in accordance with its slogan. While QUT is exceptional in its articulation of such a clear message, appeals to the ‘real’ are widespread. Implicit in these appeals is the notion that theoretical and critical knowledge is arcane and irrelevant; it is not real.

Bond University’s video advertisement for its accelerated law program contains images of well-dressed, capable, go-getting young people winning trophies, finishing their degrees in record time and connecting one-on-one with knowledgeable and charismatic teachers, all performed to a rocking upbeat soundtrack.\(^{86}\) At the point of ‘World-Class Facilities’, the video shows law students mooting in a state-of-the-art moot courtroom, complete with its own Leo McKern doppelganger on the bench.\(^{87}\) The idea that this university is geared towards preparing students to get out there into the ‘real world’ is the key message.

The language of the ‘real world’ or situated learning is also known as problem solving or problem-based learning in the legal education literature, for it seeks to create an educational context reflective of the complexity of actual practice.\(^{88}\) As with colloquial speech, the phrase is used glibly on websites reinforcing the idea that the time spent at university is a break from normal life and the process of studying for a degree is less important than the outcome.\(^{89}\) The discourse of the ‘real world’ instantiates the stereotype of the university campus as an ivory tower cut off from ordinary life; its primary use value in the market being the award of a testamur.

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\(^{87}\) In their study of UK law school websites, Broadbent and Sellman note the disproportionate prevalence of images of mooting, although the limited visible potential of law is acknowledged. See Broadbent and Sellman, above n 51, 61–2.

\(^{88}\) Rankin, above n 80, 24.

\(^{89}\) Joanna Williams, ‘Constructing Consumption; ‘What Media Representations reveal about Today’s Students’ in Molesworth et al, above n 12, 175.
C Links with the Profession and Beyond

At a time when law schools were anxious to secure their acceptance as legitimate constituents of the academy, they sometimes regarded close relations with the profession with suspicion, but this has now crystallised into an essential selling point. While the legal profession generally does not play other than a minimal role in the design and delivery of legal education, except for specifying the criteria for admission, intimate relations may now be emphasised by a law school anxious to assure prospective students of its legitimacy as a ‘real’ legal educator, and links between the two are made clear in the law school’s promotional texts. For instance, the ‘well designed curriculum’ means one that is ‘developed in consultation with the legal profession and other key stakeholders’. Further, the professional credentials of law school staff are seen as vital:

The strongest [aspect of Sydney law school] is the links it has to the current legal community outside of uni. So you go into a lecture and you’re tutored by barristers, you’re tutored by practising judges, you’re tutored by practising advocates. And having that link to the legal community is really useful because they draw upon their own experience … they give you that realism.

I’ve gone to seminars here, you know, with professionals from all around Queensland, and I sit down at a table and there’s one of my lecturers … Just the other day my supervisor had said, ‘Go and call this barrister, he’s the best in Commercial Law,’ and I looked at the name and I thought, ‘Hang on, I know him,’ and I Google him and he’s a QUT lecturer …

While academics may be ‘experts’ in regard to a substantive field of knowledge, it is more appealing if they practise law, as it is assumed that they will then be able to transmit the values and knowledge needed for students to move seamlessly into the élite, high-paying careers in the global economy which they desire. Members of the practising profession are characterised as the definitive legal ‘knowers’ and the closer the law school is able to position itself to the kernel of practical legal knowledge, the more persuasive its claims to expertise appear. That a school’s graduates are ‘highly prized by the legal profession’ is a feature that demonstrates the value of the

90 RMIT, for example, emphasises ‘work integrated learning’. See, RMIT Graduate School of Business and Law, Be the leader you want to be <http://www.rmit.edu.au/bus/schools&groups>.
degree. Such statements reveal the endurance of the profession’s ‘magnetic pull’ over legal education.\textsuperscript{95} Like the commercial focus and the emphasis on ‘real world’ skills, links to practising lawyers are believed to be highly marketable. These links effectively vouch for the fact that a law school’s educational product is a bridge to the coveted and prestigious careers to which prospective students aspire.

\section*{D Internationalising the Curriculum, Internationalising the Appeal}

Spurred on by the internationalisation of law and legal markets together with the attendant demands of employers, the impetus to internationalise legal education is ‘gathering momentum’.\textsuperscript{96} Internationalisation entails a range of approaches from augmenting the curriculum to increasing the numbers of international enrolments.\textsuperscript{97} While an increase in enrolment of fee-paying international students is one of the aims of marketing, it does not in itself necessarily internationalise Australian legal education.\textsuperscript{98} As early as 2004 the International Legal Services Advisory Council (ILSAC) drafted a report that called for a greater focus on and co-ordination of internationalisation efforts in Australian law schools in order that graduates and institutions could be competitive on the global stage.\textsuperscript{99} More recently, a thoroughgoing report was commissioned by the Australian Government Office for Learning and Teaching, which was strongly of the view that the law degree should be internationalised, although it did not prescribe how this might be done.\textsuperscript{100} A number of law schools have already embarked on curriculum redesign projects that encourage international perspectives. The University of New

\begin{itemize}
\item \textsuperscript{97} Coper, above n 96, 4.
\item \textsuperscript{98} Lo, above n 63, 36.
\item \textsuperscript{99} International Legal Services Advisory Council, \textit{Internationalisation of the Australian Law Degree} (ILSAC, 2004).
\end{itemize}
South Wales Law School, for example, has redesigned its entire curriculum to reflect the global imperative:

This is one of the strongest characteristics of the new curriculum that it’s going to reflect the new international dimensions that anybody who studies law or who works in law in the future has to be familiar with. So we will have a new compulsory course on global perspectives in law and we will be introducing and expanding more and more international opportunities for our students to go and study law overseas …

While websites stress the academic value of the global content of the law curriculum, this pales in comparison with the allure of international postings: ‘It’s not just a university, it’s a global community. You’ll join a network of Bond graduates now working in Dubai, Kuala Lumpur, London, New York, Paris, Shanghai, Singapore, Toronto…the sky is the limit’. Many law schools offer educational exchanges with overseas universities, and placements and internships with organisations overseas also come across as a means of linking the law degree with excitement and adventure, both personal and professional.

The appeal of overseas travel and the prestige of élite international careers underpin the marketing of international placements and educational exchanges by presenting them as pleasurable activities facilitated by the law school. Exchange programs with overseas universities are a response to the idea that students will be required to connect with ‘trans-national’ legal knowledge. Such programs are sometimes rationalised by drawing on discourses of personal development. To use the words of Sydney University on its ‘The Sydney LLB Advantage’ webpage, an exchange not only internationalises the degree but also ‘challenges [students] academically; facilitates the development of new skills; and enhances their personal growth and self-confidence.’ Beyond such statements, the accent is on exchanges as an ‘exciting’ opportunity to incorporate overseas travel into the degree, and the testimonials of students stress the opportunities for fun, adventure and new experiences:

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102 Bond Law School, above n 86.
All in all, it was a magical experience, and an unforgettable summer. More than rules and regulations, tagliatelle and one-euro pastries, what has stayed with me since Tuscany is how diverse the study of law can be, and what incredible places a law degree can take me.\(^{107}\)

[Studying in Japan] was a lot of fun. I think a whole different experience, a whole eye opening experience…being able to explore a country…you don’t really get to see until you’ve been there and experience it for yourself.\(^{108}\)

International internships and placements often take place in the context of human rights or international governance organisations, such as the Khmer Rouge trials\(^{109}\) or defending the rights of prisoners on death row.\(^{110}\) Furthermore, the notion of ‘where a law degree can take you’ is articulated powerfully in the choice of law alumni profiles that law schools share on their websites and online promotional material. While the alumni profiles of judges, barristers and corporate lawyers are to be expected, strong contingents of alumni profiles are also made over to those operating at the highest levels of international law and governance. The profiles of graduates working for the UN or for international courts are held out as proof of a direct causal relationship between having attended a particular law school and the attainment of a career in international justice:

Terry said he chose to study law at UQ because of its reputation, and since completing his degree he hasn’t looked back: ‘University was great. It was hard work but I wouldn’t be where I am today without UQ’, says Terry. ‘More specifically, I wouldn’t be here [at the United Nations] without the guidance and knowledge I received from the staff at the TC Beirne School of Law.’\(^{111}\)

These international careers accentuate employment as a portal to ‘enriching’ experiences that involve travel and adventure:

I am an associate legal officer in the Rwandan Criminal Tribunal’s Chambers … but having the opportunity to learn first-hand and in detail about the Rwandan genocide is extremely enriching. The opportunity also to work at an international level and in such an amazing country as Tanzania is an obvious highlight in my career path.\(^{112}\)

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During university I worked in the international office of a global firm and also undertook an internship at the United Nations in New York ... I am currently based in Paris, but my clients and colleagues are in The Hague, London and the Middle East.\textsuperscript{113}

Such texts evoke images of globetrotting careers pursued for pleasure and are often accompanied by a photo of the smiling graduate at his or her workplace. In this way, alumni profiles visually and textually embody ideal careers in a way that plays into the desires of students for pleasurable post-law school employment. There is no acknowledgement that these roles, particularly those involving the examination or prosecution of human rights abuses, are premised on the suffering of the world’s most vulnerable people. In order to set up these idealised visions of future employment, the routine and disturbing aspects of international opportunities and perspectives are excised. To be desirable to consumers of legal education, the international career appears as a glittering prize that is attainable by any graduate of that law school and it is one that is devoid of the mundane, the distasteful or the difficult.

IV Critique

As James has illustrated, there is little consistency in the meaning of ‘critique’ in legal education discourse generally.\textsuperscript{114} It is frequently confused with unwarranted criticism, and the favouring of a positivist and doctrinal approach to legal education and adjudication has coincided with ‘know how’ and the favouring of applied knowledge currently in vogue. A passive pedagogy encouraged by the lecture method also discourages interrogation and critique. It encourages students to search for ‘right answers’ rather than accept the law as a canvas comprising many shades of grey which demand interrogation.\textsuperscript{115}

James claims that terms such as ‘critical thinking’, ‘critical reasoning’, ‘critical evaluation’, ‘critical perspectives’ and ‘criticism’, while having potentially different meanings, are often employed in Australian legal education discourse interchangeably and refer to an understanding of ‘critique’ as criteria-based judgment.\textsuperscript{116} The ambit of the concept shifts depending on the broader ideological framework in which it is deployed. In the promotional monologue of legal education a particular vision of ‘critique’ as a practical skill has emerged. The texts of websites equate critical thinking with

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{113} UNSW Law, Law Undergraduate Guide 2013, Philippa Webb (online brochure) <http://www.law.unsw.edu.au/future-students/undergraduate/why-study-law/>.
\item \textsuperscript{114} James, above n 64, 377.
\item \textsuperscript{115} Thornton, Privatising, above n 4, 85.
\item \textsuperscript{116} James, above n 64, 377.
\end{enumerate}
\end{footnotesize}
the ‘skills for life’ and ‘the skills employers really look for in a graduate’. Where critical thinking is not clearly marked as a skill, it is paired with practical skills in order to have value:

[the law] program is distinctive in that it blends critical thinking and enquiry with the development of sound legal practice skills.

Our unique approach to legal education will provide you with a critical and questioning attitude, broad perspectives and the skills and knowledge required for whatever career you may choose.

This casting of critique in the service of employability is a central feature of what James refers to as the ‘vocational critique’ in which critique becomes merely the ability to ‘supplant sloppy or distorted thinking with thinking based on reliable procedures of inquiry.’ But absent from this technical understanding of the definition of critical thinking is any assessment of the broader theories of knowledge that go to the heart of the discipline to consider how law might contribute to the creation of a more just society for all. The idea that critique involves the application of a wider lens that can encompass a socio-political interrogation of law or an understanding of theoretical knowledge receives short shrift when employability is deemed to have far greater use value in the market. Despite the responsiveness of law to the politics of the day, the law school has been tardy about incorporating significant curricular change. Indeed, the core curriculum has evinced little change over a century. The social liberalism of the Whitlam era succeeded in bringing about a degree of modernisation to the curriculum, but the inclusion of critical perspectives on law occupied a prominent place for only a brief moment before there was a resiling induced by the neoliberal turn. Student demand, in conjunction with consumerism, has played a key role in the retreat from the critical and the recasting of law as a purely vocational skill. Within the current marketised environment, as we have suggested, corporate subjects, taught from a largely functional perspective, are regarded as vastly more desirable as they are deemed to have greater relevance to students’ imagined careers than critical perspectives or subjects focusing on critique.

120 University of Wollongong Faculty of Law: Professor Warwick Gullett, Dean, Where a UOW Law Degree can take you <http://www.uow.edu.au/law/uowllb/index.html>.
121 James, above n 64, 385.
As shown by this study of websites, the tendency of law school branding is to slough off critique with its suggestion of abrasive and ponderous scholarship that is unlikely to help realise the dream of a fun-filled career.

Most significantly, critique is a destabilising concept. Feminist, racial, queer and critical legal studies provide frameworks that shine a bright light on the socio-political undersides of identity and power. When deployed in the study of law, critique unmasks the myth of legal objectivity and demands that attention be paid not just to the impact of administrative and judicial decision-making at home but also to the imperialistic designs of multinational corporations elsewhere. This now includes global law firms pursuing the interests of powerful clients with mining and resource interests all over the world, without regard as to whether they are in Mongolia, South Africa or the Middle East. The version of critique contained in the marketing materials of websites constrains its political reach by focusing on the aesthetic of pleasure.

V CONCLUSION

Freedom of choice is regarded as an unmitigated good within a liberal democratic society. The concept has been effectively deployed by neoliberalism and its market embrace so that consumer choice, by metathesis, is accepted as an unproblematic good. The result of virtually unlimited choice is that it blunts the critical capacity of students and induces a conservatism among them. This is because choice favours the easy, pleasant and attractive path rather than one that is complex, challenging and reflexive. Indeed, critique is not a word that features in the marketing repertoire because it induces ‘the sort of dissonance and angst that good marketing works hard to eliminate’.

The essays in Molesworth, Scullin and Nixon’s collection show compellingly how a consumerist culture is eroding the civic role of higher education generally in the UK in favour of hedonism. Building on Privatising the Public University, and examining Australian law school marketing on websites, this essay has suggested that the shift has also been marked in law. Rather than aiming to produce critical thinkers who can contribute constructively to public debate on the pressing issues of our time, law school marketing encourages consumerism as the ultimate telos of the good life.

123 K Robins and F Webster, Times of the Technoculture (Routledge, 1998) 128.
125 Cf Broadbent and Sellman, above n 51, 59.
126 Nixon et al, above n 124, 207.
127 Molesworth et al, above n 12.
128 Thornton, Privatising, above n 4.
Academics have undoubtedly been complicit in the sea change that has occurred in the legal academy as a result of widespread acceptance of the market metanarrative.\textsuperscript{129} Academics, no less than student/customers, are neoliberal subjects shaped by the relentless demands of the market. Not only are they (we) enmeshed in the prevailing consumer culture with all its fictions, but their (our) attention has been effectively deflected by institutional demands to teach ever larger and more diverse cohorts of students while being ever more productive in terms of research ‘outputs’. Cutting corners in teaching by adopting an uncritical, minimalist approach is therefore functional for academics as well as for students.

The market, the branding of law schools and the seductive illusion of choice have effectively combined to consign the scholarly pedagogical project of the legal academy to the margins. As Askehave puts it, we no longer ‘teach courses to students’ but we ‘sell courses to our clients’.\textsuperscript{130} Of course, there are legal academics who are committed to including critical thinking in their teaching and imbuing their students with a sense of the possibilities of realising a more just and responsible society through law. However, the task of committed academics has become progressively harder as good intentions are frustrated by the fantasy world of marketing.

We have sought to draw attention to just how pervasive this fantasy world of law school marketing has become and how difficult it is to resist as marketing has become a key rationality of the corporatised university. Despite the pressures confronting law schools in a competitive environment, however, we should not abandon hope. Critical engagement — involving academics, students and the wider community — is the only way to challenge the new orthodoxy. A mere nanosecond ago, neonate law students wanted to change the world but many have been captivated by the ubiquitous message that consumerism epitomises the good life. There is no point in rueing the passing of free higher education in the belief that its reinstatement might resolve the market malaise, for those days have gone for good. Nevertheless, there are always spaces in the legal academy in which to animate the spirit of justice that many students still secretly long for in contrast to the vacuous dreams spun for them by marketing departments. We need to pay heed to those spaces.

\textsuperscript{129} Roberts, above n 10.
\textsuperscript{130} Askehave, above n 48, 725.
A DANGEROUS CULT: RESPONSE TO ‘THE EFFECT OF THE MARKET ON LEGAL EDUCATION’

PAULA BARON*

Neoliberalism has to be understood and challenged as both an economic theory and a powerful public pedagogy and cultural politics. That is, it has to be named and critically understood before it can be critiqued.

— Giroux1

INTRODUCTION

This paper addresses certain aspects of the relationship between neoliberalism and university law schools. It arose out of a one-day workshop (hereafter ‘the Workshop’) held at the Australian National University in October 2012 to mark the publication of Professor Margaret Thornton’s book, Privatising the Public University: The Case of Law.2 This book examines the ways in which privatisation has impacted on law schools and legal education, particularly analysing the ways in which changes to funding and the growth of neoliberal discourse have changed, on the one hand, students and their approaches to learning; and on the other, academics and their approaches to teaching and research.

As a discussion leader in Session 2, my focus was primarily upon Chapter 2, ‘The Market Comes to Law School’. In this chapter, Professor Thornton highlights trends in university law schools attributable to the ascendency and influence of neoliberalism. The specific effects discussed include the trend towards vocational education at the expense of a liberal legal education, the high level of homogeneity among law schools, the valorisation of competition, the emphasis placed upon marketing and branding (with an attendant redirection of scarce resources), the transformation of law teachers to ‘service providers’ and students to ‘consumers’, and the loss of critical scholarship. The picture Professor Thornton paints is

* Professor, School of Law, La Trobe University.
2 Margaret Thornton, Privatising the Public University: The Case of Law (Routledge, 2012).
bleak. Having said that, I do not disagree with the observations and criticisms she makes. Indeed, there is little sign in Australian law schools of relief from the trends identified as the relentless quest for ‘growth’, ‘productivity’ and ‘efficiency’ continues. Neoliberalism is now so normalised that it has become the standard (and accordingly, invisible) university discourse. My task as discussion leader at the Workshop was to provide ‘a short 10 minute burst’ in response to Chapter 2 to ‘crystallise the issues’, give my perspective, and ‘begin to formulate answers’.\(^3\) Given the significant and complex issues raised by Professor Thornton, this was no easy task. There is some luxury, therefore, in the opportunity to expand in writing on the ideas I discussed briefly in the panel session.

My purpose in writing this response is modest: I wish to contribute to the discussion by expanding on some of the ideas in this chapter and to provide some additional insights that might help to better understand the effects of neoliberalism on law schools. In particular, I wish to further explore three themes: neoliberalism and individual well-being; the trend to standardisation; and the nature of university discourse. These themes are distinct, but their effects tend to overlap. The key points I wish to make through exploration of these themes are: firstly, that there are intriguing linkages between neoliberal values and individual distress that warrant further research into whether there is any causal relationship between neoliberalism and distress; secondly, that there is an inherent paradox within neoliberalism between the rhetoric of choice and the trend to standardisation, and that this paradox is evident in the tertiary sector; and thirdly, that theoretical insight lends support to the notion that the university is not the natural home of independence and critique. Rather, its inherent tendency is to veil and reinforce the dominant power ideology of the wider society.

Before proceeding, it is important to clarify the use of the term ‘neoliberalism’. Neoliberalism has been referred to as the ‘defining political economic paradigm of our time’.\(^4\) It is said to be ubiquitous and its influence wide-ranging\(^5\) in its project to bring all human action within the domain of the market.\(^6\) However, despite neoliberalism’s apparent prevalence, research suggests that the term ‘neoliberalism’ is: employed asymmetrically across ideological divides (rarely used by proponents of marketisation because it has ‘come to signify a radical form of market fundamentalism with

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3 Personal invitation from the Dean of the Law School, Professor Michael Coper.
5 Nick Grant, ‘Foreword’ in Dave Hill and Ravi Kumar, eds, Global Neoliberalism and Education and its Consequences (Taylor and Francis, 2009) vii, x.
6 David Harvey, A Brief History of Neoliberalism (OUP, 2005) 3.
which no one wants to be associated’);\(^7\) frequently left undefined in research; and often used in different ways.\(^8\) For the purposes of this article, I rely upon Harvey’s definition of neoliberalism:

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\text{[It is] in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.}\(^9\)
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Despite their findings that neoliberalism is often undefined and contested, Boas and Gans-Morse suggest it may be used meaningfully, \textit{inter alia}, to ‘explain how modern capitalism is fundamentally different from previous models of political economy’.\(^10\) They identify these features as: ‘the waning or disappearance of alternatives to the free market’; the integration of production chains across national borders; the emergence of knowledge-based forms of property that challenge the enforcement of traditional property rights; and the development of large service sectors in the developed world.\(^11\)

It may be suggested that a further characteristic of modern capitalism is the rather complex role of the state. Although liberal ideologies tend to require the withdrawal of the state in a variety of areas,\(^12\) neoliberalism demands a strong state to further its interests in certain fields of endeavour.\(^13\) This is particularly so in education and training, where, despite neoliberal reforms intended to restructure and privatise the state sector, national education systems primarily remain part of the public sector, subject to both state ownership and control.\(^14\) The objective of education and training in neoliberalism is to meet the demand for ‘an ideologically compliant but technically and hierarchically skilled workforce’.\(^15\) In response to this demand, higher education has thus been, and is being, subjected to the pressures of neoliberal practices, structures and policies that

\(^7\) Taylor C Boas and Jordan Gans-Morse, ‘Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan’ (2009) \textit{44 Studies in Comparative International Development} 137. The authors go on at 140 to point out that neoliberalism ‘is not exclusively a bad word, but one rarely sees it used as a good word’.

\(^8\) Boas and Gans-Morse, above n 7, 138–9.

\(^9\) Harvey, above n 6, 2.

\(^10\) Boas and Gans-Morse, above n 7, 139.


\(^12\) ‘Deregulation, privatization and withdrawal of the state from many areas of social provision have been only too common’: Harvey, above n 6, 3. ‘Neoliberalism values individual freedom from the state’: Patricia Ventura, \textit{Neoliberal Culture: Living with American Neoliberalism} (Ashgate, 2012) 10.

\(^13\) Ravi Kumar and David Hill, ‘Introduction: Neoliberal Capitalism and Education’ in Hill and Kumar, above n 5, 3.


\(^15\) Kumar and Hill, above n 13, 3.
are reshaping both institutions and individuals. These pressures reflect two assumptions: that universities should compete to sell their services to student customers in the educational market; and that they should produce ‘specialized, highly trained workers with high-tech knowledge that will enable the nation and its elite workers to compete “freely” on a global economic stage’. As Professor Thornton observes, law schools have been particularly susceptible to these pressures as lawyers are the ‘paradigmatic new knowledge workers’. Law schools have thus become key sites of what has become known as ‘knowledge capitalism’ — a concept that entails a fundamental rethinking of the previously existing relationships among education, learning and work.

I turn now to discuss the three themes outlined above: neoliberalism and individual well-being; standardization; and the nature of university discourse.

II NEOLIBERALISM AND INDIVIDUAL WELL-BEING

The deleterious impact of legal education upon student well-being is now beyond doubt. The phenomenon has been observed for over 30 years in US law schools. When compared with other student cohorts (including medical students), law students are more likely to suffer from stress and anxiety, which may result in mental

17 Ibid, 4–5.
18 Thornton, above n 2, 27.
19 Ibid.
20 See further Olssen and Peters, above n 14, 331.
disorders. Moreover, they suffer more than other graduate students, such as those studying psychology and chemistry.\textsuperscript{22} Further studies have suggested that this distress does not decrease significantly as the law degree progresses or even in the first few years of legal practice. Transitioning to work in a law firm may increase the rate of the downward trajectory, particularly for students who are not adequately equipped in terms of skills and resilience to cope with legal practice,\textsuperscript{23} and many young graduates will, as a result, leave practice after only a few years.\textsuperscript{24}

Indeed, distress persists well into legal practice, suggesting that ‘unhappy, stressed-out, depressed law students often become unhappy, stressed-out lawyers’.\textsuperscript{25} Lawyers, as a profession in the United States, suffer a much higher level of unhappiness in their careers than members of the clergy, travel agents, architects, scientists, engineers, airline pilots, physicians, financial planners, and detectives. They are unhappier than repairpersons and housekeepers but slightly happier than roofers and gas station attendants.\textsuperscript{26} A nationwide poll of lawyers in the United States found that less than a third of those surveyed were ‘very satisfied’ with their careers.\textsuperscript{27} A survey conducted in 1990 showed that, of 104 professions, lawyers were the most likely to suffer from depression.\textsuperscript{28} Indeed, the incidence of depression in lawyers was found to be 3.6 times higher than non-lawyers who shared the same socio-demographic traits; and the incidence of depression was almost four times higher than the profession in the number two spot.\textsuperscript{29}

Such rates of distress have serious consequences, including a high incidence of alcohol and chemical abuse among lawyers. The American Bar Association (ABA) estimates that around 15 per cent of lawyers abuse alcohol and drugs, compared with around 10 per cent of individuals more than 16 years of age in the general population.\textsuperscript{30} Reports also suggest that one in five lawyers has a

\textsuperscript{22} Jennifer Jolly-Ryan, ‘Promoting Mental Health in Law School: What Law Schools can do for Law Students to Help them Become Happy, Mentally Healthy Lawyers’ (2009) 48 University of Louisville Law Review 95, 97.
\textsuperscript{24} Ibid, 351.
\textsuperscript{25} Jolly-Ryan, above n 22, 100.
\textsuperscript{27} Jolly-Ryan, above n 22, 100.
\textsuperscript{29} Ibid.
problem with substance abuse.\textsuperscript{31} Suicide ranks among the leading causes of premature death among lawyers. A 1992 annual report of the National Institute of Occupational Safety and Health reported that male lawyers were twice as likely as the general population to commit suicide.\textsuperscript{32}

Although there was originally some question as to whether the US phenomenon of law student and lawyer distress was also present in Australia,\textsuperscript{33} studies have shown that law student and lawyer distress is not confined to the United States. This is despite differences in pedagogy, demographics of law students and culture.\textsuperscript{34}

The 2009 report \textit{Courting the Blues}\textsuperscript{35} (hereafter the BMRI Report) found that, of the 738 law students surveyed, some 40 per cent reported distress severe enough to warrant clinical or medical assessment, compared with 13 per cent of the general population. The results for law students and lawyers indicated ‘a much higher level than expected of reported psychological distress and risk of depression on all measures used’.\textsuperscript{36} Although some caution has been raised in regard to the BMRI methodology,\textsuperscript{37} the phenomenon of high levels of law student anxiety and depression has been confirmed in Australia by studies undertaken at individual law schools, including UNSW, ANU and Melbourne. At UNSW, a study undertaken in 2005 which investigated students’ attitudes to their experience and expectations of their university education across the university found unexpected differences between law students and other students.\textsuperscript{38} Law students reported different reasons for their choice of course, seemed disproportionately concerned about their grades, less interested in teamwork, and had different ideas about employers’ preferences for graduates when compared with students from other disciplines.\textsuperscript{39} More recently at Melbourne, Larcombe et al analysed

\textsuperscript{31} Ibid.
\textsuperscript{32} Hourigan, above n 28, 17.
\textsuperscript{36} Ibid, 37.
\textsuperscript{38} Massimilano Tani and Prue Vines, ‘Law Students’ Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?’ (2009) 19(1) \textit{Legal Education Review} 3.
\textsuperscript{39} Ibid.
students from both the LLB and JD programs and found that while JD students expressed a significantly higher level of satisfaction with studying law and their course experience, there were no statistically significant differences in the levels of depression, anxiety and stress reported by each cohort. At ANU, Townes O’Brien et al. pursued the US finding that significant and detrimental changes to student well-being occur from the first year of legal studies, and found that such changes were accompanied by changes in thinking styles; particularly, increased rational thinking and lower experiential thinking. Indeed, much Australian research has focused particularly on the first year of legal education as a site for intervention into the problem of student distress.

The BRMI report also found high levels of psychological distress, alcoholism and drug abuse among the practising legal profession itself. According to the BMRI report, almost one in three solicitors (31 per cent), and one in six barristers (16.7 per cent), experienced high to very high levels of psychological distress. Again, such findings are consistent with other Australian literature reporting high levels of distress, including the Beaton Consulting and beyondblue Annual Professions Survey of April 2007, which found that lawyers are two and a half times more likely to suffer from clinical depression than other professionals; the later (2011) report, which showed that of the professions, lawyers were the most likely to have experienced symptoms of depression and anxiety; work by James; and work by

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41 Townes O’Brien et al, above n 34.


43 Kelk et al, above, n 35, 12.


Britton, who notes the findings that lawyers are more likely to turn to non-prescription drugs and alcohol to manage their depressive symptoms than their professional peers, and that about one in three ‘self-medicate’ in this way. Britton also estimates that lawyer emotional distress is estimated to feature in around 30 per cent of professional disciplinary matters.

Like the US studies, the BMRI Report was unable to identify the precise causes of psychological distress amongst law students and the profession. In particular, it has remained unclear whether it is the law school itself that generates distress or whether other factors are responsible. However, in relation to Professor Thornton’s observations, two points are significant here and offer scope for further research. Firstly, the initial identification of law student distress appears to have taken place in the United States in the mid-to-late 1980s — significant when one considers Harvey’s observation of the ‘emphatic’ turn towards neoliberalism that started in the late 1970s.

Secondly, Professor Thornton identifies a number of features that characterise the neoliberal learning experience: the ‘minimalist’ and stressful learning experience (caused by the fact that students must balance, for financial and career reasons, full time work with study); the valorisation of competition among students from their first day at law school; the loss of interest in knowledge for its own sake; the narrowness of student aspirations; and the growing consumerist ethos. All these correspond very closely with aspects of the study of law identified in the well-being literature as contributing to student distress.

Is it possible that there is a causal link between the growth of neoliberalism and the rise of distress? This would provide an explanation for the remarkable persistence of distress across time, jurisdictions and different law schools. The idea is speculative but provocative, and a fertile ground for further research.

I wish to add two particular insights into the relationship between neoliberalism and law student (and lawyer) distress. The first relates to a phenomenon that Professor Thornton alludes to when she observes


48 Kelk et al, above n 35, 41.

49 Harvey, above n 6, 2.

that ‘[a] key message of neo-liberalism is that all individuals must take personal responsibility for their lives’.  

Here the insight is that the structural effects of neo-liberalism are masked as matters of personal inadequacy, and remedies for such inadequacy are considered to be matters of individual responsibility. This phenomenon has been observed in related contexts: for instance, a recent study found that a failure to achieve a straightforward transition from school to tertiary education to employment is perceived by young people to be the result of personal inadequacy, rather than structural disadvantage and inequality.

The focus upon inadequacy, rather than deviation, is a hallmark of late modernism and neoliberalism. Neo-liberalist discourse is that of unlimited potential. This discourse is readily apparent in the marketing of many schools and universities (indeed, my own institution, La Trobe University, used the phrase ‘infinite possibilities’ in its marketing material; and a school in Ivanhoe, Melbourne, proclaims ‘all things are possible for you’ on its roadside message board). Neoliberalism is also a discourse of unlimited freedom: freedom to choose, freedom to be whom or what one wishes and freedom of action. As Ventura points out, though, this individual freedom is a means of control and ‘people are governed through their freedom — encouraged, educated and hounded into using their autonomy in ways that bind them to the market’.

Within this discourse of infinite potential and unlimited individual freedom, failure to realise one’s full potential, to achieve professional and personal excellence, is a matter of personal inadequacy, not attributable to those social and structural forces that create systemic disadvantage and inequalities. The focus upon personal inadequacy has been described as a ‘by-product of freedom, a cost that those who are ostensibly the laziest or least intelligent must bear’.

This focus is particularly stressful in the profession of law, which

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51 Thornton, above n 2, 28.
54 This notion of unlimited potential is very pervasive. For a particularly interesting examination of this ideology in the context of theories of brain plasticity, see Victoria Pitts-Taylor, ‘The Plastic Brain: Neoliberalism and the Neuronal Self’ (2010) 14(6) Health 635, 639: ‘Plasticity is deployed to encourage us to see ourselves as neuronal subjects, and is linked to the continued enhancement of learning, intelligence, and mental performance, and to the avoidance of various risks associated with the brain, including mental underperformance, memory loss, and aging. While endorsing a view of the body/self which resists biological determinism, I find that the popular discourse on plasticity firmly situates the subject in a normative, neoliberal ethic of personal self-care and responsibility linked to modifying the body.’
55 Patricia Ventura, above n 12, 3.
56 Ibid, 37.
places considerable store upon proficiency and is strongly driven by hierarchy and status.

Linked to this phenomenon, though not discussed in Professor Thornton’s chapter, is the neoliberal intolerance for failure, both institutional and personal. In relation to the institutional, it has been said that ‘all contemporary organisations, including universities, are risk organisations. This is because all organisations must, of necessity, focus on guarding themselves against the risk of failure’.57

As public institutions, universities are particularly concerned about risk, as ‘any notion of the public … [has become] synonymous with disrepair, danger and risk’.58

This fear of failure can be seen in the way universities increasingly focus upon retention and success (pass rates) as indicators of excellence. As Professor Thornton observes, the burden of learning is placed upon the ‘learners’, the marker of successful learning is employability, and there is a growth of a consumerist ethos whereby students seek to be ‘satisfied with pre-packaged knowledge products’59 that ward off the risk of failure. At the same time, there is greater emphasis on ‘developing pedagogically informed strategies that support student learning more fully’.60 Elaborate teaching and learning strategies and interventions have been developed for ‘at risk’ students; class failure rates are questioned and, in general, condemned. Institutional failure is thus warded off, attributed to the inadequacy of the individual student and/or the individual teacher. Either way, failure is something to be (heroically) overcome.

This problem assumes increased significance in the contemporary Australian tertiary education environment where the relentless pursuit of new markets under neoliberalism is leading to a widening of participation in, and access to, higher education.61 Although the access agenda has widespread support, students gaining access to universities often come from backgrounds marked by structural disadvantage, socially and economically, and the effects of this disadvantage often mean that they are not well-prepared for university studies. Yet, the neoliberal rhetoric is that, despite these disadvantages, ‘all things are possible for them’. Student failures

57 E McWilliams and P Taylor, ‘Danger and Grieving in the University’ (Paper presented at the Annual Conference of the Australian Association of Research into Education (AARE), Brisbane, December 2002).
59 Canaan and Shumar, above n 16, 8.
60 Ibid, 8.
are again, personal, either to them or to their lecturers, who are increasingly held accountable for student performance.62

This point about the accountability of lecturers raises a further issue about the well-being of law academics. Despite the fact that there has been much attention paid to the distress of law students and practising lawyers, there has been relatively little attention paid to the well-being of law academics.63 Yet law academics are as affected (arguably, more affected) by the pressures of neoliberalism as their students, particularly in the emphasis upon personal success. Increasingly elaborate performance management schemes (with attendant surveillance and auditing processes) are intended to ensure individual professional success — and, as noted above, individuals are increasingly responsible not only for their own success, but for student success as well. In addition, the academic work profile has expanded and intensified: academics are expected not only to achieve research and teaching excellence but to produce measurable outputs, be responsive to student and societal needs,64 and to display ‘entrepreneurialism’,65 — another characteristic expectation of neoliberalism.66 The pressure upon academics to ‘perform’ is thus intense, but as is the case with students, achievement is presented as personal, unaffected by the structural, such as the ‘isolation, neglect and underfunding of law schools’,67 poor staff/student ratios and often unrealistic university ‘growth’ targets. At the same time, neoliberalism tends to stifle dissent. As Professor Thornton points out: ‘Marginalisation, reprimands, disciplinary proceedings or even dismissal is the likely fate of any academic who is critical of his or her institution’s captivation by market magic, regardless of the academic expertise they might possess’.68 Or, to put it, more bluntly, ‘anyone who does not believe that rapacious capitalism is the only road to freedom and the good life is dismissed as a crank’.69

Perhaps unsurprisingly, this intensity of the academic project, coupled with an ethos that focuses upon the individual, rather than the structural, poses a significant challenge to quality.70 At the same time, neoliberalism is not coherent and ‘it becomes tangled in its

62 Canaan and Shumar, above n 16, 17.
63 See further, Paula Baron, ‘Thriving in the Legal Academy’ (2007) 17(1) Legal Education Review 27.
65 Thornton, above, n 2, 31.
66 See further RW Connell, Masculinities (University of California Press, 2nd ed, 2005) 255 who describes the expectations of entrepreneurialism in neoliberalism as ‘thrusting competitiveness, ruthlessness, focus on the bottom line’.
67 Thornton, above, n 2, 29.
68 Thornton, above, n 2, 33.
69 Giroux, above n 58, 428.
own contradictions’. A good example of this is the way in which the focus upon performance and the demand for success has a tendency to cause academics, particularly early-career academics, to become increasingly risk-averse, most notably in regard to teaching and learning innovations. This has been attributed to a loss of control and ownership over teaching through such elements of the work environment as guidelines and processes for the production of teaching materials, and university-level decisions to support particular learning platforms or courseware tools. It has also been attributed to the audit culture: trialing a teaching and learning innovation may attract negative feedback on student evaluations, so better to ‘play safe’ than to risk failure.

To summarise, there are interesting potential linkages between neoliberalism and a deleterious impact on individual well-being that warrant further investigation. As the values and practices of neoliberalism appear to be co-incident with values and practices that appear to generate distress in law students and lawyers, there is scope for empirical research to test the proposition that neoliberalism itself may be implicated in the heightened distress experienced by individuals. And, although distress in law students and lawyers has become a focus of much research, relatively little research has been carried out on the well-being of law academics, another area where further research is warranted. I turn now to consider the second of the three themes addressed in this paper: the growth of standardisation.

### III STANDARDISATION: THE BREAKFAST CEREAL PHENOMENON

Professor Thornton identifies the paradox between the rhetoric of student choice in the legal education market place and the spread of homogeneity among law schools. She attributes this phenomenon to the influence of admitting authorities on the curriculum; and also points to the force of student consumerism and the fact that students carry such significant tertiary education debt that they aspire to large law firms in order to pay off the debt more quickly:

The predominant concern of students is their desire to progress through their course as quickly as possible to start earning money. This has encouraged a reversion to, or at least a hardening of the attitude that the law school experience is primarily a site of training and credentialism rather than humanistic education.

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71 Kumar and Hill, above n 13, 1.
73 Ibid.
74 Thornton, above n 2, 64.
These factors drive the increasingly common view that learning is essentially utilitarian. Interest in knowledge for its own sake has largely been lost. Students thus tend to favour subjects that are perceived to be vocationally advantageous, such as commercial law subjects, rather than subjects that focus on issues of access to justice or which take a critical legal studies approach. In turn, law schools have become more homogeneous in their offerings as they seek to cater to student (and employer) demand. Professor Thornton also refers to the suppression of dissent in this context and expresses concern about its impact, arguing that ‘[c]orporate vassalage insidiously contributes to the subordination of the academy to the legal profession’.  

It is sobering to read the web pages of different universities and their law schools to see the same messages (often even identical wording) appearing repeatedly. We all, it seems, aspire to excellence and the preparation of our students for glittering global legal careers. But this creeping sameness is not confined to marketing rhetoric. It is reaching slowly but steadily into teaching methodologies and research: Professor Thornton points to standardisation across groups, for instance, ‘when the same materials, Powerpoint presentations and forms of assessment are used by each group’.  

The bureaucratisation of teaching and learning is becoming all-pervasive. As noted above, centralised teaching and learning processes and university decisions as to platforms and courseware can stifle innovation. They also drive homogenisation of teaching and learning, being designed to deliver those in-demand ‘pre-packaged knowledge products’. They reflect the neoliberal view that teaching is transmission of content and that universities have ‘no social or political responsibilities beyond providing an education that is de facto vocational training’. Their impact is not to promote critical enquiry but to demand certainty: no approved university subject learning guide will state that, at the conclusion of the course, ‘students will have more questions than answers, doubt their previously-held convictions and reject the dominant paradigm’. This problem is increasingly exacerbated by the proliferation of teaching and learning standards which are designed to meet the marketplace demand for ‘sameness’ that demonstrates their workers have the same skills and aptitudes.

75 Ibid, 48.  
76 Ibid, 89.  
77 Lynch, above n 72.  
78 Canaan and Shumar, above n 16, 8.  
The loss of critical enquiry is seen by Professor Thornton as very significant, and it is discussed at some length in Chapter 3, ‘Jettisoning the Critical’, where she argues that the idea of a liberal legal education has largely been lost. It is something of an irony that much is made of ‘critical thinking’ as a skill to be developed by students given, as Professor Thornton points out, ‘[skills are generally associated with increased productivity’.

However, Giroux observes that ‘[a]s universities … emphasize market-based skills, students are learning neither how to think critically nor how to connect their private troubles with larger public issues’. At the same time, Giroux notes that public pedagogy has declined, so that:

 Instead of public spheres that promote dialogue, debate, and arguments with supportive evidence, American society offers young people a conservatizing, consumer-driven culture through entertainment spheres that infantilize almost everything they touch, while legitimating opinions that utterly disregard evidence, reason, truth and civility.

This influence, of course, is not confined to America, but has extended to Australia through a variety of media.

In relation to research, the plague of sameness can be seen in the effects of the ERA (Excellence for Research in Australia) and similar research audit exercises in other countries. The audit culture has required academics ‘to reduce their work to a standardized language of “outputs”’.

81 Thornton, above n 2, 82 (quoting Urciuoli).
83 Ibid.
84 Periodic research assessment processes are common in a number of countries. In Australia, ERA assesses research quality in Australian higher education according to the Australian Bureau of Statistics Field of Research classification scheme. ERA replaced the earlier RQF (Research Quality Framework). ERA is administered by the Australian Research Council (ARC) and its goal is to identify and promote research excellence. ERA evaluates the quality of the research undertaken in Australian universities against national and international benchmarks. The ratings are determined and moderated by expert committees. The indicators used in ERA include a range of metrics such as citation profiles and peer review of a sample of research outputs. To date, this assessment exercise has not been linked to funding. In the UK, the Research Excellence Framework replaces the earlier Research Assessment Exercise, which assessed the quality of research undertaken by British higher education institutions. The aims of the RAE are to use the assessment outcomes to inform the selective allocation of research funding to higher education institutions; to provide accountability for public investment in research and produce evidence of the benefits of this investment; and to provide benchmarking information and establish reputational yardsticks. In New Zealand, the Performance Based Research Fund (PBRF) assesses the research performance of tertiary education organisations, funding them on the basis of their performance.
The transformation of knowledge into a standardized form allows it to be traded in a competitive market, whether that is the academic market or the global economy. Knowledge that cannot be standardized in this manner has no use value in a system driven by performativity and commercial imperatives and is rendered irrelevant for funding purposes. Standardization allows cleaner, clearer distinctions to be drawn — and defended — between those who are performing and those who are not … knowledge is, in some respects, incidental to the purpose.  

The focus upon measurable outputs means that research becomes ‘little more than a series of products’ and the emphasis is upon quantity, though the rhetoric emphasises quality. Quality is, of course, difficult to measure, so proxies, such as journal rankings or metrics are often used. In law, one of the ongoing legacies of the journal rankings in 2010, now abandoned, has been the pressure upon academics to publish in the same (limited) range of A and A* journals. Of course, these journals have their own expectations of scholarship, which tend to drive a certain sameness in scholarship. Research auditing has thus reinforced neoliberal principles so that ‘research is a competitive, self-interested, instrumental, outputs-oriented process’. 

In summary, one of the inherent contradictions in regard to neoliberalism and legal education is that, despite the rhetoric of student choice and the managerialist injunction to focus on ‘distinctiveness’, the trend has been towards a remarkable similarity across Australian law schools that means there is, in reality, relatively little real ‘choice’, in the sense of differentiated law schools. I turn now to the last of the three themes: the nature of neoliberal discourse.

IV THE NATURE OF NEOLIBERAL DISCOURSE

Reading ‘The Market Comes to Law School’ I was reminded of an article by Jeanne Schroeder, ‘The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship’. This article applied Lacan’s theory of the four discourses (that of the master, the university, the analyst and the hysteric) to the practice of law. For Lacan, a discourse is ‘a social link, founded on language’, and though we might move from discourse to discourse, each discourse ‘has its own constraints, conditions and consequences’ and each logically requires that each of the others will eventually be developed. 

86 Ibid, 358.
87 Ibid, 358.
88 Ibid, 362.
90 Ibid, 21.
91 Ibid, 22.
Without wishing to delve too deeply into some fairly difficult theoretical concepts developed by Schroeder, I suggest that her analysis provides some interesting insights into the effects of neo-liberalism. First, Schroeder observes that the discourse of the university (knowledge) always tends to reinforce the discourse of the master (power):

Lacan came close to suggesting that there was an historical relationship between the discourse of the master and that of the university, the latter being a ‘sort of legitimation or rationalization of the master’s will’. In other words, the discourse of the university can serve as a sophisticated way of making the master's claims to brute power more palatable through veiling.  

This provides an interesting insight into the relationship between the university and the dominant power relations: that is, rather than expecting universities to provide an independent, critical voice against neoliberalism, the Lacanian analysis would suggest we should expect the university to seek to legitimise and rationalise the exercise of power in the name of the market. Hence, so many of the characteristics Professor Thornton identifies: the need to suppress dissent, the emphasis upon vocationalism, the passion for entrepreneurialism. This insight has further implications. With specific reference to law, Schroeder argues that radical critique cannot arise from university discourse, which envisages a law that is whole and perfect, but from the analytic and hysterical discourses that perceive law (and the wider symbolic order) to be flawed.

Secondly, claims Schroeder, the discourse of the university is radically masculine, while the discourse of critical scholarship is radically feminine. These terms are used in a specific psychoanalytic sense that I need not go into here, but one of the effects of this gendering is that the university discourse is by nature extremely obsessive. Schroeder writes: ‘When the obsessive masculine subject confronts holes and slippages in the symbolic, he does not attempt the feminine response of recognizing what he sees. Rather, he obsessively tries to cover over the holes and explain the slippages’.  

In the context of universities, this leads to ‘feverish activity’, the endless plans, policies, standards and audits to ensure that there are no gaps, that there is already an answer and that the ‘word will always name the thing’. The university fetish for marketing and branding is a wonderful example of the ‘feverish activity’ aimed at concealing lack. While Professor Thornton adopts the critical stance in her book to suggest the emperor of neo-liberalism has no clothes,
huge amounts of activity and resources in universities are directed to covering up this lack, the utter emptiness at the heart of neo-liberal discourse in higher education.

Schroeder identifies the master’s discourse as command, the university’s discourse as lecture, the analyst’s discourse as interrogation, and the hysteric’s discourse as critique and accusation. Professor Thornton, and those of us involved in critical scholarship, would thus be categorised under this schema as engaging in hysterical discourse. Far from being a derogatory label, the discourse of critique is also the discourse of possibility, because the hysterical discourse makes no claim to perfection. It is the discourse of resistance which, in the context of law schools, gives rise to excellent clinical legal education programs based in community legal centres and individual subjects that challenge market dominance by explicitly addressing issues of disadvantage and access to justice; and which impels academics and law students to become involved in law reform and volunteer work. It is also a discourse that accepts that, at the same time that we question, we must also acknowledge, at least partially, that we share moral responsibility for the problems we see. This acknowledgement can be ‘deeply depressing’.

This is where questions arise for all of us in terms of our own conduct and a way forward. If legal education is to become more than an endless barrage of words, a meaningless marketing exercise and a vocational training ground, we must begin by accepting that no form of legal education will ever be complete and whole. There is no perfection; there will always be gaps, questions, uncertainty, failure and lack. There was no golden age of university education, nor will there be. We would also need to unmask, as Professor Thornton does so effectively, the notion that the university is not (as we might hope) the shrine of independence and the home of impartial and objective knowledge. Rather, its inherent tendency is to veil and reinforce dominant power relations. It can never be truly critical of the status quo because its function is to uphold the status quo. Making such acknowledgements may provide a way to counter and subvert the cult of neoliberalism and the tendencies identified in Privatising the Public University: The Case of Law.

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97 Ibid, 72.
98 Ibid, 76.
99 Ibid, 79.
100 Ibid, 79.
AUDIT CULTURE: WHY LAW JOURNALS ARE RANKED AND WHAT IMPACT THIS HAS ON THE DISCIPLINE OF LAW TODAY

Kathy Bowrey*

I INTRODUCTION

This article explores the shifts in research governance practices in Australian law schools that led to the production of ranking lists for law publications and reflects on the way these ranking lists were used from 2006 to 2012. As will become clear, this is a story of law gradually losing autonomy over design of the methodologies for research assessment, while seeming to continually and steadfastly oppose that movement. The example of journal ranking in law demonstrates how neo-liberal governance produces a myriad of sites of resistance, but how despite this, academic trust, goodwill and collegiality is readily co-opted into achieving management goals. In telling this story, I draw upon personal involvement in research policy work conducted by and for the Council of Australian Law Deans (CALD). I also examine public and private exchanges between legal academics and government personnel who oversaw implementation of research assessment policy, to explore the way academics continually sought to resist government interventions that would displace substantive scholarly assessments of legal research based on peer review. I explain why and how collaboration with journal ranking initiatives was nonetheless pursued, and reflect on some of the consequences of those decisions for legal academics today.

Part II begins with a brief overview of neo-liberalism and the audit culture in the higher education sector. Part III then documents the development of an audit culture in the discipline of law. I focus on the sector’s demand that the discipline rank law journals in particular. Part IV presents a more personal reflection on the socio-cultural implications of what has passed, speculating on what

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the longer term impact of the deployment of research assessment technologies in law may be.

The deployment of metrics to assess research quality in law is a subject about which many academics have strong feelings. Many academics are uncomfortable discussing their particular involvement in these processes, but this silence only further mystifies the governance practices. From experience, I think it is necessary to state at the outset that I am not arguing that legal researchers comprise a special group for whom there are no valid concerns about research quality. Nor is it my claim that there are no benefits to be had from highlighting questions such as, ‘what does quality research look like?’. But, as Shore and Wright noted in relation to British audit culture of the 1990s,

> The key question is not simply ‘who is being made accountable to whom?’ but rather, ‘what are the socio-cultural and political implications of the technologies that are being used to hold people to account?’

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There is not a good understanding of how auditing came into the discipline of law and this knowledge is essential to any evaluation of the implications of the management technologies being used today. In my view both participation in, and withdrawal from, engagement with governance technologies generate significant conflicts and strain collegiality. Accordingly, there is a significant problem in identifying how this form of governance can be effectively resisted with collegial and traditional academic values remaining intact.

## II Neo-Liberalism, Audit Culture and the Academy

Neo-liberalism involves scientific business management based upon adoption of morally neutral criteria that inculcates a competitive, individualistic market mentality.2 Audit culture is commonly referred to as a distinctive feature of neo-liberal governance. It is based upon the production of relevant metrics through which unit and individual performance is continually assessed and reported back to upper and middle management. Auditing leads to ongoing refinement of governance strategies, which may include financial rewards for high achievers and disciplinary consequences for poor performers.

In relation to higher education policy, neo-liberalism is commonly discussed in terms of the emergence of an audit culture and the

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associated rise of managerialism within the academy. Margaret Thornton, for example, notes,

Managerialism is the transformative linchpin of the university that enables new knowledge to be mediated and harnessed by the state. Reflecting this crucial role, senior line managers (formerly ‘administrators’) have rapidly become the élite within universities, replacing professors. The task of line managers is to appraise academics regularly and ensure that they are ‘productive’, a process that needs to be demonstrated in performative terms.³

Governance practices that instil a neo-liberal market mentality erode traditional, scholarly values and power distributions. As managers become the new elite within universities, the authority and independence of members of the professoriate and other senior staff who were previously ‘involved’ in disciplinary based decision-making recedes, their voices becoming correspondingly muted and less influential. Discipline and sub-discipline specific knowledge that traditionally underpinned assessment of research quality is largely displaced by more generalised auditing formulas that are conducted centrally.

Quantitative data allows for comparison so that a comprehensive audit can be conducted, extending from the individual staff member, to a unit, group or department, to an entire school or faculty, which in turn feeds into a comparative ranking of each university and Australia world-wide. Public university budgets, which are widely accepted as inadequate, can then dedicate resources to support university research ‘strengths’ or concentrations of high-performers, through ‘letting go’ or re-assigning to ‘teaching-only’ posts the units, specialisations and staff that correspondingly appear to be ‘unproductive’ or ‘uncompetitive’.

As a governance practice, audit culture is supposed to allow for greater accountability for performance at all levels of the institution. No one is exempt. However, as implemented within academia, it is inevitably imposed in a hierarchical manner on faculties, schools, departments and disciplines, by centrally administered budget allocations and decisions over staffing. In this context, it becomes exceedingly difficult to hold managers to account for their choices and the ensuing impact that decisions have at a disciplinary level. Critiques can be voiced but they have little impact on outcomes. In part, this is because a critique of the methodologies being deployed invariably speaks in terms profoundly different from those of the audit:

Both audit and positivism are rooted in the same assumptions about research and practice. Both exemplify the central characteristics of

what Habermas (1972) termed instrumental or technical rationality … representing a preoccupation with means in preference to ends, more ‘concerned with method and efficiency rather than with purposes’.4

Research assessment outcomes can be questioned or rejected as being seriously flawed.5 However, such criticism often fails to affect decision making that follows because ‘No policy maker wants to hear that things are messy, that the solutions are messy and partial at best, or that solutions to problems are uncertain’.6 The managerial mandate is to make a strategic decision based upon the data, not to question the normativity of assessment mechanisms. The result is, as Shore and Wright recall, that university accountability is a one-way street. What constitutes poor management performance is seldom defined either in practice or in law.7

Neo-liberalism and audit culture is associated with a Foucauldian discipline of the self, with metrics engendering anxiety and insecurities so that academics continually scrutinise their own behaviour, choices and performance in terms of the norms and expectations of management. Shore and Wright argue that the logic deployed is one of hyper-surveillance: ‘The rationality of the audit thus appears similar to that of the panopticon: it orders the whole system while ranking everyone within it. Every individual is made acutely aware of their conduct and performance is under constant scrutiny.’8 Likewise, Thornton argues that ‘A web of subinfeudation ensures that every person is answerable to someone above while overseeing someone below. In this way, governmentality is entrenched and normalised.’9

The fact that it is exceedingly hard to contest the facticity of research assessment is itself part of the raison d’être of a neo-liberal governance strategy. Anxiety helps instil compliance. Many sociological accounts discuss the anxiety-producing effects of audit culture within academia. Sparkes, for example, notes the psychic discomfort that comes with being a Director of Research and participating in these managerial exercises in the United Kingdom, while also trying to voice the usual disclaimers common in the humanities about the defects of the methodologies used in

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4 Phil Hodkinson, ‘Scientific Research, Educational Policy, and Educational Practice in the United Kingdom: The Impact of the Audit Culture on Further Education’ (2008) 8(3) Critical Methodologies 302, 309 (citation omitted).

5 See for example, the analysis of the decision making that led to the closure of the Department of Sociology and Cultural Studies at Birmingham University following a poor result in the 2001 RAE in Cris Shore, ‘Audit culture and illiberal governance’ (2008) 8 Anthropological Theory 278.

6 Hodkinson, above n 4, 310.

7 Cris Shore and Susan Wright, ‘Coercive Accountability: the rise of audit culture in higher education’ in Marilyn Strathern (ed), Audit Cultures: Anthropological Studies in Accountability, Ethics and the Academy (Routledge, 2000) 110.

8 Ibid 77.

9 Margaret Thornton, Privatising the Public University: The Case of Law (Routledge, 2012) 209.
ranking exercises.\textsuperscript{10} If it is believed that the academic performance of individuals and departments cannot be adequately judged with reference to numbers of publications in tiers of quality levels and other numerical impact factors, having to participate in such assessments, even if only to seek to defend colleagues, creates significant distress and anger, and reinforces a feeling of powerlessness.

Scholarly accounts of neo-liberalism and managerialism in the academy commonly focus on the higher level policy decisions of government, and the grassroots impacts on individual researchers. The description of neo-liberal governance often becomes quite abstract or site specific. However, neo-liberalism is more than a theory of management and control. It is constituted by practices that affect behaviour, conduct and identity at all levels of academia. Accordingly, it is important ‘to move beyond paradigms that speak of neo-liberalism as a thing that acts in the world and focus instead on concrete projects that account for specific people, institutions and places.’\textsuperscript{11} I would add to this a need to understand the attempts at resistance and push-back that occur when policies are sought to be implemented.

In the following section, I overview the policy demands made on the discipline of law to assist in refining research quality assessment measures and, in particular, the demand that law ranks its journals. As a participant in formulating part of the disciplinary response on behalf of the Council of Australian Law Deans (CALD) from 2006 to 2011, I cannot pretend to offer an impersonal or dispassionate account. Further, my participation in these processes came about largely as a consequence of my being available, through my changed employment circumstances. I was sufficiently concerned about the unfolding policies to not want to ignore what was happening, and felt unable, in good conscience, to excuse myself. However, in line with the theoretical literature described above, I also found it an intensely anxiety-producing experience throughout. That feeling remains in my attempt to try to account, in this article, for what transpired.

\section*{III Australian Research Assessment Exercises}

In my experience as an Associate Dean at UTS (2006–07) and at UNSW (2008–11) and through my involvement leading CALD responses to Australian Research Council (ARC) research assessment policies from 2006 to 2012, it was very rarely the case that law personnel embraced any sector management initiatives. Nor did they think criteria being used to assess research quality were

\textsuperscript{10} Andrew C Sparkes, ‘Embodiment, academics, and the audit culture: a story seeking consideration’ (2007) 7(4) \textit{Qualitative Research} 521, 527.

very sound or that assumptions being made were readily justifiable. For a long time law operated on wishful thinking, hoping the need to engage with sector policies in this area would simply all go away. Little effort went into thinking about developing appropriate performance measures or methodologies that might be relevant to assessment of legal research. Inevitably, those involved, including myself, saw themselves in a defensive role, seeking to protect the discipline and legal researchers as best they could against the ill-informed, often irrational methodologies of outsiders that could have serious consequences for (potentially) us all.

Journal ranking was always an initiative nested alongside many other policy measures, ostensibly designed to assess and improve Australian research quality, in a context of ongoing policy refinement overseen initially by the Hon. Julie Bishop under the Howard government and then by the Hon. Kim Carr under the Rudd and Gillard governments. Law journal ranking needs to be understood not as one decision related to one policy objective but as a metric developed over time under different regimes. Assessment that relies on journal ranking today is, arguably, only loosely related to the original policies that led to the genesis of the list.

A The Howard Government Research Quality Initiative 2003–07

The Research Quality Initiative (RQF) was inspired by similar research initiatives such as the RAE in the United Kingdom and Performance Based Research Funding in New Zealand. Law became involved in 2006 when, on 15 November 2006, Minister for Education, Science and Training (DEST) Julie Bishop announced that the RQF would go ahead and released The Recommended RQF. The scheme was designed to assess both research quality and impact, with metrics playing a significant role in assessments.

From its early days, there had been many informal and formal discussions and trial studies about potential criteria. In 2006, a RQF Metrics Working Group recognised that in general ‘Metrics should be used to inform the peer review process rather than replace it’. It was acknowledged in meetings conducted by DEST metrics experts that ‘best practice’ with metrics required a consideration of data reliability as determined through rigorous testing: testing for transparency, cost efficiency, positive behaviour impact (driving quality not mere productivity), the acceptability of the criteria to the community being assessed, and simplicity. A recognised problem facing the use of metrics experts was described in this way:

Quite often I am confronted with the situation that responsible science administrators in national governments and in institutions request the application of bibliometric indicators that are not advanced enough. They … want to have it ‘fast’, in ‘main lines’, and not ‘too expensive’… the fault of these leading scientists and administrators is asking too much and offering too little.\textsuperscript{13}

RQF bibliometric tools were not originally designed with the law or humanities in mind, thus any deployment of metrics in those disciplines required participation by relevant discipline representatives. Discipline-specific RQF Panels were implemented. These panels were expected to bear primary responsibility for assessment using a ‘basket of quality measures’, including metrics. Professor Hilary Charlesworth was appointed Chair of Cluster 11: Law, education and professional practices. In addition to law, this grouping included criminology, librarianship, education, media and communications and social work.

It was anticipated from the outset that there would be push-back from some disciplines. It is hard to tell if law was originally thought of in this way, or whether experts in bibliometrics were simply less interested in law and other ‘professional’ disciplines, especially given their comparative size against the rest of the humanities. The Council of Australian Law Deans (CALD) was not consulted by DEST as a relevant peak body until July 2007, at a point when RQF methodologies for assessing research quality and research impact were already well advanced.

Details of the proposed scheme can be discerned from notes of the concerns that were raised at an initial consultation with law representatives, in a meeting held in Canberra and attended by available Deans, Associate Deans (Research) or nominees.\textsuperscript{14} In general terms, law rejected the use of metrics such as ranking and citation to assess research quality. While the capacity to recognise the significance of policy-oriented legal research under an assessment of research impact was welcomed, concerns were raised about assessing impact with reference to ‘adoption’ of research by end-users. Adoption of legal research was not considered a sound indicator of the quality of the research, but more related to political fit.

Citation data was rejected on both practical and substantive grounds. Ranking of outlets was rejected on the grounds that any such proxy for quality would be unable to appreciate the complexity


\[\text{Following this event CALD appointed an RQF Working Party. It was comprised of myself and Professor Mark Israel (Flinders University). Formally the work included writing briefing notes on sector development for CALD, drafting responses to DEST requests for information and drafting numerous submissions to DEST as required.}\]
of factors affecting the choice of publisher and journal in law, including the specificities of jurisdiction, the need to relate to professional and interdisciplinary audiences, differences between ‘core’ areas and specialisations and respective size of different areas of legal research. The unfairness of retrospectivity was also raised as a concern. More generally, there were concerns over the proposed size content of ‘evidence portfolios’ required, which included criteria for selection of ‘best four’ publications. Questions were raised about the respective ‘weighting’ of books against journal publications and what considerations addressed article length, which might range from 5,000–6,000 words at the low end to 8,000–12,000 for a ‘standard’ journal article or chapter, with up to 20,000 words for some works at the extreme end. Would these all be counted as ‘equal’ works in metrics algorithms? Commentators were indifferent to the inclusion of refereed conference papers. Given that the indicators of quality could affect institutional ‘research active’ assessments and future researcher behaviour, there was discussion of the status afforded to original law reform and policy work. Law reform and policy work did not amount to reportable publication under current sector rules, but it could count for the purposes of measuring ‘impact’ under the ERA. The presumption was that law reform work was always derivative or minor, based upon pre-existing original scholarship in a journal or book publication. However in reality some law reform and policy contributions were original works produced for the organisation that invited the contribution. Where so, this effort needed to count as a research publication, as well as evidence research impact. It also became apparent that there would be overlaps within Cluster 11 (such as between criminology and law) and between the Professional Cluster and the humanities more generally. Was multidisciplinary work to be discounted when it came to assessment in two cluster areas, or double counted? The appointment and role of international advisors to ‘mediate results’ and ‘overcome knowledge gaps’ was also discussed, mainly leading to advocacy for particular names. More generally, there was a concern for the time-frames envisaged, the scale of the undertaking sought and for the small commitment of resources and time allocated to the entire process. Overall, there was much scepticism and little support for assessment of law by metrics at all.\textsuperscript{15}

\textsuperscript{15} This view was soon supported by a report of the British Academy, which noted while peer review did pose potential problems with bias and subjectivity, it remained the best available measure for assessing quality and that metrics needed to be resisted. The British Academy, Peer Review: The Challenges for the Humanities and Social Sciences (2007) 29.
Nonetheless, in August 2007 CALD was asked by DEST to begin ranking law journals and publishers. A CALD document circulated the candid views of 30 law schools. It revealed that ranking was only ever entertained by Law Deans as a last resort option, a task only to be entertained because it was believed that law had been given ‘little choice’. Deans were concerned for what non-compliance with the DEST request could eventually mean for sector funding of legal research, also about the potential consequences of law being perceived as obstructionist within home institutions. The formal advice from DEST to the discipline was that law would be the only discipline not ranking. In hindsight this proved a little misleading. Other disciplines also had difficulties with the notion of ranking publication outlets. Law was further advised that, without the indicator of ranking, RQF Panel Assessors would have nothing to go on but peer review. This was in a context where it had already been privately acknowledged that reading more than 25 per cent of the submission was unlikely to be possible. A significant dilemma now existed. Was the potential arbitrariness of assessment based on a cursory reading of some work by a handful of assessors going to be improved by including an across-the-board application of ranking metrics? DEST further advised that the lack of metrics was likely to have detrimental consequences for law, although there were no details of how metrics factored into anticipated institutional funding allocations in a way that was reflective of quality assessments.

At this point, the CALD strategy settled on trying to retain as much autonomy as possible, at discipline level, over all the assessment processes and in particular over the makeup of potential assessor and advisor lists. An interest was also taken in providing the ARC with more accurate and necessary information about difficulties in assessing legal research, especially given the diversity of legal research outputs and audiences. In the context of assessing research impact there were concerns about who should be considered an ‘end-user’ of legal research and about the limitations of referring to citation in judgments, reports or committees alone to demonstrate impact. It was argued that in appointing advisers and assessors, the ARC needed to be aware that law saw itself as a ‘professional discipline’ in a very qualified sense; that members of the profession were not necessarily relevant assessors of research quality or impact, and a fair assessment process would need to be sensitive to different approaches and styles of legal research and include a balance of expertise sensitive to differences between doctrinal, policy-oriented and theoretical legal research.

The difficulties of comparing different kinds of legal research soon struck home at institutional level as the RQF required nomination of ‘best four’ outputs of individual researchers. What did best mean? Potential criteria included a consideration of perceived inherent
qualities of the work, such as whether it had impressive depth in coverage of subject matter, originality, currency and the work’s scholarly reception. Given that short cuts may be taken to assess quality, more strategic indicators were also considered. These included outlet reputation, author reputation, citation, likely familiarity with the work, whether the work was controversial, likeability to potential reviewers and so on. It was suggested by experts in bibliometrics that the difficulties in determining best criteria pointed to broader problems with the subjectivity that is inherent in peer review, and thus the need for law to embrace metrics and rank publication outlets was underscored. This view however, was strongly countered by the results from RAE law assessments. For example, the 2001 RAE Law Panel’s Overview Report stated that:

Work of internationally recognised excellence was found in a wide range of types of outputs and places, and in both sole and jointly authored works (the Panel adhered to its published criteria in allocating credit for joint pieces). First-rate articles were found in both well-known journals and relatively little-known ones. Conversely, not all the submitted pieces that had been published in ‘prestigious’ journals were judged to be of international excellence. These two points reinforced the Panel’s view that it would not be safe to determine the quality of research outputs on the basis of the place in which they have been published or whether the journal was ‘refereed’.16

In 2005–06, British legal scholars had successfully resisted attempts to rank journals, pointing to the size of the discipline and the high degree of specialisation within it making objective evaluation of law outlets extremely difficult. They pointed to past RAE assessments that showed the publication outlet was an unreliable indicator of quality. However, there was also ongoing disquiet from some quarters in the UK about the resourcing and reliability of peer review. Australian bibliometrics experts sought to impress their international peers by demonstrating how metrics could be incorporated to improve efficiency and reliability of UK assessments, including in law and the humanities. The outsourcing of Australian research metric technologies to New Zealand was also discussed as a possibility.17

B The Rudd−Gillard Government Excellence in Research for Australia Initiative (ERA)

On 21 December 2007 the Rudd government announced the abandonment of the RQF and the development of the Excellence

17 This observation is based on conversations and readers’ postings on blogs by relevant Australian personnel at the time.
in Research for Australia (ERA) initiative, led by the Australian Research Council (ARC). Under the ERA, law was assigned to a Humanities and Creative Arts (HCA) Panel. This scheme did not include an impact measure but retained reliance on peer review of 20 per cent of outputs, with metrics that were to be applied to the whole submission of reportable publications. The latter process required the ranking of law journals across four bands: A* (top 5%), A (next 15%), B (next 30%), C (next 50%). Rankings were required to be internationally valid in order to place published Australian research within a comparative international context.

There were major logistical challenges that frustrated the creation of a law list from the outset. This included there being no starting list of peer-reviewed law journals available. In June 2008 the ARC surprised and outraged many when it released preliminary rankings of law journals. These were later confirmed to be based on Washington and Lee Journal Rankings.

While there had been some consultation with other learned academies and peak bodies, neither CALD nor the Academy of Law had been formally consulted, nor kept abreast of developments. Relations with the ARC bibliometrics personnel were already strained, due to the earlier exchanges over law’s participation in RQF journal ranking. With law unable to accept that ranking was appropriate for the discipline, and the bibliometrics personnel unable to accept that it was not, there was little common ground for further engagement over the development of methodologies for ranking under the ERA.

Initial objections to the rankings made to the ARC by concerned legal researchers and some peak specialist bodies, such as the Australian and New Zealand Society of International Law (ANZSIL), included evidence that they did not meet the ARC’s own criteria for validity. They were not international rankings as they did not include many, and major, journals from the United Kingdom, Europe and Commonwealth countries, and there were only two non-US law journals in the top 198. The ARC did not appear aware that US journals generally had different review processes from ours, and historically law had not accepted US student-run journals as ‘peer-reviewed’. The attention of bibliometrics experts was drawn to additional analysis and literature that discussed the limitations of the list and to the fact that for rankings in law, there were differences in publication markets and scholarship practices between the US and other jurisdictions. It was also pointed out that publication in a US journal may not be at all relevant to Australian researchers, that there were problems with the Washington and Lee list accounting for research specialisation in law, that the role of general law journals differed from that of specialist journals, and so on.
From emails and phone calls I had with key personnel, I was left with the strong impression that release of the law list was a provocative step designed to force law to accept the overall concept of ranking journals, through being forced to engage in ‘modifying’ a list. If so, this objective was achieved: from this time on there was no longer any real discussion of rejecting rankings but rather only discussion of how to ‘improve’ a bad situation. I felt senior bibliometrics staff were indifferent to law’s concerns because we were a small and self-contained discipline and were taking up too much of their time, when they were subject to very tight time pressures within the department. Peer review was generally distrusted, at least in part because it was a process largely opaque to their own research expertise and because their bibliometric expertise was not really necessary to conduct it. In resource terms, they felt peer review was inefficient as it involved duplication of effort to subject an already peer-reviewed publication to further additional peer review. In bibliometric terms, assessing the overall journal reputation and preferably also citations was felt to be sufficient, and more objective. Our queries about how areas of such diverse specialisation in law could be compared, and the problem that any list would indirectly create a hierarchy of research importance, were ‘too difficult’ for them to deal with. In terms of more junior personnel, as their instructions were to implement metrics, the presumption was always that only minor tinkering through adding a few missing journals and some help in assigning correct field of research codes to multidisciplinary journals was really required. It was pointed out to me that there would be an opportunity for individuals to make the case for individual changes to inappropriate rankings and thus corrections would be made to the list as part of the process at a later stage, handled by them.

I was told that the Washington and Lee based list ‘stood up’ to scrutiny according to bibliometric criteria of validity. There was no attempt made at all to justify the methodology as appropriate for Australian legal research or for the purpose it was to be put. The presumption was that as the ERA was to involve an international, comparative assessment, it was inappropriate to take local concerns about local publications too seriously, lest it be pandering to domestic insecurities and self-interest. The draft list was presented as a fait accompli based on the departmental belief that there was to be no further negotiation about the issue and that ranking of law journals would be implemented as part of the ERA with or without further involvement from law.

There were further opportunities to communicate with the ARC over the implementation of the ERA. Questionnaires were sent to each institution requesting feedback on particular assessment features. However there was little capacity to organise a well-coordinated response from law through this avenue. There was no current list of law Associate Deans or Directors of Research to
facilitate easy communication between law schools. The nature of law’s objections to the draft list was not necessarily understood within home institutions, and central Research Offices were generally disinterested in pursuing law’s ‘special’ case.

It was apparent that, without objections being forcefully conveyed at the most senior levels, there would be little possibility for anything more than an ad hoc revising of the list, to be primarily undertaken by the ARC or persons they co-opted to assist. There would be no transparency or accountability. Rumours began to circulate that some individuals at Group of Eight (Go8) institutions thought they could step in and take on the task of fixing the list for the ARC. The then Chair of CALD, Prof William Ford (UWA), discussed the problem with significant members of the judiciary and profession. Numerous communications were made to the ARC personnel and to then ARC Chief Executive Officer, Prof Margaret Shiel. This intervention resulted in the concession that CALD could, in consultation with ARC bibliometrics experts, undertake its own ranking exercise. It was a requirement that the CALD list be based on modifying and correcting the existing ARC list and that it involve further consultation with legal researchers and law specialist bodies.

The July CALD Meeting conveyed the view that law favoured genuine peer review, but supported metrics and ranked publication outlets ‘so long as those metrics are appropriate to and supported by the discipline’. CALD noted that the draft ARC ranking based on the Washington and Lee list failed to provide an adequate or relevant international benchmark. CALD proposed instead to develop a ranking in consultation with the ARC that would meet its deadlines. A CALD Steering Committee of Law Journal Ranking was then appointed, made up from an open invitation to Associate Deans (Research).

1 **The CALD Journal Ranking List**

The list provided by the ARC had approximately 1,400 outlets but very few journals that Australians would seek to publish in, especially within the top tiers. The CALD ranking methodology triangulated information from a number of sources to substantially revise this list and produce a first-cut CALD revised draft. This process took into account:

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19 The meeting was held at short notice. It was poorly attended. The Steering Committee comprised of volunteers included Kathy Bowrey (UNSW), Lesley Hitchens (UTS), Kit Barker (UQ) and Richard Johnstone (Griffith). Brad Sherman (UQ) was later co-opted to assist with some consultations. CALD provided funding for a part-time administrator to assist with data management, and UNSW provided additional technical research support.
feedback from 22 Australian law schools on all journals on the list including identification of missing journals to be added;
- information provided by 82 journal editors in line with a template produced by the ARC about acceptance and rejection rates and other details editors thought relevant; and
- 34 general submissions received from law schools and interested individuals.

While there was a rough consensus over rankings of approximately 85 per cent of the Australian journals, and information was received about many of the more prestigious US journals, scant information was received about a very large number of US general law journals that dominated the Phase One list. On advice from the ARC, it was not open to remove US journals from the list if these outlets appeared as ‘equivalent to peer-reviewed’ on the Ulrich’s Periodical Directory, regardless of whether this was the case. Former RQF Panel 11 Chair Professor Hilary Charlesworth (ANU) assisted with revision of the ranking of these US general law journals. In the absence of any feedback, reference was made to the US News Ranking of Law Schools.

In many cases, feedback was most enthusiastic and well organised by persons who had a vested interest in particular journal rankings. It was not possible to manage real or potential conflicts of interest that arose from the consultations conducted in Australia (except those concerning members of the CALD Steering Committee). ARC advice was that 'errors' that would become apparent over time could be corrected through incorporation of feedback in Stage 2, which would be provided by specialist bodies and independent international reviewers. Twenty-five specialist and professional bodies were approached and asked to participate in reviewing the second cut list. In addition, there was liaison with the Australian and New Zealand Society of Criminology (ANZSOC), which led to a redistribution of some journals to criminology and others to law and an assignment of both codes for journals that were considered interdisciplinary. All this occurred within tight time frames, limiting opportunities for extended discussion and engagement.

A list of 100 potential eminent international reviewers for particular specialisations was devised and circulated to 22 senior Australian academics for comment as to appropriateness and for additional suggestions. All those approached were highly regarded by all Australian peers. They were also invariably people who had experience in research assessment and a reasonable knowledge of Australian or Commonwealth legal research culture and journals. The 61 people ultimately approached, two to three for each area of specialisation, included representatives from the United Kingdom, Ireland, Singapore, Canada, New Zealand and the United States.
The responses to international invitations to participate in the CALD/ARC process are worth considering in some detail. Despite being sympathetic to the pressure to have ‘international endorsement’ of draft Australian rankings, the two peak UK bodies, the Society of Legal Scholars (UK) and UK equivalent to CALD, the Committee of the Heads of University Law Schools, declined to participate on the basis that journal ranking is a flawed measure of research quality. As President of the Society of Legal Scholars, Professor Fiona Cownie, wrote:

You may be aware that there is a widespread view among academic lawyers in the UK that a journal ranking table is not appropriate for the academic discipline of Law. This is a view with which the Society of Legal Scholars concurs. Our view is reinforced by the approach of every Law panel there has been, in successive U.K. Research Assessment Exercises. A consistent finding of these panels has been that very high quality work is to be found across a very wide range of journals, and not just those that informally have been seen as the most prestigious, and that not all the work in such journals is of very high quality ….

There are particular variables affecting legal scholarship not necessarily replicated for other disciplines. Writing may be jurisdictional, comparative or international; may be directed to practitioner or academic audiences or both; may be doctrinal or socio-legal; and may be highly specialised. As a result, there is a very wide range of legal journals; ranking would be likely to devalue certain kinds of high quality legal publication, such as those related to the law of a small jurisdiction or in particular specialist areas. This would be unfair to the scholars and hinder the proper development of the law in those jurisdictions or areas ….

Given the view of the Society I do not feel it would be appropriate for me to participate in the Australian exercise.\(^\text{20}\)

There was a similar response from the Committee of the Heads of University Law Schools. Ranking journals was not considered as a ‘credible’ tool for assessing research quality in law.

A significant number of distinguished academics also declined to participate and either asked for their comments to be passed on to the ARC, or only agreed to participate on condition of their objections being passed on. These included a range of comments compiled below:\(^\text{21}\)

… I believe the exercise to be fundamentally flawed ... The reason is that there is no recognised hierarchy of journals, so that very good articles are to be found in journals that are not particularly well known and, sometimes, relatively weak ones get into quite ‘prestigious’ journals. I think I can say that the experience of two RAES only served to confirm the correctness of the UK Law Panel’s decision to pay no attention whatever

\(^{20}\) Letter from Fiona Cownie, President, Society of Legal Scholars to CALD Journal Ranking Steering Committee, Nov 2008.

\(^{21}\) Feedback received by CALD Journal Ranking Steering Committee, September, 2008. Identification of authors has been removed in order to preserve the confidentiality of individual participants.
I regret that this is something I would not like to do. I am strongly opposed to these government inspired exercises which in the long term will be only detrimental to academic freedom.

I think this whole process is misguided and a waste of time. While one can probably assign relative value to individual articles (though even then, it would depend on what counts as value, and the ranking would be heavily influenced by the biases of the person doing the evaluation), to try to do so for entire journals would inevitably undervalue some articles and overvalue others. I could not in good conscience participate in such a process.

The more I looked at this, however, the more misconceived I felt the whole exercise to be. The exercise of attempting ratings convinced me it was like comparing apples and pears. Nevertheless, I shall comment on a few journals for what it is worth, but first I must make some general comments.

• [Ranking methods] favour the general over the specialist, yet monitoring of specialist journals is often much more thorough than in general journals.

• It is easy enough to pack an editorial board with field leaders without any of them actually contributing to the work of the journal.

• Ranking journals assumes that ranking will be static. Ranking may indeed become self-fulfilling, in that researchers will submit to high ranking journals, but editorial teams will change and quality changes too.

• Ranking journals gives much too much power to a few self-perpetuating groups of editors.

• Ranking journals discourages innovation, inter-disciplinarity and development.

In June 2009, the ARC published a revised list (the HCA list) which was primarily based upon all feedback received by CALD. The HCA list was utilised for an ERA Trial conducted in the second half of 2009. Unexpectedly, in September 2009, the ARC conducted another round of feedback on journal ranking in anticipation of ERA 2010. It appears a number of organisations were invited to comment. Journals unhappy with their own ranking, or that of a rival journal that was ranked higher than theirs in the HCA list, were also given an opportunity to participate in providing additional feedback. This information was incorporated into a new revision by the ARC, in most cases by complaints being accommodated. There was no involvement of CALD or former members of the Steering Committee.
in this stage of the process. A final stage consultation was then undertaken in late 2009. A revised list was confidentially circulated to a number of invited individuals for comment and final review. The ARC was happy for the original CALD rankings to be reinstated as these rankings were supported by a range of data sources. However, it was not possible to identify all the changes made to such a large list in the time frame given and from the information provided.

The final ERA 2010 list was published in February 2010 and utilised for ERA 2010. It contains significant differences from the earlier HCA list. In the final version, a significant number of Australian law journals were removed from the list, possibly because of doubts about their peer review status, however comparative US journals remained unaffected. A large number of US general law journals and the *Griffith Law Review* were upgraded. Some specialist law journals, of interest to Australian legal researchers and with strong support for their existing ranking, were downgraded. These unanticipated changes caused some consternation. Protest to the ARC over the methodology utilised in Phase Three and Four consultations by legal researchers echoed broader concerns from other disciplines over the longer-term consequences of the ranking for Australian researchers.

These concerns centred on the way rankings would deleteriously affect the health of Australian publications in the humanities, where financial viability was often already precarious. Some publishers, anxious that a journal was already financially marginal, sought to put the titles on the market. Concerns also arose because the proportion of publications reported in A and A* journal lists was influential in institutional ratings for ERA 2010, and this fed into institutional assessments of research strengths. Some institutions began evaluating research areas and individual research performance with reference to quantum of publications in various bands.

Based on these considerations, in May 2011 in a Ministerial Statement, the Hon. Kim Carr announced the abandonment of journal rankings. He noted, ‘There is clear and consistent evidence that the rankings were being deployed inappropriately in some quarters within the sector, in ways that could produce harmful outcomes and based on a poor understanding of the actual role of rankings … One common example was the setting of targets for publication in A and A* journals by institutional research managers.’

It was however, clear from the outset that this would be a consequence of the policies set in train, and well understood at departmental level. The back-pedalling by the Minister shows the effectiveness of loud voices from the sector, but for reasons explored below, it did not entail much of a victory.

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In ERA 2012, ranking ERA assessors were provided with data about the most frequently published in journals, without reference to past journal rankings.

2 Law Research Assessment Transformed

Throughout this period, the discipline remained publicly opposed to journal ranking and generally deeply suspicious of any shift from traditional discipline-centred modes of assessment. Nonetheless, for instrumental reasons, law continually conceded ground. There was a strident defence of what was understood as traditional academic values, particularly centring on a defence of peer review as the primary tool of assessment. However, the claim was reduced to that of peer review remaining as a part of the equation used within a centralised assessment process. With short timelines, heavy workloads and inadequate classification and knowledge about relevant expertise, the character of peer review was fundamentally compromised and changed in the process. What is involved, in reality, is not ‘traditional’ discipline-centred peer review, but something else. The practice of peer review has been transformed by a technical rationality.

Hodkinson argues that the accountability strategy of neoliberalism is one that seeks ‘to undermine the independent power of professional bodies, which were seen as promoting their own self-interests.’ In effect, what has occurred in law is an undermining of the authority of the discipline. This shift places academics in an invidious position. One can adopt a managerial role and take on the role of policing the discipline through participation in these processes. This can bring real career benefits, given the institutional esteem that flows from being able to show one is engaged in higher level management of one’s discipline. Or, one can eschew that role out of a commitment to more traditional knowledge-based status and collegiality. Either way, the culture of the discipline is transformed as discipline-centred knowledge and expertise loses influence and impact over assessment of research quality in law.

IV WHERE TO NOW?

A Ongoing Impacts

As part of yearly compliance with the Higher Education Research Data Collection (HERDC) that is used as part of university funding formulas, institutions generate significant reference data annually about the publications of their employees. The ARC law journal ranking list and revised reiterations of it made by interested parties is now being used, or sought to be used, as a proxy to assist measurement
of *individual research performance* based on reported publication outcomes. The current industrial uses of ranking data have little to do with the original aims of improving research quality or of allowing for comparative assessment of institutional performance. What began as a quality assessment exercise that law participated in at the instigation of the ARC and due to pressure from home institutions has thus morphed into a management tool that plays a direct role in industrial processes affecting employment terms and conditions. That this next stage would unfold was entirely predictable, given the governance logic of neo-liberalism as described in Part II. Labour cannot be transformed in line with managerial goals, as the data indicates is required in the sector, unless knowledge workers are impacted at the coalface by being rewarded or punished as the data suggests is merited.

In 2012, concerned to document what had occurred and to inform the various institutional uses being made of the journal ranking data, CALD commissioned a report to better explain specifics of the older ranking list. The report includes significant data analysis of the journals ranked, including information about known problems with the rankings of general and specialist law journals. In reading the information on law journals contained in that report, it needs to be noted that the substantive data underlying most ranking lists now in use is five years out of date. The data primarily reflects perceptions and other details of publications dated before 2008. Though revised data sets may be discreetly updated or doctored, any journal ranking lists now being used to assess individual research performance in law are unlikely to be defensible based on *any* accepted bibliometric methodology. An arbitrary ranking thus creates ‘presumptions’ of relative researcher merit with validity of the data simply presumed because the same data set is consulted to assess all.

The ability to ‘run the data’ thus sets in train presumptions of relative merit that then need to be contested and rebuffed by individuals, affected groups and their advocates as best they can, based on ‘supplementary’ information to explain ‘poor’ publication choices, a ‘different’ career trajectory and ‘career disruption’. The centrality of data collection and reliance on metrics within university processes means that so long as ranking data is available to assess legal researchers, it will continue to erode and undermine reliance on more traditional indicators of research performance in law — peer review, based on a substantive and well-informed assessment of a body of work through referee reports, book reviews and other established indicators of reputation and standing. Where it can be made to count at all, discipline-specific assessment of candidate

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performance inevitably comes to be reduced to just another ‘variable’
to be weighed against the centrally produced data, having a taint of
‘subjectivity’ hanging over it.

What is being normalised and rewarded here is the career path
and profile that most neatly fits with the normativity embedded in
the metrics — repetition of regular output drawing on an already
familiar knowledge base, published in ‘safe’ journals, in not-too-
long articles, produced with the benefit of minimal ‘disruption’
by teaching, administration, professional and other collegial
contributions, political engagement, health or family life. While
research assessments purport to reward quality, there is no attempt
to account for the intellectual and labour conditions under which
quality work may be produced. This would require a more detailed
consideration of the whole individual with reference to their career
story, longer-term goals and ambitions, and attention to the particular
conditions, challenges and values of the research field(s) they work
in. However, as noted above, audit culture embodies a technocratic
rationality and is not concerned with the ends or purposes achieved.

The research metrics being used in law will inevitably deliver
arbitrary results in assessing quality. However, a technocratic
rationality seeks to suppress that reality and naturalise the arbitrariness
of the new order by requiring researchers to fall into line with the
current rules of the assessment game. In the face of these kinds of
dynamics, dispirited individuals can seek to withdraw, as far as that is
possible. It may be possible to raise objections when the opportunity
arises, but in doing so, the individual risks being seen as difficult,
naive or engaged in special pleading. Raising problems can embarrass
and humiliate senior colleagues who can’t defend the processes and
generally don’t seek to, but whose own performance and relationship
with management is judged on adherence to the management norms.
Anxiety is not just felt at the bottom but permeates throughout all
levels. For those who retain an allegiance to older scholarly values, it
produces internal identity conflicts. These are impossible to resolve,
with hard choices requiring the sacrifice of scholarly judgment,
as friendships and careers are continually being placed in front of
you. As non-compliant managers are moved on by their superiors,
it is strategic to settle for the occasional compromise or success in
blocking a highly unpopular decision and through that avenue, help
restore the confidence of colleagues. It is naïve to hope that a benign
or well-meaning senior manager can mediate every likely injustice.
One is more likely to go into bat where there are existing personal
ties, strong networks and management imperatives that make a
person inherently of more value to the manager or institution. While
law schools have always been hierarchical and favouritism is hardly

26 As Bourdieu notes, ‘every established order tends to produce ... the naturalization
of its own arbitrariness’. Shore, above n 5, 279.
A new factor in facilitating career success, current practices do little to improve things. Arguably, the new modes of governance entrench these problems, making them increasingly intractable. Over time, and at all levels of management, we are pressured into being more selectively collegial and only taking on roles, fighting for people or issues if they are worth the hassle, when the time is right, when people are more likely to be receptive, when a favour is needed in return or when there will be little repercussion. Inevitably, as a matter of mental health and personal wellbeing, one is forced to be more and more selective in choosing what to resist.

B Being More Strategic

The technical tools deployed and now governing the sector are presumed to channel academic energies into serving the needs of a deregulated economy and the gods of productivity and efficiency. However, different disciplines have different roles to play in a neo-liberal economy. In this regard, the ‘one size fits all’ auditing of the sector, which treats all disciplinary knowledge bases as reducible to the same measure, becomes problematic.

Law is still often called a ‘professional’ discipline, but it is not the needs of the legal profession per se that legal academia serves. The professionalisation of legal education has led to a much more nuanced and sophisticated understanding of the relationships between law, the profession and the needs of society.

Law is an unusual discipline whose very character is affected by neo-liberalism because law is a tool of neo-liberalism. This makes us different from other disciplines because our discipline has to cope with significant direct pressures and tensions that stretch the possibility of what law is. In a neo-liberal world, law and legal processes become more and more diffuse, diverse and fragmented. The methodologies for knowing the law correspondingly shift, morph and differentially fail to relate to desired social and economic policies. One consequence of this is that as law becomes more diffuse, it is correspondingly harder and harder to categorise correctly and to assess retrospectively the associated legal scholarship. What may have been a sensible categorisation for an earlier time now appears to be more random, or an accident of history.

Metrics-based research assessment and evaluation of individual researcher merit is very, very heavily dependent upon the underlying research classification. Law cannot be assessed as ‘law’. It needs refinement into smaller units of assessment. However, government
classification schema for legal research is notoriously poorly equipped and ill-conceived.27 The discipline of law has always been extremely broadly based, diverse and diffuse.28 With the changing character of neo-liberal law, it will be difficult for some time to develop new sub-disciplinary classifications, and the attempt to impose new ones is politically fraught.

This reality of the world we now live in will only further strain the ability of the technologies that are being used to effectively capture legal research. It is one thing to use arbitrary measures to assess research quality. But it is another to entrench or naturalise those tools when serious doubts exist about the capacity of those measures to deliver the desired policy goals, which in law is to serve the prospective needs of government and society. Highlighting this problem is one possible avenue for more productive, if unsettling, discussions about the deployment of research assessment tools in law today.

Without an acceptable mode of classification for legal research, not only can the appropriate assessors not be found, it is impossible to judge whether the larger government investment in research will bear fruit. Thus there may be some benefit in pursuing a strategy of turning neo-liberal discourse back on itself through constantly evaluating and interrogating the effectiveness of policies deployed to assess performance in law. Though reflexivity can be a double-edged sword, I think we can do a lot more as a discipline than we have in the past to combat the arbitrary processes to which we are now subjected. We need to begin by pointing out some of the unique facets of our discipline and the ways in which we are already accommodating the need to change by responding to the world we are in. Discussing what legal research is today, and revisiting what the various strands are, is something that could be worth doing, as well as taking the time to reflect on our activities as Australian legal researchers, our politics and the practices we engage in. It is one way we can begin to reassert more discipline-centred authority and expertise over the definition of legal research and its political value. It could form the basis for a more positive mode of resistance than simply complaining and complying, given that to date, this has been rather unproductive.
THEY MAKE A DESERT AND CALL IT PEACE

FRANK CARRIGAN*

I INTRODUCTION

When the Roman historian Tacitus surveyed the impact of the colonisation of Britain and its repressive effect on the native population he summed up his sense of despair with the searing phrase, ‘They make a desert and call it peace.’ Imperial overstretch had, according to Tacitus, reduced Rome to a broken society. Rome had achieved only a pyrrhic victory. Britain was prostrate before the power of Rome — but at what cost to the ideal of a civilisation that idolised the arts and culture but in practice created client states at the point of a sword?

Today the modern university shares many of the characteristics of an overstretched imperial power. In theory it is a bastion of humane disciplines and a focal point for the transmission of values and principles aimed at increasing the public good. In practice this institution, forged in the age of feudalism and one of the crowning glories of Western civilisation, has suffered a steep decline. In classic empire fashion universities exhibit a relentless desire for expansion but at the cost of eschewing many of their core values. When operating at their optimum level, universities are self-governing citadels dedicated to promoting tolerance, diversity, autonomy, reason, informed rationality and the creation of ethical citizens driven by the ideals of a liberal education. In contemporary Australia the modern university has become a travesty of its ideal image. It has been reduced to an appendage of the state and an adjunct of a corporate market society. Like an empire slowly declining, the modern university appears in working order from the outside, but on closer inspection a state of decay is evident.

This article argues that within Australia the discipline of law has fallen victim to a corporatist approach and in that sense is representative of the forces that have colonised the academy and threaten its aesthetic lifeblood. Instead of strengthening the

* Law School, Macquarie University.
1 R M Ogilvie and I Richmond (eds), Cornelius Tacitus ‘De Vita Agricolae’ (Clarendon Press, 1967) 112.
humanities, law schools in Australia have focused on developing mechanistic skills that favour profitable specialisation, at the expense of equipping students with the capacity to think critically about the status quo. Without humane enquiries as the guiding principle of higher education, universities in the classical sense of the term disappear and trade school disciplines flourish. Universities have resiled from their role as centres of critique, and the study of law is emblematic of the shift towards higher education servicing the status quo. Instead of civilising a market society, universities pander to corporate values — and Australian law schools epitomise that phenomenon.

Part II of this article surveys the historical landscape of legal education, which has been dominated by the struggle between competing pedagogical visions. It charts the way these competing models of learning played out in the early part of the twentieth century and maps the historical contest between a rules-based, vocation-oriented education that encourages corporate values and a teaching methodology that supports a critical legal education based on promotion of the positive pedagogical values of liberalism.

Part III sketches a tragedy. By focusing on what happened at a number of Australian law schools over a period of two decades, a picture is drawn of the rise and fall of innovative law schools that strove to implement a program that paid more than lip service to socio-legal values. The strange death of a humanities-based legal pedagogy will be examined.

Part IV interrogates the complex interplay of forces that led to the demise of these trailblazing experiments. Pioneering legal programs were extinguished not only by external factors but also by internal forces. Different psychological types played as big a role as economic issues and competing ideologies or legal philosophies in determining the fate of these law schools. It will be argued that what happened at these law schools parallels the destruction of the civilising mission of universities, and the same factors can be seen at work.

Light is a strong disinfectant, and the article tries to shine light on important social phenomena. In doing so, it relies upon selection of a sum of facts and interpretation of the materials presented. It is axiomatic that every analytical framework involves its own theoretical and political judgments. The goal of impartiality is a fallacy even if one is not an actor in the events that unfold in a narrative. Facts are never neutral, but part of a social world, and what is required if objective truth is to be approached is that there must be a march towards facts — one that utilises a conceptual structure capable of comprehending empirical data. Facts have to be viewed through a dialogue with a theory that illuminates a train of events.² What do

² E P Thompson, The Poverty of Theory (Merlin Press, 1979) 231.
facts stand for in the context of the social forces that stymied ground-breaking attempts in Australia to dilute the role of rule fetishism and instead make legal education brim with enriching ideas? That social meaning is the keystone in the search for truth. In order to render actions intelligible as part of a pattern, this article seeks to draw out the inner reality of social relations and psychological traits that led to the collapse of will which caused progressive law schools to turn back to a trade school mentality. A stubborn fact at this stage of history is that those whom Gramsci termed organic intellectuals of the political and corporate elite have proved to be powerful enough to defeat maverick intellectuals who possessed a competing vision of legal pedagogy. Just what killed progressive attitudes in law schools in the twentieth century in Australia will be of prime importance to those contrarian legal scholars who will in the future tilt once more at ossified teaching and governance models.

II THE CHANGING HISTORICAL LANDSCAPE OF LEGAL EDUCATION

Ever since medieval universities began teaching law there has been a contest of ideas about whether a scholarly or skills-based methodology was appropriate. At the outset the trade school approach was rejected in favour of the scholarly values associated with a traditional conception of a university. Starting in the twelfth century in Bologna and then at Oxford and Cambridge, law was taught as a component part of the liberal arts. Roman law, canon law, legal history and jurisprudence were the core subjects taught in the great universities. As a market economy expanded, a separate pedagogical stream was developed for those who wanted a vocational and craft-based education. At the Inns of Court in London a practice-orientated syllabus that focused on vocational skills prevailed. It was a teaching model that suited the rise of capitalism. A utilitarian model that treated law as a system of rules underpinning property rights thrived, while a pedagogy that aimed at producing citizen lawyers capable of excavating legal principles in order to promote human welfare became marginalised.

By the latter part of the nineteenth century and the inception of law faculties in Australia, an empirical legal monoculture imported from Britain was dominant. At the lectern practitioners steeped in the craft tradition, who espoused the view that law is a system of autonomous

5 Ibid.
6 Ibid.
rules separate from political, social and economic factors, spent evenings conveying their positivistic tradition to budding Australian lawyers. The political power of the legal profession even at this stage of colonial evolution sufficed to control the curriculum. At this point in Australia’s development, legal education was ‘little more than the imparting of information in the form of legal principles, rules and propositions … to be committed to memory for examination purposes.’ The study of law was reduced to a trade school discipline that moved in tune with the commercial requirements of a colonial trading society.

The first law faculties in Australia were effectively apprenticeship institutes. They had nothing in common with the classical humanistic concept of universities. A doctrinal and vocational form of legal education ruled supreme. In the US the Legal Realist movement of the 1920s and 1930s at Columbia and Yale emerged to challenge legal positivism, but it was an initiative that failed to register in Australia. This was partly attributable to a cultural logic dominated by Britain. American investment and its cultural products were just beginning to have an impact on the Australian landscape after the First World War. But there was more than just Britain’s influence acting as a brake on legal innovation. The inherited system of legal positivism had become part of Australia’s corporate institutional matrix supporting the rights attached to private property and by extension the rule of the economic elite. The craft based model of legal thinking became an intrinsic part of the organisation of the circulation of commodities through contractual and commercial law. This turn of events was of lasting importance and it was to survive the sun setting on the British Empire in Australia.

The Legal Realists at Columbia and Yale pioneered a curriculum that ‘sought to integrate law and the social sciences’. The realists were an eclectic group but they were united in affirming the sterility of legal positivism. The Realists argued that ‘legal rules were not objective and value free’. They set about generating a legal education that propagated the view that legal reasoning was suffused with politics. Moreover, policy choices rather than logic or rules underpinned judicial decisions. This paradigm was bound to trigger a negative response from vested interests. Unsurprisingly,

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7 Ibid.
12 James, above n 8, 968.
13 Ibid.
within a few years the experiment at Columbia was throttled by forces intent on restoring the supremacy of legal positivism. The counterrevolutionaries claimed the production of proficient practitioners was being impeded by incorporating the social sciences into the curriculum. The Yale enterprise also collapsed under the pressure exerted by the advocates of mechanical jurisprudence who claimed that the Realists were ‘not teaching law’. As Margaret Thornton pungently expresses it: ‘Doesn’t it sound depressingly familiar?’ The view that law exists in a historical vacuum separate from socio-economic forces is an ideology, but it is one that supports concrete interests. The restoration of legal positivism at Columbia and Yale is symbolic of the capacity of the ruling elite to instil their pedagogical values into a discipline and turn these beliefs into the common sense of the epoch.

III THE POST-WAR CHALLENGE TO THE LEGAL STATUS QUO

In the period following the Second World War US academics disenchanted with the precepts of legal positivism launched a second wave of dissent. The Critical Legal Studies (CLS) movement inherited the mantle of the Legal Realists. A major theme of CLS was hostility to legal positivism. The thesis that law was a system of autonomous rules that existed in a sealed vacuum was confronted with a methodological approach that was prepared to examine the contradictions within the rule-based model. The advocates of CLS also declared that ‘law is a political product that results from the struggle of conflicting social groups.’ CLS began its life as an ideological antidote to mechanical jurisprudence but a challenge to the positivistic US law school curriculum was a natural corollary of its attack on mainstream legal thought. This was a wind of change that spread beyond the borders of the United States, and this time Australia was ripe for importation of the critical legal education model it brought. Practitioners teaching at night had been supplanted by career academics, and a welter of law schools sprang up to provide a laboratory for new ways of seeing law. In the vanguard were the University of New South Wales (UNSW) Law School, founded in 1971; the Department of Legal Studies established at

14 Thornton, above n 4, 28.
15 Thornton, above n 11, 15.
16 Ibid.
19 Ibid 5.
21 James, above n 8, 967.
La Trobe in 1972; and Macquarie Law School, which followed in 1974.\textsuperscript{22} The long boom following the Second World War was at its height, and on the policy front Keynesian social welfarism fostered different paradigms of learning, different ways of conceptualising reality.\textsuperscript{23} A class compromise between capital and labour opened up space for liberal democracy to encourage innovation on a number of fronts, and this rejuvenating spirit was cushioned by high profits.\textsuperscript{24} It looked as if the ascent of liberal legal education, based on the humane disciplines and guided by a perspective that encompassed scrutinising the inextricable relationship between politics and law, was assured of a fortuitous climate in which to prosper. Quite apart from the CLS framework of analysis, a pathway in Australia was opened to exploring law from a wealth of methodological approaches. For example, feminism and Marxism were given a shot in the arm in an era dominated by social liberalism. The horizon seemed limitless for the proponents of a critical legal education. It was a brief golden age. When the backlash came it was dressed in a familiar guise.

\textbf{A UNSW Law School}

In the wake of the Second World War Australia became a client state of the United States, and prospects of a backlash in any social sphere appeared distant as the long boom and social liberalism sparked by Keynesianism promised unbroken progress on many fronts.\textsuperscript{25} The age of Pax Britannica gave way to Pax Americana, and supervision of the Australian state by a new and dynamic global empire provided scope for fresh ways of seeing. The US political economy spearheaded an economic transformation in Australia. Its dominance was expressed by the development of large-scale firms that came to occupy the commanding heights of the economy. The economic transformation supported by social liberalism allowed US cultural and legal influences to expand their reach, and liberal legal education was provided with the oxygen it needed to flourish in Australia. A by-product of the economic boost to the legal market was the expansion of the ranks of full-time legal academics in Australia. Among these career academics some were inspired by the radicalism of the 1960s and a countercultural movement that had its genesis in the United States. The favourable cultural milieu soon found an institutional home for contrarian legal thinkers to canvass their ideas. When the UNSW Law School was formed it was given the leeway to forge a critical legal education. A number

\textsuperscript{22} Ibid 969.
\textsuperscript{23} Kelvin Rowley, ‘The Political Economy of Australia Since the War’ in John Playford and Douglas Kirsner (eds), \textit{Australian Capitalism} (Penguin, 1973) 317.
\textsuperscript{24} David Harvey, \textit{A Brief History of Neoliberalism} (Oxford University Press, 2005) 10.
\textsuperscript{25} Greg Crough and Ted Wheelwright, \textit{Australia: A Client State} (Penguin, 1982) 3.
of legal academics disenchanted with positivism and a trade school approach to law became founding staff members at UNSW. Gill Boehringer notes that a number of maverick academics ‘gladly left the deadening environment of the Sydney Law School’, where a rule-based jurisprudence prevailed, to foster a new form of legal pedagogy at UNSW.26 The opportunity to challenge the premises of legal positivism promised a stimulating intellectual climate.

Brian Kelsey was one of the academics recruited to usher in a new epoch of legal training in Australia. He noted that the UNSW project began with a commitment to providing students with a ‘wide-ranging inquiry into the law as a social and political process’.27 He stressed that, at the outset, the appointment of a Professor who was well known for his commitment to a CLS standpoint augured well for the future.28 Professor Curt Garbesi left the United States to join UNSW Law School, and he exhibited intellectual leadership by developing a remarkable common law course — a combined unit embracing tort, contract and crime.29 With Garbesi in intellectual command it must have been tempting to view the UNSW Law School as a sign of a fundamental epistemological break with the past. But events quickly dispersed any such romantic notion.

The modern law school is a reflection of the surrounding society, and the composition of its staff mirrors the contradictions of capitalism. In brief, not all the staff at UNSW were committed to CLS or other counterhegemonic legal models. This is unsurprising, given the cardinal role legal positivism plays as a legal ideology bolstering a commercial society. The allure of legal positivism is that being a component part of bourgeois ideology and a handmaiden of commodity production, it fits smoothly into a society based on promoting market values. Students who fall under the spell of legal positivism and either consciously or unconsciously absorb its capitalist spirit then move on to become academics who exhibit no qualms about instilling its central tenets in those same terms. As long as capitalist relations of production are in command, legal positivism will be a major force in law schools and unorthodox thinkers in a minority. This state of affairs applies equally to the old and the new law schools that proclaim a departure from the traditional path.

A number of academics at UNSW were traditional supporters of legal positivism or were committed to a vocational orientation to legal studies. Garbesi became a lightning rod for the expression of their ire, and his critics let their dissatisfaction be known.30

28 Ibid 125.
29 Boehringer, above n 26, 55.
30 Kelsey, above n 27, 125.
They encouraged students not to enrol in socio-legal courses and channelled them towards ‘commercial and business subjects’. In passing, it should be noted that this obviously ‘corporatist’ ploy occurred long before neoliberal politics, or a so-called ‘new knowledge economy’, became part of public discourse in Australia. The events at UNSW highlight the activist nature of some of the defenders of legal positivism. Direct action is not a monopoly of the left. Conservative conceptual ideologists went on the offensive at UNSW and aggressively defended their methodological framework. To expect gentility to prevail in academic disputes when in effect the pedagogical destiny of a department is on the line is naïve. An imbroglio of competing pedagogical philosophies is never going to generate a gentle and polite discourse. As ideological lines are drawn, the organic intellectuals of the power elite may publicly abhor conflict, bemoan the alleged dysfunctionality of the department, and preach respect for pluralism — while in practice mobilising to restore a monolithic legal conservatism.

An ideological war between the advocates of the establishment model represented by positivism and contending paradigms engulfed UNSW Law School. The CLS framework of analysis and other maverick models were able to draw succour from the existence of the social democratic political structure promoted by Keynesianism. Counterhegemonic legal models are given more oxygen when social liberalism is flourishing. But the overarching principle is that alternative teaching models wax and wane in accordance with the balance of power between those seeking to retain the status quo and those calling for change. The upshot of the contest of ideas in law is preordained. In the absence of large-scale changes in the wider polity the progressive forces will eventually experience a rollback. The forces supporting the status quo have the state, university chieftains and corporations on their team, and they are too powerful — given the dynamics of Australian society and the material interests at stake — to allow what is perceived as a radical teaching paradigm to flourish in a key ideological sphere such as law.

Kelsey’s historical narrative depicts the doomed struggle at UNSW and the ruthless nature of the campaign to decapitate those seen as the leaders of the maverick forces. Garbesi was quietly forced to resign. Emboldened, the supporters of legal conservatism began to bait their opponents. Kelsey notes that their propaganda included ‘a scare campaign … concentrated on the students to convince them their degrees and careers were on the verge of extinction.’ One teacher was even called out of class by a superior and informed that they were jeopardising the degree by offering a component

31 Ibid 124.
32 Ibid 125.
33 Ibid.
of self-assessment in a course. The rhetoric deployed against this teaching strategy was along the predictable lines that ‘if this got out to the judges it was the end of the Law School.’ The dream of a community of academics at UNSW pursuing a progressive legal program was terminated by the mid-1970s. The UNSW Law School retreated into being a positivistic carbon copy of Sydney University. A few maverick thinkers survived at UNSW, but lacking an institutional framework to promote their cause they were reduced to token rebels. The battle over legal pedagogy shifted elsewhere as the UNSW experiment collapsed.

B Department of Legal Studies at La Trobe University

Starting in 1972 at La Trobe University in Victoria, a Department of Legal Studies was formed. It was an adjunct of the Faculty of Social Sciences. It taught legal studies subjects, but these did not ‘satisfy the educational prerequisites for admission to the practice of law’. For twenty years it offered courses to Arts students and was free of the oversight of an admissions board charged with monitoring the curriculum. It was a boutique body separate from the profession and thus a zone of unhampered self-regulation. Thus it met no resistance in integrating the social sciences into the study of law. When Margaret Thornton moved from Macquarie Law School to a chair in Legal Studies at La Trobe in 1989 she did so knowing a fully-fledged law school was on the cards. She was optimistic about the vision of an innovative LLB program being implemented at La Trobe. A stable of socio-legal scholars was already employed at La Trobe, so staffing the new law school was not an issue. A seamless transition was mooted.

Thornton’s confidence in the future was misplaced. She notes that roadblocks began to appear even before the offering of a law degree at La Trobe began in 1992. A plan to spend a year developing an innovative curriculum prior to the first intake of students was rejected by the university administration. This led to the adoption of curricula from other law schools, and even at its birth La Trobe had the appearance of borrowing second-hand clothes rather than daring to be different.

34 Ibid.
35 James, above n 8, 969.
36 Thornton, above n 11, 6.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid 8.
41 Ibid 6.
By the time it took its first law students, the idealism that had spurred the opening of a law school at La Trobe was already being eviscerated. Thornton provides a list of woes. To placate the admitting authorities an assurance was given ‘that the social was not going to overshadow doctrine; the core curriculum was devised along conventional lines.’\textsuperscript{42} When extra appointments were made, the La Trobe hierarchy employed legal positivists who would teach the commercially oriented core subjects in line with what the admitting authorities desired.\textsuperscript{43} Yet again history repeated the refrain of the legal profession and its corporate allies calling the shots in crucial pedagogical areas. Then, in a move that was paralleled at Macquarie Law School, a restructuring exercise occurred. Thornton correctly terms the restructuring strategy a quintessential example of the corporatised university.\textsuperscript{44} The fledgling School of Law was taken out of the Social Sciences fold and placed in a cluster that included Economics and Business.\textsuperscript{45} A Faculty of Law and Management was established.\textsuperscript{46} For Thornton, the new faculty was designed to ensure that ‘law was expected to facilitate business rather than critique it. The general characterisation of law and legal studies as a social science was rejected altogether.’\textsuperscript{47} Then the elective courses were whittled down by reducing the interdisciplinary offerings or replacing them completely with doctrinal units. The message coming from management was unambiguous. One academic summed up the pedagogical trend by noting: ‘Law electives had to be generalist, dull and doctrinally orientated. The more black letter the better.’\textsuperscript{48}

In 1999 the coda to the long decline of La Trobe was played out. A report was commissioned by management under the pretext that the trajectory of the law school in the new century needed mapping out. Raoul Mortley, formerly a Vice-Chancellor from Bond University and academic at Macquarie University, was recruited to write the report.\textsuperscript{49} Mortley’s role as an ex-Vice Chancellor was paraded as the basis of the managerial skills required to conduct a review of the Faculty of Law and Management.\textsuperscript{50} The background to the commissioning of the report was the liquidation of socio-legal scholarship at Macquarie in 1998. (That history is detailed below.) The winds of change were favouring legal conservatism. The La Trobe review, as it related to the law school, comprised just four pages. Its presuppositions were apparent from the types

\begin{itemize}
\item \textsuperscript{42} Ibid 9.
\item \textsuperscript{43} Ibid.
\item \textsuperscript{44} Ibid.
\item \textsuperscript{45} Ibid 10.
\item \textsuperscript{46} Ibid 10.
\item \textsuperscript{47} Ibid.
\item \textsuperscript{48} Ibid.
\item \textsuperscript{49} Ibid 11.
\item \textsuperscript{50} Ibid.
\end{itemize}
of sources employed to support its findings. The report noted that the office holders in the student law society declared the La Trobe program ‘needed to imitate its neighbours, rather than accentuate its distinctiveness’. This sort of comment was completely in keeping with the ethos expected from such an organisation, predicated as it is on building close links with large corporate law firms. The students who enrol in such a body are renowned for their ultra-conservative conception of law and their ambitious desire to join corporate firms when they graduate. Giving any credit to the viewpoint of a student body of this type regarding the destiny of an innovative law school is baffling. Putting an emphasis on their contribution is only explicable if there was a preconceived desire to utilise any evidence that favoured corporatising the law program. Unsurprisingly, the report recommended ‘the rejection of the social in favour of applied commercial knowledge as the appropriate direction for the School of Law and Legal Studies.’

After eight years, the socio-legal framework at La Trobe law school was dismantled. The administration had no qualms about fully implementing the recommendation of the report. The socio-legal scholars at La Trobe were pressured to leave. Those who resisted were targeted as being incompatible with vocational methods of teaching and forced out by involuntary redundancies. Those who survived bowed before management in order to keep their jobs. Thornton labels them as ‘progressive colleagues’ but describes her surprise as they went along with the sackings and the philosophical transformation of the La Trobe law school executed by management.

This phenomenon had occurred at Macquarie when the long delayed siege at that institution was waged. Liberal individualism and moral cowardice made the restructuring role of La Trobe and Macquarie management easier. Timorous academics fell in line with the corporate managers who wanted a curriculum based on professional practice. On a bizarre note, Thornton was herself ordered to relocate to the Spanish department at La Trobe. Again the historical example of Macquarie was deployed by La Trobe management; at Macquarie the dissidents had been relocated to a different building. The upshot was that Thornton left La Trobe. Management was delighted: she was the best known liberal feminist there. The teaching staff at La Trobe was then replenished by recruitment of legal conservatives. One of those recruited noted that

51 Ibid.
52 Ibid.
54 Ibid.
55 Ibid 14.
’the head of the law school had sought to hire him as he was keen to clean out the feminists’. 56

C Macquarie Law School

Macquarie Law School was founded in 1974. It took its first intake of students in 1975. Its two founding professors, Peter Nygh and John Peden, spent 1974 drafting the curriculum model that would be implemented at Macquarie.57 Peden was in essence a traditional academic lawyer. In 1972 he had written a booklet spelling out his view of legal education. He noted that the primary aim of a law school was to instil the requisite skills and training to undertake legal practice.58 He was only prepared to slightly modify his positivistic standpoint by accepting a role for policy considerations.59 Stripped of its genuflection to the role of law in society, Peden viewed a law school as a vehicle for training students in the mechanics of legal practice. His was an epistemology firmly anchored in the axioms of legal positivism. Nygh was at first blush a more progressive spirit than Peden. He approached the curriculum task on the basis ‘that law could be best understood through an intellectual examination of it as a social phenomenon’.60 In sum, Nygh and Peden exhibited an assorted mixture of views. Just what sort of law school would evolve from their ruminations was an open question. The calibre of staff enlisted at Macquarie would be of seminal importance in deciding its trajectory.

The early appointment of two CLS scholars who hailed from North America was a watershed event. Like Garbesi at UNSW, they opened up the prospect, at Macquarie, of a definitive break with vocational courses and the inception of a legal education in which the best values of liberalism would drive the curriculum. Would they suffer Garbesi’s ignominious fate? This worry was to cast an omnipresent shadow over Macquarie. From the outset of their appointment, Gill Boehringer and Drew Fraser were the driving force behind the attempt to create a critical legal education at Macquarie. For over two decades, in tandem with a handful of colleagues, they struggled to achieve their vision. They were not revolutionaries. They were pragmatists who understood that in the age of capital a truly liberal arts education was the highest peak of achievement attainable. This pedagogy was summed up by Boehringer and Fraser as constituting ‘such values as free enquiry, intellectual … independence of thought and breadth of perspective … and love of

58 Ibid 21.
59 Ibid.
60 Ibid 23.
In effect, at Macquarie, virtues associated with support for a citizen-based democracy were set as a guiding principle. In the wider society during the heyday of Macquarie, economic doctrines came and went while the Boehringer and Fraser group ploughed on regardless, inculcating a spirit that ensured teachers and students engaged in a ‘joint adventure of ideas’. It would be wrong to cast Boehringer and Fraser in a hagiographic light, but the empirical evidence supports the view that they spearheaded the drive to integrate law and the humanities at Macquarie while narrowing the province of legal positivism.

Boehringer and Fraser were blessed with some success, but in 1998 they were comprehensively routed. Within a short space of time everything they built had been extinguished. Macquarie was transformed into a vocation-oriented law school, and this became its trademark with the ideological content of the curriculum experiencing a sharp shift to legal conservatism. The classroom became a location for focusing on instrumental skills. Time was soaked up by solving legal problems that treated facts as discrete entities sapped of their social component. An ambience was created that ensured decontextualised issues became the centrepiece of study. With the spotlight on practical problems, theoretical ambition nosedived. Macquarie lost its pedagogical edge and reforming zeal. It eschewed the vision that law was a component part of the humanities. It sidelined the idea that mastery of doctrinal structure had to be balanced by an interrogation of the economic, political and historical context of judicial decisions. The corporate managerial elite led by Di Yerbury, the long running Vice-Chancellor, was happy about the sequence of events. Yerbury and her clique were now free to inform the legal establishment that Macquarie was concentrating on inculcating the applied skills and commercial knowledge necessary for its students to undertake legal practice. Legal positivism ruled supreme. As the critical legal education model was quashed, a tranquil mood descended on Macquarie Law School. In a short space of time it became a pale copy of its mechanistic peers. A peaceful desert underpinned by a trade school mentality was created. A number of key administrative figures were appointed by management to leadership roles in the law school. They exhibited no reluctance in doing management’s bidding.

The defeat of the Boehringer and Fraser group was much more than a personal tragedy. It symbolised the death of the ancient ideal of universities. The image of a university endowed with a decentralised form of governance comprising a community of equal


scholars perished at Macquarie Law School. The range of forces that pulled Boehringer, Fraser and their supporters down were not purely economic. The tragedy is that from the inception of the Macquarie Law School, Boehringer and Fraser foresaw the social forces that would destroy their educational and governance project. In 1977 Fraser was warning that if an oligarchical power structure which had Nygh and Peden as its figureheads remained immune to change there would be a ‘crushing of the hope that the School of Law might play a significant role in the development of an autonomous tradition of critical legal scholarship and teaching.’ Fraser began to experience scepticism that a ‘dialogue among equals’ was in operation, and insisted that without a spirit of egalitarianism there was no hope of achieving a scholarly syllabus at Macquarie, given the growing anti-democratic proclivities of Nygh and Peden. Fraser pointed out the dire events at UNSW and the implications for the mode of legal education at Macquarie, given its democratic deficit. Without what Fraser termed ‘collective resistance’, the future would be one where ‘the ideal of a progressive law school at Macquarie can never hope to become more than a well-intentioned cliché.’

Neither Boehringer nor Fraser was imbued with prophetic powers. What they did understand was that based on historical precedent, there was only a slim chance of pulling off a victory over the dominant teaching model that favoured professional legal training. And to secure lasting educational success, the ethos within the law school would need to be transformed by a flowering of internal democracy. A strong united front drawing together those who wanted to teach in a different way and those unwilling to follow a path charted by corporate managers would need to be built. That objective was to prove an elusive one.

In retrospect, 1977 was a crucial year at Macquarie Law School. In the previous two years there had been some positive steps taken towards the creation of a challenging legal education. Of prime importance was the early delegation of course design to groups of teachers. Drafts would then be ‘submitted to the entire academic staff for discussion and general agreement’. This was self-government of a community of equal scholars in practice. But such steps proved unpalatable to orthodox minds bent on closing down open and democratic forms of governance. Rifts started to widen, and two schools of pedagogy and governance began to collide. One group was led by Nygh and Peden, the other by Boehringer and Fraser. It

64 Ibid 47.
65 Ibid.
66 Ibid 63.
67 Ibid.
68 Ibid 47.
was a dispute that was not resolved until the events of 1998 put the issue beyond doubt.

In 1977 the law school was in the grip of a battle between two competing ideals. The Boehringer and Fraser camp were calling for a decentralised and collegial form of governance that emphasised political equality. They wanted open forums for discussing matters such as the role staff should play in selecting new recruits. Boehringer and Fraser were not interested in bringing on board those who simply aped their views. They wanted appointments to reflect ‘readily discernible or coherent standards of academic excellence and scholarly achievement’. Obviously the hope was that whatever the philosophical persuasion of future recruits, the overarching factor was that new blood, whether of the right or left, would have the intellectual horsepower to engage with big ideas and facilitate an uplifting classroom experience. In recruitment, as in every other sphere of governance, what mattered to Boehringer and Fraser was crystal clear. They steadfastly promoted the view that without a community of scholars busily engaged on discussing a medley of methodologies that promoted spirited intellectual enquiry, there could be no coherent academic program.

While Boehringer and Fraser were promulgating the adoption of a classic view of a liberal arts law degree, the Nygh and Peden group were inextricably linking the issue of authority with the primacy of legal positivism. In a memorandum to the law school in July 1977, Nygh noted the mandate he had from the University Council and the Supreme Court of New South Wales to ‘create a course of professional training’. Fraser picked up on Nygh’s intellectual blind spot. He accused him of backtracking from his earlier idealistic protestations issued at the time of the founding of the law school. At that juncture, Nygh had noted that Macquarie should follow ‘a socially aware alternative approach to legal education’. Fraser accused Nygh of ditching his proclaimed progressive credentials. According to Fraser, what was occurring was the bypassing of collegial decision-making processes and acceptance, as an article of faith, of the nostrums of legal positivism. Authoritarian rule had supplanted the self-governing aspirations of a community of scholars bound together by an egalitarian code. Nygh had broken ranks and was seeking to further the aims of a ‘patrician elite composed of

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69 Ibid 45.
70 Ibid 49.
71 Ibid.
72 Boehringer, above n 26, 54.
73 Ibid 54.
75 Fraser, above n 63, 48.
76 Ibid.
senior members of the Professoriate, the legal profession and the judiciary'. Nygh was acting as the spokesman for the power elite that believed it ‘possessed the authority to prescribe the intellectual parameters of a professional legal education’.

It was in 1977 that the need for an infusion of new staff to teach the final two years of the law degree program was recognised. For Nygh and Peden this represented a fortuitous opportunity to dilute the legitimacy of the CLS position Boehringer and Fraser held while delivering a blow to their calls for collegial decision-making. For Nygh and Peden, the recruitment drive at Macquarie was part of an ‘extended campaign to transform the character of legal education’. At the same time as watering down the influence of Boehringer and Fraser, the space for other theoretical frameworks apart from CLS to emerge at Macquarie would be crushed. For Nygh and Peden the way forward for a law school was to recruit ‘more black letter law teachers to provide students with the appropriate professional orientation in their law studies.

As those staff members barracking for students to be drilled in the positivist rules and concepts that they took to be the skeletal structure of law mobilised, Fraser issued a withering critique of the epistemological flaws in their argument. In a discussion paper he noted the debasement of practice implicit in the positivists’ case. This struck at the heart of the intellectual rationale for positivism. After all, the case for instilling in students a rule-based education was founded on the belief that it provided the practical tools necessary for legal practice. It provided a system of rules that had practical significance in the real world. If this craft rationale was based on unexamined assumptions that were false, it struck a blow at the pedagogical foundations of positivism. It reduced the study of law to an ideological enterprise that perpetuated misguided premises and inequalities. Fraser expressed the view that a priori knowledge in the shape of mechanically applied rules was guaranteed to produce unsatisfactory results. By manipulating rules bereft of a reasoning process that took account of a complex social universe imbued with contending values and interests, jurists could only achieve irrational and impractical outcomes. In other words, judicial decision making

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77 Ibid.
78 Ibid.
79 Boehringer, above n 26, 54.
80 Fraser, above n 63, 52.
82 Boehringer, above n 26, 54.
84 Ibid 67.
85 Ibid 68.
of a positivist persuasion was premised on operating in a social vacuum, and the upshot was an instrumental view of law that failed to serve justice. Only by imbuing the judicial process with a holistic understanding of the social nature of the facts in dispute could a prudent and empirically supported practical decision be achieved. Implicit in Fraser’s critique of the dogmatic nature of positivism was the view that a legal education guided by the humanities would result in a qualitative rise in the calibre of legal reasoning that would translate into superior judicial judgments.

Fraser’s opponents were not interested in countering him on an intellectual plane. Their utilitarian training had not equipped them to engage in socio-legal analysis. They spurned a contest based on contending concepts and philosophies. They were craftspeople who had never attuned their minds to thinking of law as a political product that reproduced hierarchies and domination. They also turned a deaf ear to Fraser’s critique because they realised that raw power was on their side and that the respective calibre of arguments would not be the cardinal factor in determining the fate of Macquarie Law School. Their mantra that a model of rules was the functional imperative for professional legal practice was relentless and immune to logic. It was a campaign that was given fresh impetus by Nygh and Peden successfully hiring a batch of legal positivists in 1977.

By 1979, Peden was confidently repeating the refrain that the courses at Macquarie were established to satisfy the admission requirements that were supervised by the Supreme Court. He stated that the approval of the Court for courses that satisfied admission purposes was what drove many students to enrol at Macquarie and that ‘we owe a duty to present and future generations of students to ensure that our degrees are accepted by employers as meeting their standards.’

This pragmatic approach, with its emphasis on serving the practical considerations of a corporate hierarchy, was reinforced by one of Nygh and Peden’s new legal conservative recruits: in 1979 Andrew Lang stressed that the aim of a legal education was to ensure students acquired a ‘firm grasp of basic legal principles’.

By 1985 a balance of power had been struck between the warring sides at Macquarie. It was, like all truces, an unstable arrangement, and it was destined not to endure. In 1985 a report into the state of Australian legal education was commissioned. The Pearce Report

86 Ibid.
88 Ibid 81.
89 Andrew Lang, ‘Should the School of Law Have a Philosophy? Andrew Lang, August 1979’ (1988–89) 5 Australian Journal of Law and Society 79.
90 James, above n 8, 973.
was released in 1987 and it had an ambivalent message.\textsuperscript{91} It spoke of the need to promote a law degree that contained a sociological and liberal component.\textsuperscript{92} However, the Report also recommended the closure of Macquarie’s law program.\textsuperscript{93} The Report accepted the persistent allegations from the legal establishment that focused on the supposed lack of ‘solid legal substance’ in the teaching program at Macquarie.\textsuperscript{94} Supporters of the CLS movement at Macquarie were regarded as scarecrow figures and impugned for impeding the training of legal practitioners.\textsuperscript{95} Ironically the Report, with its nod towards the benefits of an interdisciplinary and contextualist legal education, bore witness to the fact that a return to unbridled legal positivism was not feasible. The historical endeavours of the pioneering figures at Australian law schools had been partially exonerated. Thornton neatly sums up the underlying dynamic of the Pearce Report when she wryly observes that ‘doctrine, it seemed, must remain at the centre regardless of what else was going on.’\textsuperscript{96} Any move towards a genuine critical legal approach or steps beyond the merely tokenistic would be met by stiff resistance from the legal establishment.

Macquarie survived the closure fears sparked by the Pearce Report. In 1988 Boehringer admitted rather ruefully that the debate over the destiny of Macquarie Law School had been going on for more than a decade.\textsuperscript{97} It was to go on for a further decade before the finale was played out. In 1989 Lang was still continuing with the theme that he and his confreres helped sow with the members of the Pearce Committee. Lang asserted that a law school containing CLS proponents would make students unemployable because they had prioritised the sociological at the expense of the coverage of rules necessary for professional legal practice.\textsuperscript{98} Evolution then took its course, and by the early 1990s Nygh, Peden and Lang had departed from Macquarie. Boehringer became Head of the Law School, but his elevation was set against a backdrop of a traditionalist majority that continued with their doctrinal teaching practices at Macquarie. Fresh appointments were made including some who enthusiastically supported the ancient ideal of a community of scholars. These new staff members understood the need for students to possess technical competency but also relished the prospect of aiding a flourishing critical legal scholarship guided by the need to create within every course a rigorous strand of conceptual thinking. These new recruits

\textsuperscript{91} Margaret Thornton, \textit{Privatizing the Public University: The Case of Law} (Routledge, 2011) 62.
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{95} James, above n 8, 974.
\textsuperscript{96} Thornton, above n 91, 62.
\textsuperscript{97} Boehringer, above n 26, 53.
\textsuperscript{98} James, above n 8, 972.
understood that it was possible for law to be taught in a way that made it a progressive force.

I was one of the new recruits who sought to entrench a different way of viewing governance and the legal syllabus at Macquarie. I joined those who were catholic in the range of epistemologies they acknowledged but were united in a passionate commitment to socio-legal scholarship as part of every course. This entailed teaching the rules, but putting them in historical and social context. I quickly realised that implementing a holistic legal program faced stiff resistance. The upper echelons of the university administration regarded Boehringer and Fraser as a thorn in their side. They had always supported the kinds of views expressed by Nygh and Peden and were bent on realising the aims of a style of legal education based on applied knowledge. The overwhelming majority of staff, old and new, had a vision that only stretched as far as their own courses required. As liberal individualists they wanted to be left alone to pursue their own predilections, and any talk of a collective mission was met with claims about ‘totalising theories’, while increasingly the old chestnut about a dysfunctional law school began to recirculate. Pejorative language of this type was a boon for management and it signified that a day of reckoning was looming. In fact it was a singular theory that had operated from the inception of the law degree at Macquarie. The theory that bound the mavericks together was one of providing scope for refreshing ideas, free enquiry and the creation of a coherent legal program that provided a curriculum that was not simply ideological training for entering the service of the power elite. As the always fragile unity in a common cause frayed, a fragmented and loose coalition of forces lacking a unified purpose emerged. This presented a ripening opportunity for managerial prerogatives to play a decisive role. Instead of acting as an honest broker and striving to ameliorate differences, the administration played a partisan role. It threw its support behind the forces that railed at any notion of a community of scholars bound together by allegiance to a curriculum that challenged a market based model. Management encouraged schisms and created a climate conducive to a showdown that would produce a revamp of the law school.

When in 1998 a restructuring proposal was engineered by Di Yerbury and her circle of advisers — one that entailed shifting a group of Business Law academics into the Law School — the hierarchy quickly grasped the splintered nature of the forces that confronted them. Only one group in the Law School was vociferous about the reactionary nature of the proposed amalgamation. Management were confronted by the Boehringer and Fraser group declaring against the strategy, which they claimed was a corporatist plan to reclaim territory lost by legal positivism, and a scheme designed to appeal to the ultra-conservatives in the legal establishment which had always
excoriated the Macquarie experiment. Management were not coy about stating that its restructuring plans were supported by judges and legal firms they had consulted. The Boehringer and Fraser group were alone in asking what justifiable synergies existed between business aims and the study of law. This group also sought an academic rationale for merging a group of business academics intent on teaching the law as a system of rules with a school that was at least nominally committed to a liberal arts orientation in legal education. Business Law had been based in the Economic and Financial Studies department and its students were made up of finance students seeking to top up their studies with corporate law subjects that prepared them for entry into the accountancy profession. None of the Business Law academics questioned their adherence to the ethos of legal positivism. The Business Law academics had not initiated the merger. They were content to stay under the umbrella of the Economics department. It was a management strategy led by Yerbury and her disciples. The underlying aim was to further dilute the role within the Law School of those responsible for the development of a critical legal education at Macquarie. It was payback for years of being confronted by those who battled for an autonomous law degree free of deference to the power elite. It was a ploy to appease those who wanted a legal system and functionaries obedient to a corporatist agenda. And it was a strategy that worked. The Boehringer and Fraser group was isolated, and cognisance was quickly taken of the fact that it was just one of a number of competing groups in the law school. There was no impetus for collective action to block the restructuring plan, and the bulk of law staff either acquiesced or joined forces with management.

Management acted swiftly to settle accounts with the sole dissident group in the Law School. They provided an object lesson in the machinations of the corporate managerial elite that wields power in the modern Australian university. Working in tandem with a cohort of malleable academics within the Law School, a plan was devised that involved not only physically relocating the mavericks but setting up a special department designed to house them. The collaborators included those who identified as postmodernists. They may have regarded themselves as progressives, but by their actions they revealed that they were prepared to execute managerial policies. They comprised a component part of the liberal individualists who had never displayed any interest in creating a critical legal scholarship program that embraced the whole of the Law School. Likewise they had never challenged the legitimacy of management to set the parameters of governance. Guided by a linguistic based philosophy and a doctrine of political individualism these academics

were well suited to entrenching managerial prerogatives. Acting in concert with management, the collaborators formulated a plan that linked exile with a scheme to take courses away from the Boehringer and Fraser group and hand them over to orthodox academics already on the staff, or to pliant recruits ready to fill the shoes of those being involuntarily hived off from the Law School.

The dissidents were left with a meagre number of elective courses to teach. The word soon spread that undertaking courses with those housed outside the law building was a risky venture. The implicit message was that any such courses would not satisfy admission authorities. A voluntary redundancy program was launched with the aim of winnowing the Boehringer and Fraser group. It worked, and the ranks of the exiles shrunk. The rump that was left had to confront the sober fact that no matter how long they clung on to their employment, any prospect of career progression vanished. The viciousness exhibited by the administration and their academic acolytes elicited a backlash from two academics. These two had stood aloof from the struggle against the amalgamation with Business Law, but they refused to partake in the ostracism of colleagues that followed the partition of the Law School. They were disenchanted with the new order and were sufficiently outraged to write an article about the dying of the Law School. Shortly after leaving Macquarie, John Touchie and Scott Veitch wrote their article against the backdrop of the expulsion of the Boehringer and Fraser group. The article is a scathing critique of the administrators and the personality traits of their academic collaborators within the Law School. With polemical passion they note the conceptual poverty that underpinned the setting up of discrete departments within the shell of a refashioned Law School. They grasped that this was a move to camouflage the moral infamy of locating the exiles in a sham department. In brief, the creation of multiple departments was designed to sanitise the fact that one department was treated as an outcast. They illuminated the simple fact that the restructure had no pedagogical basis. It was driven by malice towards the dissidents, and apart from reinforcing their isolation it was simply a mechanism to put people together who felt comfortable and secure in each other’s company.

Touchie and Veitch were clear in expressing the view that none of the rationale for basing departments on proper and justifiable academic divisions occurred. The exercise was aimed purely at achieving personal preference for the insiders who had given unbridled support to management, and discriminated against the Boehringer and Fraser group by engineering a pretext to

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101 Ibid 28.
institutionally isolate them and take courses away from them, thus confirming their pariah status.\textsuperscript{103} Touchie and Veitch accused their former colleagues in the Law School of acting in bad faith and being a tool of Yerbury and her supporters. They alleged that all of those who lined up on the side of management were guilty of intellectual and moral cowardice.\textsuperscript{104}

Looking back, Thornton derives an important point from her travails at La Trobe. She notes that any ‘attempt to do more than make a tokenistic gesture in the direction of law and society meets with resistance.’\textsuperscript{105} In other words, a robust counteroffensive will be launched by a powerful constellation of forces against those who set out to confront the axioms of the dominant legal pedagogy. The decapitation of the La Trobe, UNSW and Macquarie experiments provides cogent evidence that the university guardians of the power elite will not remain neutral and passive when the ideological content of a law school curriculum is being challenged by ardent reformists.

IV THE TURNING BACK OF THE CLOCK

Psychological traits played a role in the demise of the attempt to forge new pathways of legal education in Australia. Those who cooperated with management to discard academics promoting a critical legal education model were complicit in securing the rule of the power elite and positivism. They were not insignificant players in the drama that unfolded at UNSW, La Trobe and Macquarie. But deeper forces than human psychology were at work in ensuring the obliteration of any institutional structures that gave succour to those challenging the dominion of applied commercial knowledge at law schools. This part of the article illuminates the key factors that curbed the rise of ground-breaking law schools.

Thornton has enumerated the issues that ensured the demise of socio-legal forms of teaching law. She notes that the doctrine of neoliberalism and a new knowledge economy are responsible for the unbridled rule of mechanical jurisprudence.\textsuperscript{106} According to Thornton, the critical legal studies movement that began to flourish in Australia in the 1970s was felled by the economic doctrines of Hayek and Friedman, which began to garner influential political support in Australia during the 1980s. Belief in unchallenged property rights and free markets combined with the technocratic requirements of a system that seeks facilitative legal rules shrugged off a challenge to the stranglehold of legal positivism.\textsuperscript{107}

\textsuperscript{103} Ibid 27.
\textsuperscript{104} Ibid 28.
\textsuperscript{105} Thornton, above n 11, 15.
\textsuperscript{107} Thornton, above n 91, 5, 8.
Thornton’s is an incomplete insight. It omits the historical pattern at work both in Australia and overseas that resulted in the dethroning of a number of ventures aimed at transforming legal education. Over the years, several projects foundered due to vested interests killing off methodological frameworks that challenged the supremacy of legal positivism. The eclipse of the Columbia and Yale legal education model in the interwar years pinpoints the misguided perspective of Thornton. Long before the advent of the ideology of neoliberalism, an attempt at revamping legal education had come to grief. Moreover, the way the UNSW project was crushed at the highpoint of Keynesianism is another empirical retort to Thornton’s assumption that the rise of neoliberalism and a new knowledge economy spearheaded the eclipse of critical legal education. Another challenge to Thornton’s framework of analysis is that no radical shift in economic doctrine or ideology provided the catalyst for the victory of legal conservatism at Macquarie. Thornton even undercuts her own thesis by noting that in 1970, well before the arrival of neoliberal politics, the great English historian E P Thompson was inveighing against the combined power of local industrialists and university administrators at Warwick University who were busy imbuing its academic program and operations with corporate capitalist values.108

What occurred on the legal educational front is more plausibly explained by seeing it through the prism of the long-term growth of corporate power. Legal positivism went on the retreat for short bursts of time, then an inevitable blowback was experienced as mechanical jurisprudence reasserted its dominance. Its victory was aided and abetted by the evolution of corporate firms and their allies in the legal profession and the administrative hierarchy within universities. Political power in the age of corporate capitalism snuffed out Legal Realism, and since then every reforming mission has fallen victim to the same combination of elite forces. Put simply, those who championed legal positivism had power on their side.

Legal positivism legitimates the sovereignty of capital. Neoliberalism, with its elixir of deregulated markets and unfettered corporate power, is simply the latest stage in an accumulation of capital process that has reached a tipping point where monopolisation has created giant firms.109 The rise of oligopolistic corporations preceded neoliberalism. An ostensibly depoliticised legal framework that underpins a commodity economy is just as necessary in contemporary oligopolistic market conditions as it was in the era of nineteenth-century free market economics. The vaunted apolitical nature of legal positivism assists its ideological role of reinforcing the property rights owned by the economic elite. Its ideological

function is the keystone for the longevity of legal positivism. This conservative legal philosophy has shored up the economic foundations of private property and a commodity-based economy through all the phases of capitalism. As a legal model it has been durable because it provides a powerful ideology that supports the buying and selling of commodities, and it operates as a bulwark for commercial society. In effect, legal positivism is concentrated economics. Economic power is the foundation upon which legal positivism rests. In a true sense those who have an alternative understanding of law and legal education are at the same time implicitly or explicitly critics of the extant property relationships, and must expect to draw fire from legal academics who owe their allegiance to positivism and the power elite that underwrite its hegemony.

Corporate capitalism expanded its reach throughout the twentieth century and its monopolising tendencies narrowed the scope of democracy in every field.¹¹⁰ Universities are too important to the corporate capitalist system to be left as islands of self-governance. Thus it is not surprising that in the course of the twentieth century there was a growing trend of interventionism in the internal operation of places of higher learning. As corporate capitalism expanded its reach into every sphere of life, there was a struggle between those who viewed universities as a domain of freedom of thought and corporatist interests which desired a learning institute that instilled mechanistic skills in trade school disciplines. Neoliberalism accentuated the move to a corporate model in universities. But the roots of the drive to make universities a form of business enterprise stretch back into the history of the system and the logic of a social formation that has undergone waves of development.

If neoliberalism was not the catalyst that Thornton posits, then it can be cogently argued that the so-called new knowledge economy was also not instrumental in executing a reconfiguration of the legal syllabus. To begin with, the economic structure underwent no fundamental transformation that sparked the need for a boost in the mechanistic skills of trainee lawyers. Under modern capitalism, legal positivism has been an effective instrument of the economic status quo. It is a protected species, and whenever its authority has been put to the test there has been a putsch to restore the status quo.

Deep structural corporate forces operating after the Second World War provided an impetus to legal positivism. While the post-war years provided the Keynesian trigger for socio-legal studies to be given a new lease of life, it also ironically provided the material circumstances that would eventually restore legal positivism to its commanding role. Weisbrot has illustrated how large corporate law firms began to emerge in Australia in the post-war period in

response to the rapid expansion of multinational companies.\textsuperscript{111} From the outset the corporate law firms focused on the commercial work that facilitates the needs of capital and the takeover of the Australian economy by foreign multinationals.\textsuperscript{112} These legal firms are adjuncts of capital and they run lean businesses, for they are well aware that their rich clients talk among themselves about where to get the best deal, and they will move their account if over-servicing occurs and bills are too high.\textsuperscript{113} Viewed within this historical context, it was post-war multinational capital, not neoliberal orthodoxy, that turned lawyers into knowledge workers. The big corporate law firms spurred the movement to make lawyers knowledge workers who spent their days facilitating market exchanges by ‘preparing contracts for billion-dollar takeovers, mergers and acquisitions, as well as negotiating cross-border conflicts and protecting intellectual property.’\textsuperscript{114} Given that legal positivism provided the bedrock knowledge that was applied in the corporate law firms, the captains of these enterprises had a vested interest in not promoting a form of teaching that proffered a challenge to the commercial forces that the legal system is devoted to serving.

It is a mistaken assumption on Thornton’s part to believe that a nebulous concept such as a new knowledge economy stifled the prospect of long-term success for the critical legal education movement. Both in the UK and in Australia studies have shown that new technology is not creating a knowledge-driven economy that is transforming jobs in the service industry. The delivery of legal services is not being revolutionised by communications technology. In fact the bottom end of the market is responding to technological forces. Job growth in the UK is focused on the ‘low-skilled end of the service sector—in shops, bars, hotels domestic service and in nursing and care homes’.\textsuperscript{115} In the Australian context a similar picture emerges. Using data from the Australian Bureau of Statistics, a team of researchers demonstrated that in the contemporary era there was a decline in high-skilled jobs and a rise in low-skilled employment.\textsuperscript{116} The major source of this deskilling was information technology. It was creating low-grade jobs with minimal autonomy and job discretion.\textsuperscript{117} Even in professional occupational groups there was a trend towards a lowering of the skills required to execute

\textsuperscript{111} David Weisbrot, \textit{Australian Lawyers} (Longman Cheshire, 1990) 258.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid 259.
\textsuperscript{114} Thornton, above n 91, 27.
\textsuperscript{115} Larry Elliott and Dan Atkinson, \textit{Fantasy Island: Waking Up to the Incredible Political and Social Illusions of the Blair Legacy} (Constable, 2007) 79.
\textsuperscript{117} Ibid.
In large law firms there is an advanced division of labour; individual lawyers are responsible for only a component part of a brief. This compartmentalisation of the work is designed to maximise productivity, but it reduces the range of skills required by lawyers.

The contradictions of liberalism have also played a role in unravelling projects aimed at revamping the foundations of legal education. The philosophy of liberalism is shot through with contradictions. While praising human rights, democracy, reason, tolerance, diversity and scepticism, the emergence of concentrated economic power undercut the liberal goal of maximising the free play of the mind. The attempt to make liberalism live up to the better angels of its tradition has been undermined by the rise of giant corporations. Within the legal academy, encouraging the intellectual qualities necessary to challenge the status quo in the name of human welfare and autonomous thought is made more difficult by the hegemony of towering corporations that rule in the private sphere and seek to set the agenda of public policy. Corporate managerialism has facilitated the submission of individuals to market forces and put pressure on the Enlightenment values of justice, equality and informed rationality. The elements that constitute a liberal legal education are put under enormous strain by the authoritarianism of corporate Australia along with a legal profession, and a bureaucratic elite within universities, that serve commercial imperatives. The pervasive individualism of liberalism also undercuts its positive traits. The academics aligning themselves with management for careerist and opportunistic reasons vividly illustrate the downside of liberalism and magnify the forces opposed to its finer humanistic tradition.

V Conclusion

In a sense this article has traced a tragedy. It has spelt out the collapse of numerous attempts to create new and modern law schools. It has tracked the shattering of optimism that occurs when an ancient institution begins to die. Universities are part of the civilising chain of Western civilisation. They emerged to give voice to the humane arts and act as a focal point for a critique of society. They were not established to be trade school institutions that instilled mechanistic skills and were governed by an oligarchy. If universities are to be reduced to appendages of corporations and the state, then it would be better to let them die and be replaced with apprenticeship institutes governed by the business elite. Once the humanities are divorced from a discipline and a university betrays its classical mission to instil intellectual values, it is on the path to becoming an instrument of a corporate managerial elite.

118 Ibid.
In the case of the study of law, the transition to corporatisation is complete. As this article has highlighted, during the twentieth century the drift towards law schools becoming an instrument of a corporate elite and state was challenged a number of times. The possibility of a competing ideology and revamped law school curricula surfaced. These contrarian models were based on the ancient concept of universities. Law was to be taught as a component part of the liberal arts. This humanities-based pedagogy was to be underpinned by a collegial form of governance based on the equality of a community of scholars. In Australia this methodological framework was defeated by the selfish aims of those who were blind to the ethos of the ancient university and instead worked hand in glove with the power elite to corporatise higher education. This article has pinpointed the array of factors that strangled the flourishing of an alternative legal education. The causal chain responsible for stifling the emergence of a new model for teaching law is not straightforward.

It is one of the bitter ironies of history that the class that held aloft the banner of individual freedom while emancipating humanity from serfdom has retreated from implementing a legal education based on liberal humanism. Concentrated economic power is regarded with suspicion by liberals, for it undermines the liberty of the individual. Yet modern capitalism is based on oligopolies or monopolies, and reconciling that reality with classical liberalism has proved impossible. Contemporary powerbrokers feel threatened by a liberal credo that prioritises equality, free enquiry, love of truth and independent thought. Of greater utility has been a framework of analysis that uncritically accepts the status quo and makes only hollow gestures towards liberal values. Legal positivism is a deeply conservative form of jurisprudence, and it exerts a seductive allure over the power elite. Under the guise of the dominance of rules it provides the depoliticised legal scaffolding that allows continuity for the sovereign rights of private property. It is a zero-sum game for big business to entertain universities as centres of independent thought, for the resultant critique of society may entail a close investigation of the prerogatives of capital and the systemic inequalities that are the hallmark of a market society. The upshot of this culture of fear on the part of the economic elite and their allies is that corporate power throughout the twentieth century was opposed to the socio-legal doctrines that flourished in a university context. As history shows, as soon as the balance of forces was favourable, reformist models that challenged the trade school mentality were toppled.

Within the academy, a medley of circumstances broke the linkage with the old idea of a university. As the twentieth century unfolded, universities came under commercial pressure to turn into business enterprises, with syllabi to match, and the corollary was that strange alliances were struck. Instead of top administrators waging
a fierce struggle against the corporatisation of universities, they fell into line with their private-sector peers. This was not the product of neoliberalism. The period immediately after the Second World War saw the rapid growth of large firms, and as business culture penetrated every sphere of society, university chiefs lost interest in creating islands of self-governance and collegial equality and instead replicated the aims and organisational structure of big business. A pyramid of power became a cardinal feature of universities and they began to operate as if they were empires of capital. Universities became top-heavy with administrators, and they spoke a business-oriented language of profit centres and the pricing mechanism. Humanities were regarded as loss makers and were subsequently irretrievably weakened. Only courses that had synergies with big business prospered. In law, instrumental skills accentuating professional legal practice and mechanical jurisprudence were uncritically accepted as the focus of a law degree. Those who espoused a critical legal education that implicitly contained a critique of the corporate state were hounded, and their ideas snuffed out. Most legal academics, even those of a self-proclaimed progressive hue, were unable to rouse themselves and fight for the ideal of the ancient university. Calls to fight for counterhegemonic ideas and give practical support to the quest for a community of scholars dedicated to self-governance fell prey to personal foibles and a brand of competitive individualism that fuelled the move to the marketisation of universities. These personality types cooperated with the political and economic elite of corporate capitalism in speeding the death of the innovative models employed at places like UNSW, La Trobe and Macquarie.

The aspiration of reconfiguring law departments to fit within the matrix of an ancient concept of universities and guiding them towards a genuine liberal legal education now appears utopian. Today it is simply inconceivable to realise the dream of a dialogue of equals determining the pedagogy and governance of law schools. The burst of open democracy at places like Macquarie in its heyday appears a distant memory. The epoch that opened up pathways for critical legal education to emerge has ended as managerial capitalism has tightened its autocratic grip on law schools. Decisions on fundamental issues of vital importance to the lifeblood of law schools are now made without any reference to those affected by them. Democracy has no reach within law schools. Corporate power, which now stretches up into the highest realm of the state apparatus, makes major decisions with only a token nod to input from academics. The bulk of professors are as powerless as the lower ranks. Only the Dean in each law school is strategically placed to be part of the conversation that sets academic and governance parameters. Power has been centralised and made even more unaccountable since the demise of the progressive experiments at UNSW, La Trobe and Macquarie. The
Deans of Australian law schools have their own peak organisation and behind its protective wall they engage in policymaking along with other more important bodies. The Council of Australian Law Deans (CALD) is an activist organisation that operates beyond the purview of the Deans’ fellow academics, and they have made use of their freedom from accountability and close interrogation to formulate the standards they deem applicable to legal training.\textsuperscript{119} Above this bureaucratic body, the Australian ALP government has taken direct control of the syllabus by creating organs charged with prescribing ‘what an LLB graduate is expected to know, understand and be able to do as a result of learning.’\textsuperscript{120} The government-inspired organs fashioned pedagogical outcomes in league with standards promoted by CALD.\textsuperscript{121}

In effect, the outline of a national curriculum has been mandated. And it was achieved with a controlling input from the usual suspects who have operated behind the scenes over the decades to set the agenda for legal education. The judiciary, the admitting authorities and the legal profession were at the forefront in drawing up a prescriptive list of objectives that were implemented by CALD and government bodies.\textsuperscript{122} Needless to say, the anodyne generic skills listed in these objectives cannot grapple with all the crucial issues that underpinned the moves to transform legal education. There is no discussion of the need to develop an underlying philosophy allied with democratic governance structures to coordinate the actions of a community of scholars intent on sustaining a critical legal education. Instead of confronting the issue of the underlying dynamic of legal positivism there are homilies about identifying and articulating issues and applying legal reasoning to solve problem situations.\textsuperscript{123} Buzz words abound, but stripped of a concrete context where they would operate, everything is reduced to clichés. The concrete context is a corporate capitalist world where legal positivism rules. To give the project a veneer of pluralism, consultation with academics is predictably paraded as one of the legitimating factors for a legal education template produced by an inner circle.\textsuperscript{124} Beyond the phony consultation claims, it is clear that the objectives of learning that emerge are a technocratic exercise formulated under the aegis of the state apparatus and essentially driven by the elite interests which have traditionally stymied any innovative and liberating steps in legal education. The outcome of the project is study guides littered with vapid phrases about learning outcomes and graduate attributes

\textsuperscript{119} Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), ‘Preface’, in Excellence and Innovation in Legal Education (Lexis Nexis, 2011) xxxix.
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid 12.
\textsuperscript{122} Ibid xxxix.
\textsuperscript{123} Ibid 13.
\textsuperscript{124} Ibid xxxix.
while in practice conservative legalism rules. Law schools have been pressured into becoming a mirror image of corporations and their knowledge base has been systematically ring-fenced to reflect the ethos of a market economy.

In the classroom an arid orthodoxy that poses no challenge to the corporate status quo, undergirded by the axioms of legal positivism, continues to predominate. This desiccated teaching model inflicts a personal and national cost. Thornton has noted that only half of all Australian law graduates enter legal practice, while in the UK less than half of all law graduates enter the legal profession. Even allowing for some law graduates finding work where legal knowledge may be a part of the required duties, the oversupply factor is a burning issue. It produces a misallocation of human resources. A substantial number of Australian law schools should be closed. But the university hierarchy is full of empire builders, and taking account of the national interest and stepping in to avoid many young people wasting their tertiary education is not part of their remit. Expanding the production of law graduates far beyond the capacity of the labour market to soak them up produces a swathe of workers who have received a very narrow and technical form of education that quickly becomes superfluous. Devoid of the generalist skills that a liberal humanist education can instil, the surplus law graduates will have to struggle even harder to equip themselves with a range of skills necessary for employability in other professional work. Often this will entail expensive retraining done from a very limited knowledge base due to the years of rote learning of legal rules that proved a waste of labour. Furthermore, if only there was an emphasis on law students employing their intelligence analytically and studying the social sciences in more than a desultory manner, more of the excess graduates could be endowed with the capacity to expand their horizons and grasp the potential aesthetic and financial rewards of making and fixing things in conceptually challenging occupations where skill shortages persist in Australia at every stage of the economic cycle. Ironically their working lives would be richer than the bulk of those who found a cubicle in a law office and spent their time sifting through streams of paper and experiencing Kafka-like drudgery.

The folly of slavishly focusing student learning on technical proficiency and professional practice requirements has ramifications that reach deep into the national fabric. Yet the law schools are deserts, and any dissenting voices are easily marginalised. The days of dissent at UNSW, La Trobe and Macquarie have receded.

125 Thornton, above n11, 8.
126 Thornton, above n 91, 47.
into history and are fading from view. In sum, a peaceful desert prevails in place of the lively joint adventure between academics and students, based on contrarian ideas, which should be ricocheting through the halls of the academy. This is the sort of peace that power elites everywhere cherish. There will be another generation of radical dissenters prepared to tilt at reactionary pedagogical and governance models but that next wave is on the dim horizon. The closing of the mind in a dark age of orthodoxy is the present keynote of legal education in Australia.
In early 2012, a group of colleagues in the University of Adelaide Law School formed a working group on critical thinking. The initial intention of the group was to discuss Margaret Thornton’s recent book, *Privatising the Public University: The Case of Law* and to consider its applicability to our school. To facilitate this discussion, we held several ‘reading groups’ and the Law School hosted Thornton for a presentation and interactive workshop.

Thornton’s book brought to Australia a critique of the corporatisation of legal education that is well established in other jurisdictions. In one part of her analysis Thornton argues that the neoliberal competition reforms of the 1990s have led to an overly vocationally focused curriculum. She also argues that effective teaching of critical theory and thinking have been ‘jettisoned’ in favour of a positivist-dominated curriculum: ‘[A] focus on doctrinarism, known knowledge and “right answers” has replaced the questioning voice.’ This has led to a focus on black-letter law,
to the detriment of understanding and questioning the principles on which legal principles rest.

Thornton attributes this phenomenon, predominately, to three pedagogical practices associated with the dramatic expansion in student numbers in law schools and in the perception of tertiary education as a commodity. The first practice is the use of large-group teaching, moving away from flexible, small-group learning; the second is the increase in flexible delivery, including online courses and intensive teaching; and the third is a move away from research assignments and participation-based assessment towards the almost exclusive use of examination-style assessment, which is naturally suited to assessment of doctrinal knowledge and application. As such, students are achieving surface level learning outcomes, associated with knowledge, comprehension and application, without moving into analysis, evaluation and critical thinking.

This method is analogous to what Paulo Freire termed ‘banking education’ where a teacher ‘issues communiqués and makes deposits which the students patiently receive, memorize, and repeat.'

While we did not feel that every aspect of Thornton’s critique was applicable to our school (Thornton herself recognises the great divergences that exist across institutions), we were motivated to strengthen critical thinking across our curriculum. Colleagues were also interested in creating a supportive learning community to strengthen our own pedagogical expertise. To facilitate this we supplemented our existing reading with texts from leading educators on critical thinking such as Stephen Brookfield. We also received Faculty funding to visit the law schools at the University of New South Wales and the Australian National University, both of which had recently undertaken significant curriculum reform. We spent time speaking to staff and students about how critical thinking had been incorporating into the curriculum design. Our motivation was to get beyond critique and explore what positive initiatives we could create as a community of educators committed to student development.

In this article, we share some of the insights and findings we have made as part of the critical thinking group. We do so in the hope that our story inspires other legal academics to work collaboratively with colleagues on similar projects. Fundamental to this hope is our belief (and our experience) that legal academics are not passive tools of

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6 Thornton, above n 1, 12–18.
8 See for example Lorin W Anderson and David R Krathwohl (eds), A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom’s Taxonomy of Educational Objectives (Pearson, 2000).
recent university reforms. Rather, if we work collaboratively with colleagues, we can play a role in shaping our curriculum and the kinds of interactions we have with students.

With this in mind, Part I outlines our definition of critical thinking in the legal context, developing a definition that incorporates both internal and external critique. Part II provides a brief account of the history of legal education in Australia, tracing the extent to which regulatory and institutional pressures have supported or discouraged the teaching of critical thought in legal education. While these pressures have predominantly required legal educators to focus upon the teaching of doctrine and professional skills, we find that there remains a consistent concern that law students develop a capacity for independent thought and that law school goes beyond the mere transmission of knowledge. In Part III we reflect on the core elements of legal education, noting a common focus in the literature on independent thinking, intellectual breadth and social responsibility as core to a legal education. To develop these attributes, we argue that law students need to be exposed to theory as well as doctrine, and to internal and external critiques of the law. Finally, in Part IV we outline the journey we have begun at the Adelaide Law School to implement critical pedagogy in our courses. Our analysis will focus on elective and compulsory courses. We hope that the methods we describe will inspire other educators to experiment using the flexibility we have as legal educators in Australia.

I Critical Thinking

In the course of exploring the teaching of ‘critical thinking’ in legal education, we have found that there is no consistent definition of the concept. At its most basic, critical thinking is ‘the art of analysing and evaluating thinking with the view to improving it.’\(^\text{11}\) This process requires the ‘thinker’ to first recognise that they hold assumptions that influence the way they think and engage with the world. According to Brookfield, these assumptions are of two kinds: the assumptions held by scholars regarding the way legitimate knowledge is created and the assumptions and perhaps biases that the thinker individually holds. Once identified and brought to the surface these assumptions are evaluated against a range of different criteria such as practicality, ethics, bias and logic. If the assumption cannot withstand scrutiny it should be rejected and ‘thinkers’ encouraged to re-evaluate their positions. In this sense, critical thinking can also be described as ‘the habit of making sure our assumptions are accurate and that our actions have the results we want them to have.’\(^\text{12}\)

\(^{12}\) Brookfield, above n 10, 14.
In the legal context, critical thinking has both immanent and extrinsic qualities. That is, it can be pursued both within the teaching of legal doctrine and from a position of external evaluation. An immanent analysis recognises that the accuracy and validity of the assumptions in law is inherent in critical analysis of legal reasoning itself. A common inquiry here is whether we accept that there is an underlying *corpus juris* of legal principle waiting to be uncovered through the legal techniques, or whether morality, politics and personal choice plays a larger part in legal reasoning.\(^\text{13}\) An immanent approach to evaluating assumptions in law requires understanding the orthodoxy of legal reasoning and analysis, and also being able to assess the validity of the assumptions on which it is based and understanding different methods of legal interpretation — including legal determinacy. It may also involve instruction in legal critique, the practical workings of the law and advocacy for law reform.\(^\text{14}\)

A second strategy for unpacking assumptions is achieved through introducing a range of extrinsic perspectives on the law and legal processes. There is the fundamental critique of law in jurisprudence and political theory: *What is the nature of law and the source of its authority? What is law’s function? Who is the law for?* The function of law dictates the function of lawyers, and feeds into a critical legal ethics perspective. There is thinking about law as a social, cultural, economic, historical, and political phenomenon. These perspectives on the law require an introduction to core critiques of law as a social and political phenomenon, such as feminist critiques, legal realism and critical legal studies, critical race theory, and postmodern theories of law. There is thinking about law in society — as a mechanism for justice through democracy and human rights, or as a means of oppression, through protecting vested interests and entrenching class privilege. All these perspectives assist in developing the ability to analyse and critique substantive rules and legal processes, and engaging in processes of law reform and policy formation.

Many legal educators have adopted the ideals of critical thinking and the methods described in this section. Further, critical thinking is formally recognised in the description of skill competences in most law degrees\(^\text{15}\) and is employed explicitly as a skill requirement in the


\(^{14}\) Note that advocacy for law reform is not itself critical thinking, but can be an example of critical thinking if it employs the capacities described in this section.

\(^{15}\) See, for example, the Adelaide Law School Graduate Attributes <http://www.adelaide.edu.au/professions/downloads/gradattributes/law_llb.pdf>. This document states that graduates will have ‘critical thinking and problem solving skills’ as well as ‘an understanding of social justice through the operation of law.’
Australian Qualifications Framework (AQF),\(^\text{16}\) the function of which is described in more detail in Part II. However, despite this level of acceptance, critical thinking has also received both historical and current resistance. Further, as noted in the introduction, important elements of critical thinking, such as critique, have also received relatively low priority or been jettisoned from curricula.\(^\text{17}\) To understand this tension, it is necessary for us to say something about the changing role of legal education in Australia and those pressures that have limited the practical adoption of critical thinking.

II A BRIEF HISTORY OF CRITICAL THINKING IN LEGAL EDUCATION

The University of Adelaide’s law school was the second in Australia,\(^\text{18}\) opening its doors in April 1883 to law students seeking entry into the profession through a university degree.\(^\text{19}\) Up to this time in Adelaide, and throughout the country, entry into the profession was obtained through a long period of what was essentially an apprenticeship.\(^\text{20}\) The creation of a professional university-level degree for law was an innovative move for Australia. It was strongly supported by the profession, from which the vast majority of the fledging law school’s tutors were drawn. But an Australian law degree in the 19th and early 20th centuries remained a ‘non-academic discipline’,\(^\text{21}\) controlled and taught by the legal profession.\(^\text{22}\) Apprenticeship remained a parallel avenue into the profession.\(^\text{23}\) By the 1950s, full-time academic staff started to assert responsibility for legal education in Australian universities. In 1964 the Australian Universities Commission’s Committee on the Future of Tertiary

\(^{16}\) See for examples the skills required at Levels 7 & 9 <http://www.aqf.edu.au/Portals/0/Documents/2013%20docs/AQF%202nd%20Edition%20January%202013.pdf>.


\(^{18}\) After the establishment of the University of Melbourne Law School in 1857. Although the University of Sydney Law School opened in 1855, it only examined and did not teach law students until 1890.


\(^{22}\) David Weisbrot, Australian Lawyers (Addison-Wesley Educational Publishers Inc, 1990) 122–3; James, above n 17, 967.

\(^{23}\) Weisbrot, above n 22, 120.
Education in Australia released a report, the Martin Report, which recommended:

It is very desirable that lawyers seeking admission to independent practice ... have an education founded upon full-time studies at university level ... not so much to train them as legal practitioners as to provide them with the background intellectual training necessary for leaders in the highly complex society of the future.24

Law thus eventually became accepted as an important academic discipline in the modern university, and this created the possibility of legal education extending beyond strict doctrinal training and into broader theoretical disputes. In short, it created the opportunity for the teaching of critical thinking within the legal context. Thus the move from vocational training to a university-based and then academically focused legal education represents a fundamental shift in the nature of the legal profession itself — from apprentice-trained professionals to university graduates. In the next part we will consider the place of universities, and university graduates more generally, within our communities and the importance of teaching graduates to engage in independent judgment from both within and outside of the law; that is, to engage in critical thinking.

However, law schools continue to operate within a very specific regulatory and institutional context and this has meant that despite the opportunity created by the shift to a university education model, Australian legal education has, by and large, remained predominantly focused upon the transmission of doctrinal rules25 and, more recently, practical skills.26

There has only been one significant challenge to this template for law schools in Australia. In the 1970s, law schools started to be influenced by more politically radical movements, and Marxist, feminist and critical legal studies critiques started to be taught in the curricula.27 The incorporation of these more radical critiques into law curricula divided the legal profession and the universities. In the 1980s, academics at Macquarie University engaged in a vigorous debate about whether law schools should define themselves as a purely academic discipline engaged in the theoretical critique of the concept of law, with no necessary role in training lawyers.28

25 See description of legal education in, for example, Sally Kift, ‘My Law School — Then and Now’ (2006) 9 Newcastle Law Review 1, 3–5.
26 See James, above n 17, 968–9.
27 Ibid 969.
28 For a summary of these debates, see volume 5 of the Australian Journal of Law and Society (1988–89) which is devoted to the question of critical legal education, and includes key documents from debates among law school staff at Macquarie. See also James, above n 17.
Allegations were made that students educated in this environment would be unemployable as lawyers because of the lack of focus on substantive doctrine and professional skills.29

It is fair to say that even today the existence of these more radical political perspectives within the law degree is divisive. The disputes on the 1970s and 1980s have left scars on many legal educators, making terms such as ‘Critical Legal Studies’ (CLS) heavy with baggage. In our discussions with colleagues in law schools across Australia, our group has found that the legacy of these disputes has even coloured the term ‘critical thinking’. For this reason, our definition of critical thinking (set out in Part I) focuses on methods that enable students to identify and question their assumptions. While this process might occur with reference to ideas developed in CLS and subsequent critical legal theories, it might occur in a legal education that is very differently focused. We have discovered that clarifying the distinction between critical thinking and critical legal theories has been important for bringing people into the conversation.

In the early 1990s the possibility of challenge to the dominant template again emerged, and Thornton’s experience of its demise shaped much of her current critique of law schools. In 1992, La Trobe University moved from offering legal studies to its BA students through its Department of Legal Studies, to offering an accredited professional LLB degree. During its time offering legal studies in the BA, the university developed a reputation for focusing on ‘law as a social phenomenon’ rather than ‘law for practice’.30 As a newly appointed chair at La Trobe, Thornton describes the anticipation of developing an ‘innovative LLB’ in this environment,31 and its initial sale to the market as ‘an interdisciplinary study of the law in its social context, combining and integrating law with the perspectives and intellectual skills of the social sciences.’32 However, the program that was adopted for the new school was taken from existing law school curricula, at least partly to reassure the market of the quality of the new graduates.33 The Department of Legal Studies became the School of Law and Legal Studies in a professionally dominated faculty, and eventually La Trobe Law.34 In 1999, a review of the School recommended that it turn further towards the commercial and practice-focused curriculum expected by the market. Many remaining socio-legal scholars (the large majority of whom were

31 Ibid.
33 Thornton, above n 30, 6, 9.
34 Ibid 10, 13.
feminist scholars) were given ‘exit packages’ and replaced with ‘professionally orientated’ academics and practitioners.\textsuperscript{35}

Alongside these developments in legal education, law schools remained very closely regulated by the legal profession. Today, entry into the profession in South Australia requires an individual to satisfy the Board of Examiners and ultimately the Supreme Court that they are of good character, and that they meet the academic and practical requirements set out in the Admission Rules and the LPEAC Rules.\textsuperscript{36} The academic requirement is filled by an Australian tertiary degree in law which teaches the subjects specified in the ‘Priestley 11’ (the Priestley 11 subjects will be returned to below). Admitting authorities have the power to approve a particular law school’s degrees as satisfying these requirements. The practical requirements were once met by a two-year period as an articled-clerk. They are now met by completing a practical legal training course.

In 1987, a discipline assessment for the Commonwealth Tertiary Education Commission (the ‘Pearce Report’) strongly supported a scholarly and critical approach to teaching law at the 12 schools in Australia (while at the same time recommending that the Macquarie Law School be closed down, at least partly on the basis of the rejection of the view that law schools should be predominantly concerned with training lawyers and its association with the CLS movement). The Pearce Report accepted that legal education was highly doctrinal in content. Nonetheless, it also recommended a focus on the ‘theoretical and critical dimensions of legal education’, accepting that university law schools are ‘concerned to evaluate and criticise the law’, as well as a focus on the teaching of legal skills.\textsuperscript{37}

In a report that assessed the impact of the Pearce Report on legal education in Australia, McInnis and Marginson credit the Pearce Report with leading to a significant review of law curricula.\textsuperscript{38} However, contrary to another recommendation in the Pearce Report, between 1989 and 2013 the number of law schools has increased from 12 to 36,\textsuperscript{39} and the intake of students in existing schools has also risen sharply. This reflects changes in the university environment in Australia more generally, though the change in law has been particularly dramatic.\textsuperscript{40}

\textsuperscript{35} Ibid 11.
\textsuperscript{36} Similar requirements apply in other states.
\textsuperscript{38} Eugene Clark, Australian Legal Education a Decade After the Peace Report (Australian Government Publishing Service, 1994).
\textsuperscript{39} Including the University of the Sunshine Coast, which is due to open its Law School in 2014.
\textsuperscript{40} See generally, Glyn Davis, ‘The Rising Phoenix of Competition’ (2006) 11 Griffith Review 13, 21. Since the 1950s, the proportion of the community with a University education has increased 23-fold. In 1950, there were 30,000 students
These changes have placed competing pressures on law schools. Firstly, there is pressure to broaden law degrees and reduce the focus on legal skills. This is because a large number of graduates do not end up practising law — either because of the scarcity of legal jobs or because they never intended to do so. However, alongside this pressure to broaden the role of legal education is a countervailing pressure from the profession and students to ensure that graduates have the requisite skills to practise in an increasingly competitive job market.

Nickolas James describes the trend in the 1990s towards a ‘clinical or skills-based education’. The trend away from articles of clerkship and practical training within the profession has meant that on-the-job training has largely been replaced by the ‘virtual workplace’ and the ‘mock file’. Law firms hire graduates already admitted to practice, and they expect these students to be proficient in the practical skills required. The emphasis on ‘practical skills’ often pulls against attempts to introduce critical engagement with the law.

More generally, the pressure to teach skills competes with the traditional role of universities as places of free intellectual inquiry and critical thinking. This tension is not unique to Australian law schools. An influential review of US Law Schools, the 1992 MacCrate Report commissioned by the American Bar Association, observed:

Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers. The lament of the practicing bar is a steady refrain: ‘They can’t draft a contract, they can’t write, they’ve never seen a summons, the professors have never been inside a courtroom.’ Law schools offer the traditional responses: ‘We teach them how to think, we’re not trade schools, we’re centers of scholarship and learning, practice is best taught by practitioners.’

In response to such sentiments, many legal educators and professionals have emphasised the harmony between the goals of training good lawyers and teaching critical engagement with the
law. This line of thinking is articulated by English Professor Sir Otto Kahn-Freund, who argued:

There is in fact no contradiction between the needs of an academic professional education and those of a vocational training. English law does not consist of an uncoordinated mass of rules for practitioners which can only be learnt by rote. The unquestioning acceptance of judicial decisions or utterances is not part of the professional equipment of an English lawyer.\(^{43}\)

We return to the core elements of a legal education in Part III of this article, where we explore this relationship between doctrine, theory and skills.

As we have already demonstrated, the professional regulation of Australian law schools has been predominantly concerned with the doctrinal content of law degrees. In 1994, the Law Council of Australia created a ‘Blueprint for the Structure of the Legal Profession’. The Blueprint included a list of 10 areas of law that needed to be studied for admission. The Council proposed that these subjects be taught ‘in the context of an overall course of study which provides: a well-rounded education in the law; a level of scholarship usually associated with a course leading to an undergraduate degree; a good grounding in the analytical, communication and other skills required of a lawyer in a modern society; and which placed the theory in a practical context.’\(^{44}\)

The Law Admissions Consultative Committee, headed by Justice Priestley, expanded the list to 11 core subject areas — criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence, ethics and professional responsibility. The Law Council of Australia has since compared the academic requirements in Australia with those in other jurisdictions and considered options for reform.\(^{45}\)


In contrast to the heady debates of the 1980s, in some law schools at least, there has been little resistance from the academy to this prescription of content from the profession. This may be symptomatic of the financial and time pressures felt by academics within law schools. Financially, law schools have come under increased pressure since the introduction of a relative funding model by the Commonwealth Government in 1990. The funding model compares the cost of funding different disciplines in higher education and allocates funding accordingly. Law was assigned to the lowest funding band. In 1996, a differential system of student contributions was introduced to reflect the cost of providing different courses as well as the potential earning capacities of graduates. Law was included in the highest contribution band because of the potential earning capacity of graduates.

The combination of these funding and contribution reforms now mean that law students pay the highest contribution per unit of study, while law schools receive the lowest funding from the Commonwealth.\(^\text{46}\) In a submission to the Review of Higher Education Base Funding in 2011, the Council of Australian Law Deans described law schools as ‘chronically under-funded’.\(^\text{47}\) This has led to increased student–staff ratios, a higher proportion of casual staff, and increased reliance by law schools on full-fee paying students — increasing their international student and post-graduate level intakes. Margaret Thornton argues that these financial and time pressures have caused legal educators to turn their focus away from deeper philosophical questions about the mission of a law degree and how it fits within the University and society, to more prosaic and pragmatic questions of how to competently teach a standard, relatively uniform law degree.

While recognising that increased student–staff ratios, high proportions of casual staff and increases in international student intake all present significant challenges, one of the purposes of our group was to identify and apply techniques to re-engage our students in critical judgment within existing constraints. We have found that within the Priestley 11 there is significant flexibility in the content that may be taught, as topics are described with broad generality. Further, educators have broad freedom to teach more or less how they like within these content areas, including through immanent and


extrinsic methods of critical thinking. Some of these techniques are necessarily innovative; some are adaptations of old methods to this new context. We return to explain a number of these techniques in Part III.

A new phenomenon in legal education in Australia has been a move towards teaching law at a post-graduate level, through a Juris Doctorate (JD). At many universities the introduction of JDs was a response to the funding pressures described above. However, at two law schools, UWA and Melbourne, the move to a JD was part of a comprehensive reform of all degree offerings at the university, and thus had strong pedagogical motivations for the change from undergraduate to postgraduate law degrees. At least 12 law schools currently offer JD degrees. Of these, the law schools at the University of Melbourne, RMIT and UWA no longer offer undergraduate law degrees in addition to the JD. JD programs contain a mixture of full-fee paying and Commonwealth funded places.

For law schools in which the motivation for introducing a JD was financial, JDs were a way to bring law degrees to new markets, such as graduate entry students with existing careers. JDs are shorter than LLBs, and are more often taught through an intensive-delivery mode. The emphasis has been on teaching as short a degree as possible within the professional accreditation rules, and on teaching the JD in as similar way as possible to existing LLB teaching, so as not to require extra resources for its delivery.

JDs have caused issues for state accrediting bodies, which have insisted on a law degree being a minimum of three calendar years of full-time study, and for the Tertiary Education Quality Standards Agency (TEQSA) in relation to the whether the teaching methods and assessment requirements in JDs fulfil the requirements for an

48 See also Lucy Maxwell, ‘How to Develop Students’ Critical Awareness? Change the Language of Legal Education’ (2012) 22 Legal Education Review 101, who argues that ‘changing the presentation of legal doctrine and developing critical awareness can be achieved simply, requiring neither additional class time nor additional resources’; contrast David Weisbrot, ‘What Lawyers Need to Know What Lawyers Need to be Able to Do: An Australian Experience’ (2002) 1 Journal of the Association of Legal Writing Directors 21, 40.

49 See further examination of the emergence of the JD and the issues it raises in Donna Cooper, Sheryl Jackson, Rosalind Mason and Mary Toohey, ‘The Emergence of the JD in the Australian Legal Education Marketplace and its Impact on Academic Standards’ (2011) 21 Legal Education Review 23.

50 These are ANU, University of Canberra, UNSW, UTS, Sydney, Bond, University of Southern Queensland, Monash, RMIT, Melbourne, Murdoch and UWA.

51 Cooper et al, above n 49, 26–9.


Australian Quality Framework (AQF) Level 9 (Masters level) degree. These requirements are discussed below.

The move towards JD degrees as a common, and possibly in the future the standard, way to attain a law degree has the potential to profoundly affect legal education and the potential to teach critical thinking. On the one hand, the shorter length of a JD means that it will focus on a core group of subjects with fewer elective choices. Since a much higher proportion of students (and in some institutions, all students) will be fee-paying, there may be a demand for the degree to be more narrowly focused on preparing students for legal practice. On the other hand, the JD format may lead to new opportunities to re-invigorate legal education. JD students, having completed a tertiary degree already, and being on average older and therefore with more adult experience of the world, will bring to their law studies an experience of critical thinking that students straight out of school may not have. The fact that the degree is post-graduate means that there is a formal requirement for a higher level of learning than for an undergraduate degree.\footnote{If this requirement is embraced, it opens up space for a higher level of critical engagement with the law.}

The introduction of JDs in Australian law schools coincided with a new emphasis on the quality of teaching and learning in universities. Again, this presents new opportunities for law schools to impart critical legal thinking skills to their students. In 2001 the Commonwealth government established a new body, the Australian Universities Quality Agency (AUQA), to conduct audits of all Australian universities. In 2011 AUQA was replaced by the Tertiary Education Quality and Standards Agency (TEQSA). Like AUQA, TEQSA’s role is to monitor and assess the delivery of higher education against certain standards as part of the Government’s Higher Education Quality and Regulatory Framework, which includes the Australian Qualifications Framework (AQF), the requirements of which have already been mentioned in Part I, above. Part of the AQF is a statement of minimum learning outcomes for each AQF level and qualification type (for example, bachelor degree (level 7), honours degree (level 8), masters degree (level 9)).

In the lead-up to the implementation of these new reforms, in 2010 the Australian Learning and Teaching Council (ALTC) issued a report containing the Learning and Teaching Academic Standards Statement for the Bachelor of Laws.\footnote{This is discussed further in Part II.} The report contained the agreed minimum learning outcomes, known as the Threshold Learning Outcomes (TLOs), to meet the AQF qualification standards for the LLB. The ALTC consulted with professional bodies, accreditation bodies, employers, graduates, academic institutions and teachers.

\footnote{Sally Kift, Mark Israel and Rachel Field, \textit{Bachelor of Laws, Learning and Teaching Academic Standards Statement} (ALTC, 2010).}
The report sets out six TLOs for the LLB. The TLOs are: TLO 1 Knowledge; TLO 2 Ethics and Professional Responsibility; TLO 3 Thinking Skills; TLO 4 Research Skills; TLO 5 Communication and collaboration; and TLO 6 Self-management.

A number of the TLOs emphasise the importance of critical legal thinking within a Bachelor of Laws program, and developing in graduates a sense of their role and responsibilities to the community as university graduates. TLO 2 includes an ability to ‘recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community’. TLO 3 includes the ability to identify and articulate legal issues and apply legal reasoning and research to generate appropriate responses to legal issues as well as:

(c) engage in critical analysis and make a reasoned choice amongst alternatives, and
(d) think creatively in approaching legal issues and generating appropriate responses.

Law schools must reflect upon their curricula against this new framework. At the University of Adelaide, for example, in 2012, the Law School conducted a mapping exercise for each of the TLOs across the core courses in the LLB. In addition to assessing their current curricula against this framework, the new AQF standards and TLOs provide an opportunity and justification for legal educators to re-engage with critical thinking as one of the fundamental purposes of the law degree.

Another factor that will affect choices of how to teach law is how individual universities respond to the changing tertiary education environment. Online and distance education is challenging conventional approaches to teaching and learning, and requiring universities to consider their missions within a global context. At our institution, the University of Adelaide, the most recent University Strategic Plan, the *Beacon of Enlightenment*, has committed the university to recapture an ideal of ‘Small Group Discovery Learning’ where students are not only taught in small groups, but are exposed to research and discovery in that forum. An important caveat to this new policy is that the university is not offering additional resources to prepare and engage in this more intimate learning environment. On one level, this exacerbates the financial and time pressures on legal educators. However, the new emphasis on teaching at university level also offers an opportunity and justification for educators to explore new learning opportunities for students that emphasise deeper theoretical engagement with legal doctrine in small classes.

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As legal education in Australia has moved away from its historical origins of a vocational training course, its focus and objectives have fundamentally changed. It is now properly viewed as an important academic discipline in a modern university, although its connection and regulation by the profession still remains. But what is clear from this brief survey of legal education in Australian universities is that the environment remains dynamic. There is a new focus on teaching and learning in higher education institutions, and more attention to teaching pedagogy, learning outcomes and student satisfaction.58

In law, the dominance of the LLB degree as the pathway to legal practice is being challenged, and there are on-going discussions at the national level of what are the minimum requirements for accreditation of law degrees, and the minimum requirements for offering law at the postgraduate level. The most recent AQF standards demonstrate that there is now almost universal recognition that a law degree must produce graduates with not just the knowledge of legal principles and processes, but a broader liberal education that provides them with a foundation for informed and independent judgment in whatever role they ascend to within the community, whether as a practising lawyer or not. In this environment, we are convinced that individual legal educators, and legal educators in the collective, have a fundamental role in developing their own techniques to encourage students to engage critically with their legal education. The recent moves have encouraged this emphasis and provide a number of opportunities for renewed work and creativity in this area.

Sally Kift has noted that one of the challenges for 21st century education is the articulation of the purpose of the modern law degree.59 In Part III of this article, we will explain more specifically what we believe are the core elements of legal education, against the background of the role of universities more generally, and why critical thinking is the key element of legal education. We then turn to techniques we have recently employed in our own courses as we strive to be better educators against these standards.

III REFLECTIONS ON THE CORE ELEMENTS OF LEGAL EDUCATION

In 2000, as part of its review of the federal civil justice system, the Australian Law Reform Commission emphasised the ‘critical role’ education and training played in shaping the ‘legal culture’.60 In their role as educators, academics do not participate directly in the

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59 Kift, ‘21st Century Climate for Change’, above n 58, 12.
legal profession. Yet they play a pivotal role in shaping the culture of the profession — both in the university and through continued legal education.

This, of course, begs the question what legal culture law schools want to participate in shaping, and whether, within the constraints imposed by external and internal forces, that is achievable. The 2000 Law Reform Commission Report recommended a culture that ‘values lifelong learning and takes ethical concerns seriously’. Without derogating from the law school’s responsibility to teach substantive law, it recommended a greater emphasis of ‘legal ethics and high order professional skills’. It explained that:

professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility.

The Australian Law Reform Commission agreed with the 1996 report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC), in England, that a law degree ‘should stand as an independent liberal education in the discipline of law, not tied to any specific vocation’. The ACLEC stated that the first goal of legal education in England should be:

*Intellectual integrity and independence of mind.* This requires a high degree of self-motivation, an ability to think critically for oneself beyond conventional attitudes and understanding and to undertake self-directed learning; to be ‘reflective’, in the sense of being self-aware and self-critical; to be committed to truthfulness, to be open to other viewpoints, to be able to formulate and evaluate alternative possibilities, and to give comprehensible reasons for what one is doing or saying. These abilities and other transferable intellectual skills are usually developed by degree-level education.

As can be seen from the historical exploration of the regulatory framework in which law schools operate, chronicled in Part II, there is growing evidence that the legal profession, the students, the community, the regulators and the law schools themselves also expect legal education to provide more than just the transfer of knowledge of legal rules. In 2000 a special edition of the International Journal of the Legal Profession was devoted to ‘theory in legal education’. The central theme of the collection was that ‘theory … should not be seen as separate from substantive law and legal education; and that theory

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61 Ibid.
62 Ibid [2.77].
63 Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First report on legal education and training 1996*, 57, referred to in ALRC, above n 60, [2.85].
64 Ibid, 21. This goal was then supplemented with the goals of core knowledge, contextual knowledge, legal values and professional skills.
is intrinsic to, and constitutive of, legal education and scholarship.‘65 Most legal educationalists in Australia have also called for a broad set of objects for law degrees including the teaching of skills, doctrine and theory in an integrated program.66 David Weisbrot has argued:

[i]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a (moral/ ethical) sense of the role and purpose of lawyers in society.67

This understanding of legal education has been advocated by student groups as well. An investigation conducted by a student group at the ANU Law School, the ANU Law School Reform Committee, revealed that students want a legal education that leads to ‘transformative personal growth’, and not just the transmission of legal rules. Students are seeking a law degree where doctrine is taught with critical perspectives, self-reflection and broad skill development.68

Critical thinking is mentioned explicitly as a skill requirement in AQF level 7 (bachelor) and AQF level 9 (masters) degrees. Law degrees at the undergraduate and postgraduate level must reach the requisite AQF standards. It is instructive to compare the standard required for a JD (AQF Level 9) with that required for an LLB (AQF level 7). At Level 7, graduates of a bachelor degree will have:

• cognitive skills to review critically, analyse, consolidate and synthesise knowledge
• cognitive and creative skills to exercise critical thinking and judgement in identifying and solving problems with intellectual independence.

At Level 9, graduates will have:

• cognitive skills to demonstrate mastery of theoretical knowledge and to reflect critically on theory and professional practice or scholarship
• cognitive, technical and creative skills to investigate, analyse and synthesise complex information, problems, concepts and theories and to apply established theories to different bodies of knowledge or practice
• cognitive, technical and creative skills to generate and evaluate complex ideas and concepts at an abstract level.

67 David Weisbrot ‘From the Dean’s Desk’ (1994) 3(1) Sydney Law School Reports 1. This statement was recommended to be adopted by Law Schools as an underlying philosophy by the ALRC, above n 60, in 2000 ([2.89]).
68 Law School Reform, above n 2.
The TLOs that have been adopted to meet the AQF requirements, set out in Part II, demonstrate that the thinking skills described at both Level 7 and Level 9 are high-order thinking skills. They are not skills that students can simply ‘pick up’ through learning and analysing legal doctrine and applying it to legal questions. This is the challenge that critiques of modern legal education in Australia, such as Margaret Thornton’s, present to legal educators, and that TEQSA and the AQF descriptors require us to meet.

With this background in mind, we set out to articulate the purpose of legal education. It is our contention that many of these goals and approaches to legal education are realised through a focus on critical thinking (as defined in Part I) in pedagogical practice.

We believe a legal education should equip students with a foundation of legal knowledge that distinguishes them from students educated in other academic disciplines. This means law degrees will require a detailed knowledge of the legal institutions of the state, the origins of the common law and Australian legal systems, the political processes that generate laws, the systems of dispute resolution, and a knowledge of key areas of legal doctrine and their application. This initial goal focuses then on teaching students the ‘content grammar’ of law as a new discourse.69 In law, John Zerilli has referred to the necessity of teaching ‘faculty’:

> Practising lawyers must comprehend legal principles and processes. The curriculum rightly would include a survey of the substantive corpus of law, for example, the law of obligations, public law and crime as well as the adjectival law, such as the law of evidence and procedure. It would also cover legal method, rules of precedent and formal legal reasoning. A lawyer is not a lawyer until he or she has these arrows in his or her quiver. The lawyer may possess nothing besides and still be a lawyer. But without these, even possessing other admirable qualities, he or she is no lawyer.70

While its focus is on substantive legal doctrine, we do not accept that this necessarily requires the adoption of a passive, teaching-as-transmission style. Within the teaching of the legal rules, we envisage an important role for immanent critique of doctrine, including through logical critique and critical engagement with orthodox legal method.

However, we also believe that the prescriptive content of a law degree, currently articulated in the Priestley list of subjects, need not constrain the scholarly mission of a legal education. As we explained in Part II, by setting the broad parameters of the required knowledge base in a law degree, the Priestley requirements somewhat relieve

69 P S Peters, referred to in Brookfield, above n 10, 28.
law academics of the need to determine what to teach, and free them to focus on the more important issue of how to teach it.

A legal education should also produce graduates with an understanding of the place of law in society and with an ethical framework which ‘prepares the graduate for intelligent participation in the politico-legal life of the community’.71 For this, graduates should have the capacity to engage in debates arising in and around the practice of law. They need a global perspective and a deep understanding of the key ethical questions facing society to engage in rigorous extrinsic critique of the existing legal structures and rules. With these considerations in mind, Roberto Unger has suggested that law school education should be ‘a sustained conversation about our [socio-economic and political] arrangements’.72 It might be added that even lawyers not wanting to engage in this larger conversation need to have the resources and skills to draw upon when faced with difficult legal questions.

In a legal education, students should learn not only how to think like a lawyer, but also how to think in different frames outside of the law so that they have ‘the capacity to form their own independent judgments on … matters’.73 In this way, students learn to engage in an external critique of law. There have been numerous calls for, and formulations of, the place of ‘theory’ in law degrees to satisfy this capacity for independent thought.74 A legal education should, therefore, consider law as a discipline, a way of thinking, and a theoretical and social construct. There is great value, Ian Duncanson has noted, in ‘re-examining the discipline’s truths from different sites of knowing’.75

Finally, legal education offered by universities should teach students how to engage in self-directed learning. This requires a solid grounding in skills such as reasoning and communication, research and intellectual discipline. There is a direct link between independent learning and critical thinking. An important way to unpack assumptions, and to formulate independent views, is to have the capacity to access and interrogate fresh material. Furthermore, from the educator’s point of view, a focus on developing skills of self-directed learning relieves the pressure to cover a particular canon of doctrine in the course of the degree, leaving more time for immanent and external critique of that doctrine.

74 See, for example, Charles Sampford and David Wood, ‘The Place of Legal Theory in the Law’ (1987) 11(41) Bulletin of the Australian Society of Legal Philosophy 98; Sherr and Sugarman, above n 65; Cownie, above n 71.
IV Teaching Critical Thinking in Law

We now turn to explain our journey of discovering new teaching strategies that enhance critical thinking in our efforts to meet the standards of legal education articulated above. From our experience as legal educators and the review we conducted of existing curricula and pedagogy as part of this project, the trends in legal education towards doctrinal and vocationally focused mass-education identified by Thornton were apparent. However, in our subsequent development and implementation of new strategies to foster critical thinking, we found that even under the pressures every legal educator faces (we particularly felt the strain of high student–staff ratios, high reliance on casual staff and the pressure to provide online teaching resources at the expense of face-to-face teaching), sufficient flexibility existed to improve student engagement with legal discourse.

We will explain why we have adopted certain strategies and provide practical insight into how we have incorporated them into our current courses. This section is organised by subject and where possible we have endeavoured to reference the sources that have inspired our techniques. Although we have received feedback on these courses through standard student evaluations of teaching, we have not included this information, as it is not possible to disaggregate feedback specifically relating to the techniques used. We offer these examples in the hope that they encourage other educators to explore strategies for teaching critical thinking in their own courses.

A Peter Burdon: The Politics of Law

This year I used my elective subject ‘The Politics of Law’ to trial techniques directed at critical thinking. I taught this course to a class of between 70 and 90 students in one three-hour session, once a week. The first hour was generally a lecture, followed by two hours of discussion. The setting was an amphitheatre-style lecture theatre. In this course I focused on three main pedagogical tools — discussion as a way of teaching; classroom democracy; and the Critical Incident Questionnaire (CIQ).

For this elective subject my focus on critical thinking was made explicit from the outset. My course description contains an explicit statement that:

This course is designed specifically to foster an inclusive learning environment and encourage critical thinking skills. It also intends to provide students with ownership over their learning and their assessment.

This statement was followed up in the course guide with an explanation of why I think discussion and critical thinking are
important skills and guidance on how to read texts critically. The course guide also contained a detailed description of my teaching philosophy, and the following ‘product warning’, which I used to establish expectations and limit my elective to those seriously interested in developing critical thinking skills:

If you don’t feel comfortable talking with others about your ideas in small and large groups, you should probably drop this course.

If you don’t feel comfortable with group discussion and think it is a touchy-feely waste of valuable time, you should probably drop this course.

If you are not prepared to analyse the political and moral beliefs of yourself and the class, you should probably drop this course.

However, if you are comfortable with this process or you are at least willing to give it a genuine try, then welcome. I hope we can look forward to a creative exchange of ideas this semester.

Our first group session was dedicated exclusively to the learning environment and critical thinking. Students were required to complete preliminary readings for discussion and I took the time to ensure that every student introduced themselves and had their voice heard.

We also used the first session to establish a group agreement and ground rules for discussion. To facilitate this process I asked students to prepare answers to two questions prior to class:

1. Think of the best group discussion you’ve ever been involved in. What things happened that made these conversations so satisfying?
2. Think of the worst group discussion you’ve ever been involved in. What things happened that made these conversations so unsatisfactory?

Students then put themselves into groups and took turns sharing their feedback and listening to their peers. I then facilitated a whole-group discussion which resulted in a group agreement. The agreements were usually 10 points long and contained rules such as ‘Sit at the front of the class so that we can hear and see each other’ or ‘Respect the talker and don’t speak over the top of each other’. This group agreement was put online for students to review and onto the lecture screen prior to every class. It was a living document that could be amended as the semester progressed.

The final tool that I used to encourage discussion is a weekly ‘sentence completion exercise’. There were no topic-specific

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questions for our weekly seminar and instead I asked students to answer the following questions prior to class:
1. What struck me about the text/s we read to prepare for the discussion is …
2. The question that I’d most like to ask the author of the text is …
3. The idea I most take issue with in the text is …
4. The part of the text/s that made the most sense to me was …
5. The part of the text/s that was the most confusing was …

These questions helped ensure that discussion was connected and directed by the students’ own concerns. As above, students were first put into groups of 5–6 where they listened to each other’s answers and recorded the points they would most like to discuss with the rest of the class. The students then led the discussion with myself as teacher playing a facilitative role. I also used this as an opportunity to encourage students to delve deeper into the assumptions that underpinned their comments, and if needed, brought students back to the topic at hand or to the group agreement.

Further to focusing on discussion as my dominant method of teaching I also used lectures to model the forms of democratic dispositions I wished to encourage in my students. Some of the techniques I used include:
• Beginning every lecture with one or more questions that I am trying to answer. I do this to encourage the view that education is a never-ending series of questions and striving toward points of greater understanding. I also acknowledge that whatever truths I claim are provisional and temporary.
• Encouraging questions, interruptions and discussion as I proceed.
• Ending every lecture with a series of questions that I have raised and left unanswered. I hope that this prepares students for the practice of volunteering questions that will form the basis for our subsequent discussion.
• Deliberately introducing alternative perspectives to the position I have advanced during the lecture and involving the class in interactive exercises aimed at uncovering the assumptions that underlie both positions.
• Introducing buzz groups and interactive exercises into the lecture.

The final key method that I used to encourage critical thinking is the CIQ, developed by Stephen Brookfield. The assumption underlying this tool is that students learn critical thinking skills best by watching people in positions of power and authority model these

78 Brookfield, above n 76, 69–70.
processes. The CIQ is a simple classroom evaluation tool that is used to find out what and how students are learning. It consists of a single sheet of paper containing five questions, all of which focus on critical moments in the classroom that have taken place in class. The CIQ is administered three times over the semester at the end of class.

The five questions are always the same:

1. At what moment were you most engaged as a learner?
2. At what moment were you most distanced as a learner?
3. What action that anyone in the room took did you find most affirming or helpful?
4. What action that anyone in the room took did you find most puzzling or confusing?
5. What surprised you most about the classes?

Importantly, the CIQ sheets are never signed and I encouraged students (both verbally and in the course guide) to be honest and frank in their responses. After the exercise was completed, I analysed the responses to get a sense of main themes and forms. The following week, I began our class by going over the results and invited reactions, comments and elaborations. For this exercise to work effectively, we teachers must be prepared to be open and self-reflective with the class. That is, we must model the skills we are hoping to inculcate in our class. This means we must be prepared to hear criticism and respond as non-defensively as we can. At times it will be appropriate for us to defend our pedagogical position. However, we must also be open to change and learning from students who seek to invigorate our practice.

While this process can be difficult, in my experience the overall effect is very powerful. This is particularly true if students see us putting ourselves in the uncomfortable position of highlighting comments that show us in a bad light. Over the course of a semester, the CIQ earns us the right to ask students to take the same risk and extend themselves as part of their learning.

B Gabrielle Appleby: Constitutional Law

In first semester 2013, I coordinated two subjects: Australian Constitutional Law, a compulsory course usually undertaken in second or third year with an average cohort of approximately 400 students; and Advanced Constitutional Law in Theory and Practice, an elective undertaken by an average cohort of 40 students who have completed Australian Constitutional Law.

Inspired by my involvement with the critical thinking reading and discussion group that started in 2012, in 2013 I introduced a number of strategies designed to foster an environment that encourages critical thinking across both subjects. Some of these strategies are relatively innovative, while others are more traditional, but have
refocused my courses away from doctrinal learning and problem-based assessment.

1 Using Twitter to open up new perspectives and networks

In both of my subjects I have used the social media microblogging forum Twitter.\textsuperscript{80} I used Twitter to supplement the course material and teaching in a number of ways. For example I used it to disseminate to students information that provides greater context and new perspectives on doctrinal rules learnt in class. This might be through tweets that provided links to articles or blogs that introduced contemporary examples of significant legal developments and legal commentary. Using social media in this way provided the students with new perspectives from which to consider legal principle and challenge their assumptions about the operation and impact of legal rules. Twitter thus provided students with a digital tool to unpack some of the assumptions made in doctrinal teaching. For example, after spending two weeks on theories of constitutional interpretation, I tweeted a link to a feminist blog post written by Helen Irving, ‘Constitutional Interpretation: A Woman’s Voice’.\textsuperscript{81} This was not just an act of transmission on my part. Students favourited and retweeted the post, and also engaged with Irving’s work in subsequent essays to critique current High Court jurisprudence.

I also hoped that my students would use Twitter to develop their own networks, sharing and collaborating with other legal students, professionals and academics on the forum. By linking into the diverse legal network available on Twitter, students were provided with a forum in which to engage in self-directed learning and critical thought during my course but also, more importantly, as an ongoing concern. I therefore saw my role in introducing them to the opportunities of Twitter as facilitating self-engagement. Galloway, Greaves and Castan have explained that diverse relationships forged over twitter can ‘provide ongoing inspiration and support and “constructive confrontation” that challenge our assumptions and complacencies’.\textsuperscript{82} Almost immediately, students engaged in these conversations and forged these relationships. For instance, after posting a piece on the value and status of undergraduate degrees in modern society,\textsuperscript{83} I engaged with two of my students in a critical

\textsuperscript{80} For a good explanation of Twitter as a microblogging tool, see Kate Galloway, Kristoffer Greaves and Melissa Castan, ‘Interconnectedness, Multiplexity and the Global Student: The Role of Blogging and Microblogging in Opening Students’ Horizons’ (2012) \textit{Journal of the Australian Law Teachers Association} 177.

\textsuperscript{81} Helen Irving <http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html>.

\textsuperscript{82} Galloway et al, above n 80.

conversation about the reasons for undertaking a law degree when degree saturation is high. I also witnessed students favouriting and retweeting interesting legal posts, asking critical questions of others, and tweeting interesting legal posts themselves.

2 Rethinking reliance on problem-based assessment

I read Margaret Thornton’s critique after teaching Australian Constitutional Law at the Adelaide Law School on and off since 2008. While I did not necessarily agree with Thornton’s description of the inevitability of the decline of teaching critical thinking in the current legal education environment, her warnings immediately made me reconsider the course’s assessment scheme. Australian Constitutional Law has been, at least during my time teaching in the course, entirely assessed through problem-based questions (an interim assignment and final exam) requiring knowledge and application of doctrinal rules. While we may have taught the students more critical engagement with the material (for example, in lectures and in small group discussions), we were not assessing this.

Assessment is emphasised in the literature as a very important part of the teaching function. Assessment incentivises work, and therefore the different forms of assessment will incentivise different forms of work/learning. Students focus on knowledge and rote-learning where assessment is problem based (and the focus is therefore on rule handling, fact analysis, questioning, reading and interpretation), and particularly in exam situations. Problem-based questions emphasise individualism, knowledge of the status quo, stressing the importance of ‘quickness, surprise, comprehensiveness in lieu of depth’. Barnes argues that using problem-based assessment and exams is an obstacle to greater experimentation with teaching and learning styles. Because of the emphasis on knowledge and application, it emphasises lectures and knowledge transmission, with tutorials focused on practice problem questions.

Having identified the Australian Constitutional Law assessment scheme as a barrier to encouraging critical engagement in this course, I made a number of changes. These changes did not necessarily implement novel or innovative strategies. However, they demonstrated that in large, compulsory, Priestley 11 courses, assessment does not have to be solely problem-based.

First, I introduced class participation (not attendance) marks. When we visited the Faculty of Law at the University of New South Wales, we were struck by the use of class participation marks in all of their compulsory courses. We were told that students responded

85 Ibid, 188, 190.
86 Ibid, 195.
very positively to the class participation marks provided that the rules and expectations were set out clearly for them. I developed a set of ‘class participation’ guidelines that I released to the students. These explained to the students my reasons for introducing class participation marks:

I included a class participation mark in the course to:

• encourage students to explore a diverse range of viewpoints and question their own views and assumptions;
• strengthen students’ communication and listening skills;
• increase students’ confidence and voice;
• increase student engagement with the material;
• invite students to be co-creators of knowledge; and
• encourage students to engage in a continuing discourse in the area.

I then explained what type of participation I (and other seminar leaders) would be looking for. I emphasised that I was not looking for quantity, but rather:

thoughtful contributions that demonstrate good preparation and engagement with the conceptual issues raised by the readings. This does not mean that each contribution that is made has to be correct — students will not be marked down for questions that assist them in coming to a better understanding of the more complex concepts in the course. I will also be looking for students who engage with their peers in an appropriate fashion — responding and listening to their contributions as well as myself, or a guest who may be leading the class.87

By explaining the class participation marks in this way I was able to emphasise that while it was an individual mark, students would be rewarded for working well with their peers and class leaders and therefore an individualistic, competitive atmosphere was, hopefully, avoided.

Secondly, I supplemented the problem-based questions in both the interim assignment and final exam with short-answer questions. The aim of the short-answer questions is to ask the students to engage with the historical and theoretical perspectives that are contained in the course to critique the doctrinal teaching. Students may engage in an external critique of the law, or critique the doctrinal reasoning employed in particular cases by reference to logic or methodology, that is, engage in an intrinsic critique.

I supported the short-answer questions in the course through a number of discussion questions in each seminar and a weekly ‘activity’. The activity asked students to engage critically with legal principles in a practical scenario that required them to consider the impact and relevance of the principle on different interests in government and/or society. For example, the activity for the week

87 Ibid.
relating to taxation powers of the federal and State governments, was as follows:

Imagine you have been asked to attend as a delegate to a constitutional convention to draft the constitution for a new federation. What arguments will you make about dividing the power to raise revenue between the States and the Commonwealth? What limits would you like to see placed on the revenue-raising powers of the different levels of government? What impact do you think this will have on how the federation will operate?\(^8\)

Students engaging with the exercise adopted the perspective of the legislator and the politician. Informed by their understanding of how Australia’s current revenue-raising powers operate, they had to think about the possible future consequences of a different system for different groups within society. Students were asked to consider the various entities that may be affected by the system (the governments, the community, the individuals) and how different models would impact on them. Students needed to consider the law as a social, political and economic phenomenon within society, and advocate and defend a proposal against possible critiques.

In formatting the short-answer questions in the mid-semester assignment, I realised that one difficulty would be ensuring that students engaged deeply with the question. My experience with short-answer questions in previous courses has been that students tend to regurgitate doctrine rather than engage critically, or write out pre-prepared answers. Instead of asking a number of short-answer questions related to each issue raised by the problem question, I gave students an option of answering one short-answer question from a bank of three or four — each relating to an issue raised by the doctrinal rules they had to apply in the problem question. That way, I was able ensure that students were provided with sufficient time to encourage deep thinking, rethinking, and precision of communication.\(^8\)

Finally, I introduced a small piece of peer review assessment early in the course. While this was a problem-based question, I introduced it as part of my critical thinking reforms to the course. This is because the purpose of the peer-review exercise was twofold: to allow the students to revise the initial topic and receive feedback on it, but also to develop an understanding of the marking process for problem-based questions. The last point was intended to be the most important part of the exercise. It will assist the students to reflect on their own work in future, and particularly the coverage of issues and logic of their arguments. Students were asked to mark

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\(^8\) This particular activity was drawn from the ‘critical morality’ model that is expounded in Charles Sampford and David Wood, ‘Legal Theory and Legal Education — The Next Step’ (1989) 1 Legal Education Review 107, 113–20. Each week, the activity will ask students to engage in different types of critical thinking about the relevant principles and concepts.

\(^8\) Barnes, above n 84, 189.
another student’s assignment and to discuss with their peers and the teachers why a particular mark ought to be given to the work. This critical reflection on the assessment process will be valuable to students when they come to write and edit their own work in this course, but also across their law degree and into their post-university careers. Students have been given a new perspective through which to critique their own work, and question the assumptions that they brought to that exercise.

3 Structuring and modelling critical engagement with cases

My elective course, Advanced Constitutional Law, focused on critical engagement with recent High Court decisions. Students in Advanced Constitutional Law were in the final years of their law degree and brought a level of prior knowledge and maturity to the material. The course itself is less concentrated on knowledge transmission and understanding legal principles than on critical engagement with different perspectives — primarily of the judges, but also lawyers, litigants, governments, and other interest groups in the community.

The course commenced with two foundational classes on constitutional interpretation and history, which set up many of the tools which were to be used to analyse the High Court’s jurisprudence in the second part of the course. In the following weeks, each class was designed around the discussion of a single recent High Court decision. Students were asked to prepare for the class discussion in these weeks by reading the decision carefully and considering a number of questions about the case. The questions were designed to encourage students to engage critically — with the effect of the case, the reasoning employed by the judge (from both internal and external perspectives), and also with the parties and the positions they adopt. These questions were provided to the students at the start of the semester and were the same every week, although some were more relevant to particular cases. The questions included:

- Who was the plaintiff/applicant/appellant and why were they bringing the challenge?
- What is the political background behind the legislation under challenge?
- Can you follow the logic of the reasoning of the judgments? To check the logicality of the judgments, check (1) is the argument based on sound premises? (2) do the premises support the conclusion?

Many of these questions have been drawn from the ‘melee’ model of critical thinking; Sampford and Wood, above n 88, 120ff; and the work of Jonathan Crowe on supplying methodical knowledge: Jonathan Crowe, ‘Reasoning from the Ground Up: Some Strategies for Teaching Theory to Law Students’ (2011) 21 Legal Education Review 49, 57–8.
• How would you describe the interpretative methodology used by the different judgments? Why do you think particular judgments have adopted a particular methodology? Do they justify it? Was there an alternative approach? Why wasn’t this adopted?
• Are the judgments informed by constitutional principles (such as federalism, responsible government, democracy)? What do the judgments reveal about the judges’ conceptions about these principles? Where do these come from? Are there competing, alternative conceptions of these principles?
• Did the practical consequences of the outcome inform the judgment? If so, how?
• Does the judgment reveal anything about the judge/s conception of the role of the Court? What about their values and politics?
• Does the case reflect tensions that exist in the broader community? How will the decision affect government and the community? Will there be groups who benefit from the decision, and groups who will be disadvantaged?

During the class, I used large-group discussion, small-group exercises and discussion and group presentations as we progressed through the different questions. In the class itself, I was joined by one of our Adjunct Professors, the Hon. John Doyle AC QC, who has extensive experience and expertise in constitutional law. His perspective, as a former Chief Justice of the Supreme Court of South Australia and Solicitor-General of South Australia, provided a contrast to my own academic perspective. Brookfield emphasises the importance of teachers modelling the process of identifying and questioning assumptions, and the technique of ‘modelling point-counterpoint’. In Advanced Constitutional Law I have been able to model this technique throughout the course. With my co-teacher, we have been able to demonstrate to the students how to question the assumptions of each other’s (often different) views on the questions in a professional and non-threatening manner.

In my compulsory course, Australian Constitutional Law, I would also like to start introducing some aspects of this more critical engagement with the cases that we teach — particularly some of the seminal constitutional cases that have had an enduring impact on the structure and practice of governance in Australian. However, because of the significant difference in the size and experience of the cohort, the smaller amount of flexibility in terms of content (as it is a core course), and the restraints in funding, I had to consider alternative ways of bringing the technique into the course. I have to accept that a large part of this course will be on doctrine. But this does not mean that it must be taught as the transmission of unquestionable judicial decisions or constitutional or statutory provisions.

91 Ibid, 65.
92 And also with other invited guests.
Next year, I will develop a series of podcasts on important constitutional law cases covered in the course. The podcasts will show a critical discussion engaged in between the lecturer and another person (who may be another lecturer in the course, an adjunct professor, or a legal practitioner who may have been involved in the particular case discussed, although the key here will be that they bring a different perspective to the case). These podcasts will be a resource that can be drawn on in later years and will allow large groups of students to see critical discussion modelled in an intimate setting. As part of a larger trend towards the ‘flipped classroom’, these changes will also allow me to use creatively the time and spaces that I do have with my students.

C Alex Reilly: Foundations of Law and Refugee Law and Policy

A particular concern of critical thinking is to appeal to and develop students’ extrinsic and intrinsic motivations for learning. A technique I use in all my courses to motivate students to learn is teaching legal principles through an engagement with contemporary issues which students discover for themselves in the context of a course. I do this very differently in a first year course and a final year elective.

In 2013 in Foundations of Law, the teaching team began each seminar with 15 minutes of ‘Legal Gossip’. Students were required to find local, national or international legal issues in print, broadcast or online media. The task was to identify the legal issue underpinning the news item and to ask questions about the item that reflected our learning of the law in the course at that time. As we learned about the institutions of government and the separation of powers, court hierarchies, and the concept of jurisdiction, students were required to apply their understanding of these concepts to the item that was currently the subject of legal gossip.

In the first week of Legal Gossip, we discussed the sources of legal information in the media and which information outlets students themselves used to source information. Students were encouraged to try out new sources of legal information, such as the ‘Legal Affairs’ sections of The Australian and the Australian Financial Review newspapers on Fridays, and the Law Report on ABC Radio National. Introducing students to these alternative sources of legal information is an important way to foster independent, self-directed learning.

93 See, for example, Jonathan Bergmann and Aaron Sams, *Flip your Classroom: Reach Every Student in Every Class Every Day* (International Society for Technology in Education, 2012).

We discussed the limitations of the media as a source of legal information, noting in particular that the journalists producing the stories were unlikely to have a legal background, and may not have had a deep understanding of the operation of legal institutions and their production of law. We also asked what assumptions underpin the journalists’ reporting of the law.

When a Legal Gossip item was reported to the class, the student presenting it was asked to present a brief summary of the story, and then to identify the legal context in which it arises and the particular legal issues at stake. Throughout the semester, students accessed an increasingly broad range of legal issues. Whereas in the early weeks they tended to report back on court cases, predominantly cases involving criminal offences, as the semester progressed they were able to identify a broader range of legal issues that were not evident on the face of the article, and through this, were often able to assess and critique the balance of reporting in the article.

Legal Gossip begins the process of inquiry that we hope to model throughout the law degree at Adelaide. Firstly, it demonstrates to students that they in fact have a considerable knowledge of the law without any formal training, and that they are able to extend this knowledge through their own inquiries. Secondly, it makes evident to students that law is a social and political construct which underpins and shapes the resolution of all issues in society. Thirdly, it offers an opportunity to unpack assumptions that are made in the reporting of legal issues, and the students’ assumptions in reading them, thus offering a direct engagement with the process of critical thinking as we have defined it above.95 By the time students study Refugee Law and Policy in the final years of their degree, they have a strong foundation of doctrinal knowledge. Instead of contributing to this store of knowledge directly, Refugee Law and Policy poses fundamental questions that underpin this area of law, such as the nature of state responsibility, the concept of state membership, the legal and political scope of the concept of a ‘refugee’, and the operation of the Refugee Convention in the Asia Pacific region, given the nature of refugee flows and political relationships in the region.

The course explicitly aims to raise difficult policy issues in their global, national and local contexts. The assessment requires students to engage in their own inquiries in response to the set questions discussed in class. The class discussion is designed to provide a foundation for deeper individual inquiry. Students are required to engage in two assessment tasks. The first is a short research paper on one of a set of topics arising from the classes. The second is a group presentation at the end of the semester on a set topic to which a group

95 Brookfield, above n 10, 159.
of students has been allocated. Each assessment is structured so that there is an interim assessment task on which students will receive feedback leading to the final research essay or presentation.

The difficult policy questions that underpin a nation’s response to the global refugee issue obviously lend themselves to this sort of wide-ranging inquiry. As a result of the investigation we have been conducting into critical thinking, I am considering other ways to challenge students’ assumptions about the regulation of people seeking asylum in Australia. One idea is to require students to have a more personal engagement with the issues by:

1. Requiring students to engage in community service with public or private organisations offering assistance to refugee arrivals in the local community, and writing a reflective journal on this experience. Possible activities include volunteering to assist high school students with homework, or acting as a mentor for first year university students with a refugee background. There are a number of established programs run by refugee organisations in which students can participate.

2. Organising students to visit refugees in the Inverbrackie Alternative Place of Detention. I have organised a tour of this facility in a previous course. The Department of Immigration and Citizenship openly facilitated this tour and spoke to the students at length about the facility. A different and more challenging experience for the students would be to visit the facility in a volunteer capacity, offering a service to residents in the Centre.

These examples of experiential learning could be linked to assessment tasks which require students to reflect on their experiences, and to consider those experiences in light of the legal regime governing refugee resettlement in Australia.

The Legal Gossip segments are a way to shift the focus from doctrinal analysis to a critical appraisal of law in society. It is a segment that works well in large or small classes. For me, this simple segment is a useful strategy to meet Thornton’s concern about the loss of a critical appraisal of law as a result of class sizes and passive teaching methods.96

V CONCLUDING REMARKS

This article began by describing how the Adelaide Law School critical thinking group was formed in response to Margaret Thornton’s economic analysis of contemporary legal education. While we do not claim to have transcended this critique, we have done important work toward strengthening the critical thinking skills of our students in both elective and compulsory courses. Our experience has been

96 See above, text accompanying footnote 5 to 7.
that, in many instances, the doctrinally focused pedagogy at the heart of Thornton’s critique does not necessarily exist because it is the inevitable result of neoliberal pressures on universities, but because it has become accepted and replicated as the status quo. But for educators interested in moving beyond doctrinal transmission, encouragement lies in a number of recent reforms that have again emphasised the importance of teaching critical thinking in the LLB.

Through this project we have built relationships with other educators committed to critical pedagogy, shared knowledge and experiences and involved ourselves in a project that enriches our working lives. It is our hope that by sharing our journey we inspire other academics to work collaboratively on a project that matches their own unique interests and institutional concerns. At the Adelaide Law School, our critical thinking group will continue to encourage new membership and will run a daylong workshop to elicit feedback from students who have participated in the courses described above. We also plan to run seminars for our colleagues where we can share our experience and learn further about how to strengthen critical thinking in our curriculum.

Our project, like other investigations into areas such as staff and student wellbeing, represents one part of a growing tapestry of initiatives that are seeking to enrich our schools and ‘humanize legal education’.

We should not lose sight of the level of collective energy that is going into alternatives, even as we continue to be self-reflective and critical of neoliberalism and its impacts on law schools.

I INTRODUCTION

Contemporary Australian universities have always been implicated in the broader power relations in which they are embedded. In our historical period, this context has been characterised by neoliberal political and economic practices which have, among other things, made central the relationship of individuals with the market and sidelined any larger conception of the social. Australian universities have not been immune to the changes neoliberalism has wrought on the social fabric. Indeed, as we will argue, their impact on universities is difficult to understate.

The Australian tertiary sector has been subject to the market imperative through the implementation of policies designed to transform it from a domestic social institution to a competitive export industry. To this end, university funding and accountability arrangements have been dramatically transformed in a manner designed to achieve a move from full government finding to ‘partial subsidisation’ and to bring about fundamental changes to university governance, budgetary processes and the conduct of teaching and research. Australian universities have undergone changes at every level from structure and governance through to the size, duration and nature of classes.

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1 David Harvey, A Brief History of Neoliberalism (OUP, 2005) 1.
5 Ibid 171, 176.
At the same time, rather than public funding for universities being understood as spending for public benefit, the much-diminished government funding now allocated is justified in terms of outcomes delivered rather than in terms of the public good. Margaret Thornton contends that in this process, the concept of the university, as well as its form and functions, has been altered as ‘the model of the for-profit corporation began to take over from the not-for-profit corporation as the primary meaning of the incorporated university.’

Law schools have been particularly vulnerable to neoliberal policy changes. Since student demand has been high and teaching in law is seen to require minimal upfront expenditure, increasing law student numbers has been a popular method of raising institutional prestige and subsidising other parts of the university. The steep increase in student numbers has inevitably raised concerns about the quality of legal education and its ability to foster creative inquiry and critical thinking. These concerns are lent credibility by the fact that increased staffing and resources have not accompanied higher student numbers. Instead, increases in student enrolment have brought larger classes, higher teaching and marking burdens and higher casualisation in most parts of the tertiary sector, including law. In this context, some law schools have responded to pressure to manage increased student numbers and remain competitive by simplifying course content, adopting multiple-choice assessment or removing theoretical material.

Our paper takes this account of neoliberal impacts on Australian legal education as its starting point. We focus on understanding the impact of neoliberalism on legal education with a view to investigating the potential for academic resistance to it. We argue that there is a pressing need for legal academics to go beyond critique and work to uphold alternative educational ideals. We also hope that this paper might provide one framework for thinking through the possibilities for mutual support and academic resistance. It is not our intention to advocate for a specific idea of legal education, or a single conception of how academics should respond. Rather, we

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7 Margaret Thornton, Privatising the Public University: The Case of Law (Routledge, 2012) 16.
8 Ibid 27.
11 Ibid 71.
12 Thornton, above n 7, 100–4.
13 Ibid 94–100.
propose the exploration of alternatives to neoliberalism tailored to
the unique conditions faced by legal academics.

We begin by conducting a review of the literature on academic
resistance to neoliberalism, much of which emerges from management
studies and sociology. This research provides very little evidence of
organised or collective resistance to neoliberal university reforms.
It does, however, highlight visible and hidden acts of individual
resistance that are both creative and effective. This literature also
investigates the operation of power in the university, including the
ways in which contemporary work practices and discursive strategies
reconstitute academics as self-disciplining and self-monitoring
neoliberal subjects.

These accounts offer valuable analyses of the nature of university
‘reform’ and academic responses to it. In some cases, however, they
draw on the early work of Michel Foucault to conclude that there is no
‘outside’ to power and that the as a result, academic subjectivities are
necessarily formed within neoliberal power. Under this analysis, it is
difficult to resist the conclusion that neoliberalism effaces academic
agency — a conclusion which, the sociological work on resistance
to neoliberalism in higher education suggests, many academics have
already accepted. We argue that this conclusion is not required.
Rather, we argue, using Foucault’s later work on governmentality,
that power can only be exercised over free subjects and resistance
is the effort to further expand and strengthen that freedom. Thus,
we argue for an account of power that enables academic agency in
opposition to neoliberalism.

Finally, we put forward an alternative conception of the academic:
academic as activist. This reconceptualisation recognises that
academics have a unique social responsibility to critically examine
social institutions, including the university. While this responsibility
might be taken up on an individual basis, we also wish to highlight
possibilities for collective action and strategies that respond at
the level of subjectivity, motivation and values. In short, we are
interested in exploring strategies for resistance that are counter to
the individualism and competition of neoliberalism as well as its
centralisation of the market.

In regard to collective action we begin by describing strategies
foregrounding law student wellbeing and the humanisation of
law schools as potential entry points for academics to engage in
transformative work. We go on to discuss approaches that would
require collective organisation, including ‘prefigurative politics’
— efforts to form alternative social relations and decision-making
processes that would ‘prefigure’ a different kind of faculty, school
or university. Finally, we consider the potential for academics
to ‘accompany’ other university workers and students in acts of
resistance that highlight common concerns, goals or grievances.
II Academic Resistance and Neoliberal University ‘Reforms’

It is difficult to understate the extent and nature of change within Australian universities over the last few decades. As Hamish Coates has remarked, Australian higher education has experienced ‘the most profound changes anywhere in the developed world.’\(^\text{15}\) Ryan, Guthrie and Neumann, for example, describe four successive waves of change to university funding arrangements.\(^\text{16}\) Of course, the higher education sector has not been alone in this process. Authors from management studies and sociology situate ‘reform’ to higher education within the wider context of reform to public management and public financial management.\(^\text{17}\)

These changes have produced escalating levels of accountability and micro-level government control\(^\text{18}\) accompanied by major changes in industrial relations which have, in both legal and structural terms, divided ‘the academic community into employers and employees, and further into full-time and casual employees.’\(^\text{19}\) The 51 per cent increase in student numbers between 1996 and 2005 while teaching-only and teaching-research staff slightly decreased\(^\text{20}\) has been accompanied by ‘onerous workloads and long working hours’, increased stress, escalating levels of casualisation\(^\text{21}\) and reduced job satisfaction as well as having impacts on the quality and experience of tertiary education, as we explained above.

It seems logical to expect that staff centrally involved in changes of this magnitude and extent might object to them. Various commentators have claimed that academics represent a constituency of workers who are particularly well equipped to critique and to resist neoliberal processes of surveillance, control and management. Gina Anderson, for example, argues that academics are motivated

16 Ryan, above n 3, 1723.
18 Ibid 174.
19 Ibid 177.
20 Ibid 178.
to ‘resist, ameliorate or neutralize managerial change’. She argues that academics are trained in analytic thinking and critique and therefore ‘unlikely to passively accept changes they regard as detrimental.’ Yet, researchers investigating the process of reform concede that there is little evidence of organised resistance to these changes in Australian universities in general, nor in Australian law schools specifically. Rather, as Margaret Thornton has observed, law school participation in neoliberal change has proceeded ‘with alacrity’. There is evidence that law schools are early and thorough adopters of neoliberal approaches, and this must be seen as particularly problematic for those who do not accept that these changes are desirable.

Researchers investigating responses to neoliberal and managerialist changes in Australian universities have offered several different accounts of this apparent failure of response. Some authors explain academics’ lack of organised resistance as arising from the extent and nature of university reforms themselves. They suggest that low levels of academic resistance to neoliberal management result from the hostile, precarious and overloaded nature of academic work which has resulted from changes to governance including performance management, quality assurance processes, restructuring and budgetary devolution, all driven by funding arrangements and reductions in government funding. Academics are simply too overworked, exhausted and overwhelmed to resist even when they do not live in fear of losing their jobs or failing to get another contract or casual position. These changes to university funding and industrial practices have been amplified by demographic changes which have created an ageing academic workforce.

26 Ibid 482. Thornton, above n 7, 227–8 provides a brief comment on counter examples from universities in Canada, New Zealand and Europe.
27 Thornton, above n 25 482.
Other writers argue that targeting academics’ avenues for resistance to managerial change has been a core part of the process of higher education reform and not merely an incidental effect.  

Parker and Jary, for example, explain diminished academic autonomy and reductions in democratic and collegial decision making in universities as prerequisites for the intensification of academic labour. They argue that the degree of intensification of academic work which has occurred would not have been possible without significantly decreasing the role and power of academics in decision making as well as restricting the democratic nature of decision making. They also suggest that the public pillorying of the university as a ‘bastion of parochialism rather than the cutting edge of the intellect’ has limited academic preparedness to counter neoliberal changes, which are often articulated as being essential to ensure efficiency, productivity and market capacity. The Gillard government’s decision to call its cuts to university funding an ‘efficiency dividend’ beautifully illustrated the effectiveness and impact of references to productivity and efficiency in the neoliberal context.

While many Australian law schools have been insulated from redundancies to a higher degree than more vulnerable parts of the university, they have certainly not been immune from casualisation, workload intensification and pressure to take higher numbers of students. Nor have they been exempt from the general move away from collegial decision making in favour of managerialist approaches. Indeed, where this has not been mandated, ‘professional’ disciplines such as law are, for the reasons outlined in the introduction, under greater pressure to operate on a business-like model. Given this array of pressures and high demand for legal education, Margaret Thornton has argued that law schools are compromising, if not overtly forsaking, the traditional values associated with collegiality, public good and the disinterested pursuit of learning in favour of a constellation of values associated with entrepreneurialism and the market.

Accounts of these changes to higher education, and to law schools specifically, offer valuable descriptions of the nature of university ‘reform’ and its context. However, they offer little to those

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31 Parker and Jary, above n 17, 324.
32 Ryan, above n 29, 5. See also Thornton, above n 7, 131–4.
33 Parker and Jary, above n 17, 323.
35 Thornton, above n 25, 482–3.
who would resist these processes or their impacts on the quality and nature of legal education in Australia. Further, they do not seek to articulate the impact of these changes on the experiences of individual academics rather than upon the workforce as a whole.

Whether we conceptualise the changes that have been wrought on higher education as manifestations of ‘managerialism’ understood as a power/knowledge discourse, or as strategies in the quest for ways to further regulate academic and university labour, they do not impact only on the sector, on institutions and on schools. They also impact on tertiary sector workers and students as people.

A second cluster of authors make these impacts their focus. They seek to understand academics’ capacity and strategies for resistance to neoliberalism through qualitative investigation of academics’ lived experience. Bronwyn Davies and her co-authors, for example, contend that it is not only the policy and governance context within which academics work that has changed. In doing so, they draw on Foucault’s early construction of power as a productive force, the constant negotiation of which produces our social relationships as well as our self-understandings and values — our subjectivities.

These authors suggest that neoliberal governance has imposed panoptic surveillance regimes on academics: regimes of oversight, accountability and audit which ensure every academic knows that s/he is constantly being watched and judged. They argue that this sense of constant surveillance produces academics who exercise self-surveillance and self-monitoring rather than requiring the imposition of external forms of coercion, though of course, this also occurs.

They argue that the escalating accountability to which academics have become subject has changed academic self-concepts, role concepts and emotions. We might add that law schools and legal academics are subject to further layers of surveillance arising from our relationship to the profession and the forms of accreditation necessary to ensure that law degrees will allow admission to that profession.

Anderson, above n 22, 253.
Parker and Jary, above n 17, 327.
Davies and Bansel, above n 24, 47; Bronwyn Davies et al, ‘Embodied Women at Work in Neoliberal Times and Places’ (2005) 12(4) Gender, Work and Organization 343; Davies and Petersen, above n 2, 77.
Davies and Bansel, above n 24, 47; Davies et al above n 38, 343; Davies and Petersen, above n 2, 77.
Ibid 327.
Ibid 329.
Further, these theorists argue that neoliberal processes constitute academics as subjects who think of ourselves and one other primarily through the lens of neoliberalism. This lens constitutes us first and foremost as individuals competing in the global marketplace. We teach students who have similarly been transformed into strategic, choice-focused consumers of educational services who need to make sure that they are maximising their chances of success under neoliberalism.\(^{45}\) In this context, choosing law can be seen as choosing a strategy to optimise future success. The current economic climate has produced a cohort of law students whose choices are not leading to the success they anticipated at enrolment.

These accounts of the neoliberal university also suggest that many academics (necessarily) attempt to turn neoliberal processes and discourses to our own ends even if also seeking to resist them. Some academics believe that they can use neoliberal discourse without being co-opted into accepting or participating in it.\(^ {46}\) Academics and administrators who have made the case for goals seen as desirable for law schools on the basis of resoundingly economic arguments may represent a case in point. Yet, as Judith Butler argues: ‘If I am someone who cannot be without doing, then the conditions of my doing are, in part, the conditions of my existence.’\(^ {47}\) Davies and Petersen draw on Butler to argue that neoliberal discourse is, like all discourse, active: ‘It is not just a tool we take up and use for conscious and intentional ends, but it is also an active force that limits and constrains us, and that has effects we may not choose.’\(^ {48}\)

Neoliberalism works on us without our consent and despite our motivations as well as being actively taken up by us in conscious ways,\(^ {49}\) constraining us as well as constructing us and being constructed through our responses to it. Davies and Petersen therefore argue that it is not possible to take up neoliberal discourse in a purely instrumental way, complying with its dictates as you might choose to comply with a law you do not personally agree with in order to avoid forms of law enforcement which you would prefer not to suffer. Rather, in taking up neoliberal discourse, we become implicated in it; it becomes us — a process which they argue holds clear risks.\(^ {50}\)

This understanding of the construction of subjectivity in the terms of Foucault’s early work on power theorises power, including

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\(^{45}\) Davies and Petersen, above n 2, 77 and Davies and Bansel, above n 24, 47.

\(^{46}\) Davies et al, above n 38, 344.


\(^{48}\) Davies and Petersen, above n 2, 79.

\(^{49}\) Ibid 80.

neoliberal power, as something with no outside. It is not possible to choose a vantage point from beyond neoliberal discourse from which to critique or resist it on this analysis. However, this understanding has implications for agency: a term which Foucault did not use but which Davies and Bansel deploy in arguing that academic workers have the capacity for autonomy but lack a sense of agency in the face of regulatory frameworks, globalised education systems, institutional policies and practices. They point out that the autonomy that academic workers do have tends to lead us to see ourselves as blameworthy individuals when our ‘choices’ produce undesirable results. Yet our choices and the context in which we can exercise them are severely constrained and the sense that the problem is individual and not structural or institutional or systemic is in itself problematic.51 This body of argument implies that the discourse of neoliberalism effaces, if it does not entirely eclipse, academic agency.

The conclusion that any sense of academic agency is under challenge is supported not only by the work of Davies and Bansel but by the work of other qualitative researchers within the Foucauldian tradition, whose work provides a description of both academics and universities as focused not on resistance, but on survival.52 For example Suzanne Ryan describes the effort to survive as resulting in ‘zombiefication’, 53 and Bronwyn Davies and Eva Bendix Petersen’s qualitative research describes ‘disillusioned and distressed individuals’ rather than ‘collective academic critique and resistance’.54 Maria Maisto supports these findings, arguing that for members of the profession, organising instils a fear of being labelled as ‘the kind of person’ who organises or joins a union.55

These findings are concerning for those who would resist neoliberalism in higher education, both in the sense that they suggest that despair rather than resistance currently prevails, and in the sense that this deployment of Foucault’s early work on power seems to call into question any ground from which such resistance might begin. In the next section, we investigate Foucault’s later work on power and argue that it offers more resources toward the conceptualisation of academic resistance.

A third category of writing about academic resistance argues that analytical frameworks which focus on active, organised and collective resistance are unable to apprehend or account for the

51 Davies and Bansel, above n 24, 51.
52 Ibid 52.
53 Ryan, above n 3, 4.
54 Davies and Bansel, above n 24, 80.
primarily individual and passive forms academic resistance to neoliberal policies has taken.\textsuperscript{56}

Gina Anderson is the key author who takes this perspective. She critiques the Foucauldian research discussed above, which documents academics as suffering anxiety and demoralisation rather than as engaged in resistance.\textsuperscript{57} She suggests that there has been little research into academic resistance to the implementation of market-based measures and neoliberal managerial practices in Australian universities, limiting our understanding of what is taking place.\textsuperscript{58} Further, the qualitative research which has been undertaken has used methodologies and perspectives that focus on a conceptualisation of resistance as involving co-ordinated acts with a durable public presence.

Anderson takes a broader view of political action and argues that our understanding of resistance should be expanded to include everyday, routine and informal acts of resistance to the exercise of power within university settings.\textsuperscript{59} She records passive and individual forms of resistance such as ‘forgetting’ or not completing certain tasks as well as more overt forms of resistance such as teaching students about changes to higher education.\textsuperscript{60} Anderson argues that these forms of resistance are widespread and effective in enabling academics to ‘resist many of the micro-physics of power associated with managerialism in Australian universities.’\textsuperscript{61}

Anderson argues that we need to step beyond pessimistic accounts of power drawing on Foucault’s early work that locate individuals as engaged in self-discipline and thus as unable effectively to resist. Instead she proposes focusing on ubiquitous power as presenting increased scope for resistance and contestation in its multiple locations.\textsuperscript{62} She makes the case for the forms of passive resistance she observes among academics being ‘creative, effective, and accomplished with humorous reflexivity.’\textsuperscript{63}

We accept Anderson’s proposal that we consider resistance and the construction of alternatives to neoliberalism as requiring, and taking, multiple forms. However, while Anderson, focusing on the early work of Foucault, treats Foucault’s analysis of power as an

\textsuperscript{56} Anderson, above n 22, 251.

\textsuperscript{57} Ibid 252.

\textsuperscript{58} Ibid 251.


\textsuperscript{60} Anderson, above n 22, 260.

\textsuperscript{61} Ibid 254.

\textsuperscript{62} Ibid 253.

\textsuperscript{63} Ibid 262.
obstacle to this project, we believe that Foucault’s later work can contribute an analysis of power capable of enabling, rather than foreclosing, academic resistance in the face of neoliberalism.

III POWER AND RESISTANCE

‘Power Is Exercised Only Over Free Subjects, and Only Insofar As They Are Free’

The forms of everyday resistance Anderson traces are primarily individual and passive, even undeclared. They do not rise to including the staff of a single school. Anderson was unable to find examples from the work of a trade union or staff organisation. Perhaps this reflects the prominence of individualism in academic work and ‘hyperindividuality’ within the neoliberal university. Perhaps it also reflects the experience of academics who engaged in more visible and active protests and reported feeling ‘dismissed, erased and reminded of their disempowerment.’ They also felt that their protests were ‘fruitless, and somewhat embarrassing, to their colleagues, and ultimately to themselves.’

This picture raises important questions for those concerned with resisting neoliberal reform. What is the source of the capacity to resist? More specifically, if power is, as Foucault puts it, an ‘omnipresence’, if ‘there is no outside’ from which to contest it, then how can the possibility of resistance arise? Pessimistic accounts of Foucault’s perspective on power certainly suggest it cannot account for agency. Alain Touraine, for example, critiques the Foucauldian construction of power as incapable of explaining the ‘constant transformation of society by social actors’ since Foucauldian accounts of power construct social actors as merely ‘the manifestations of a hidden domination.’ As we suggested above, the tenor of the Foucauldian accounts of academic life under neoliberalism to which we have referred is distinctly pessimistic. These accounts draw primarily on Foucault’s early work on power from *Discipline and Punish* and The History of Sexuality Vol 1.

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65 David Damrosch, *We Scholars: Changing the Culture of the University* (HUP, 1995) 7.
66 Anderson, above n 22, 259.
67 Ibid.
69 Foucault, above n 64, 301.
However, in this section we will show the centrality of resistance — indeed the priority of resistance — in Foucault’s later work on power. Further, we contend that the power exercised over academics is also productive. Thus power should be understood ‘not only a force of prohibition and repression external to subjectivities, but also and more important one that internally generates them.’ As a result, we need not understand the construction of academic subjectivities as foreclosed by power.

If universities are thoroughly invested with formations of power, these formations are mutually constitutive with the forms of resistance which contest them. If ‘[p]ower is everywhere’, then by the same token, ‘points of resistance are present everywhere in the power network.’ For Foucault, this relationship is not a simple coincidence. Nor is it the case that resistance only galvanises itself in response to power. Resistance is not a mere ‘reaction or rebound, forming with respect to the basic domination an underside that is in the end always passive, doomed to perpetual defeat.’ Rather, resistance ‘inhabits power’ and gives it content and form.

In summary, we contend that any given instantiation of power within the university is dependent upon formations of resistance that both impel it and imbue it with form and substance. Formations of power are in a constant process of being undermined and re-formed by the resistance of active agents. There is always something that ‘escapes them’.

As we explained above, researchers who have investigated academics’ responses to neoliberalism using qualitative research methods paint a picture of academics as overwhelmed and in despair. It seems to us that an invitation to conceptualise ourselves as agents (still, again) is called for. We accept that power operates through multiple mechanisms, including the formation of subjectivities. We also believe that any hope of an outside or external standpoint from which to contest power is both ‘futile and disempowering’. However, we do not accept that these propositions eliminate agency or require despair. Rather, even in the face of profound challenges, we contend that academics remain free subjects with agency to resist. Freedom is necessarily prior to the exercise of power and...

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74 Foucault, above n 68, 95–6.
75 Ibid 95.
76 Ibid.
78 Ibid 138.
79 Ibid.
our resistance is ‘the effort to further, expand, and strengthen that freedom’, an effort in which we believe everyone can participate.

IV Academic as Activist

How then could academics resist the forms of power associated with contemporary universities? We accept Anderson’s argument that there is a place for the individual, hidden acts of resistance that she and other authors document. Further, we also believe that neoliberal practices and discourses should be resisted in a multiplicity of ways and that there are concrete benefits to adopting strategies that are collaborative and overt. Acknowledging the diversity of contexts in which we might resist or construct alternatives, and the many strategies academics could deploy holds promise for counteracting the discouragement and despair that has been documented by many of the authors whose work we have considered.

We propose that academics conceptualise themselves as activists: advocates and actors for a political cause. Moreover, to be effective, we argue that academic activism should refuse the discourses central to the operation of neoliberal power. In particular, since individualism, competition and the centralisation of market models and goals form key neoliberal discourses, we propose them as discourses we might seek, in particular, to resist.

In articulating a vision of academics as activists, we draw on the tradition of academics as having unique social responsibilities in accordance with the university’s role as ‘critic and conscience’ of society. Gina Anderson has identified academics’ deployment of traditional academic culture and traditional understandings of the university as generating alternative subject positions from which to critique the impact of neoliberalism, and this project is one form resistance might take. Edward Said goes further, with his characterisation of an academic as ‘somebody whose place it is publicly to raise embarrassing questions, to confront orthodoxy and dogma (rather than to produce them) [and] to be someone who cannot easily be co-opted by governments or corporations.’ Said argued further that when necessary an academic should be prepared to be ‘embarrassing, contrary, even unpleasant.”

80 Hart and Negri, above n 73, 82.
82 Ibid 256–7.
84 Ibid 12.
Building on Said’s description, we contend that academics have a responsibility to understand the consequences of neoliberal reform in the university. While this responsibility might take the form of private intellectual inquiry, it could also comprise taking collective action to contest neoliberal ‘reforms’ and their outcomes in our schools and universities, as well as in the ways we conceptualise our co-workers, our students and ourselves. Given our training in advocacy and the specific impacts that neoliberalism has had on law schools, we contend that legal academics are in a strong position to conceptualise ourselves as activists. As Thornton contends, ‘[l]egal academics, in particular, know that justice emerges from the dialogic relationship between the ‘is’ and the ‘ought’ of law, not from ‘is’ alone.\(^\text{85}\)

In the space remaining, we give further content to our characterisation of the academic as activist beginning with a discussion on ethical resistance. We also engage with issues of strategy that are particular to legal academics. In starting this discussion, we are keenly aware of the gap between the exhausted and disempowered everyday life of academics described in the qualitative research we have referred to and the levels of energy, time and collaboration required for effective resistance. This context underscores the priority that must be given to creating a context in which these forms of action could begin. Here, we begin by considering actions that begin with the present situation and then move to larger projects that require greater organisation and aspire to transformation. For us, this structure is not simply theoretical. Rather, it mirrors a recent process that we have initiated in collaboration with other academics from different disciplines and universities who are interested in pursuing activism on neoliberalism that is social, investigative and collaborative. In pursuing this approach we have acknowledged that responding to overwork and despair may be a prerequisite to other forms of action and opened space for a conversation about what might be possible and how it might be accomplished.

**A Desirable Change and Ethical Resistance**

Academics who identify as activists need a clear conception of who or what they are resisting. Put simply, not everything that occurs in universities is neoliberal or undesirable. The university consists of a complex assemblage of structures, values and practices. Like other social institutions, it has evolved over time with reference to the projects of individuals, political groups and other social institutions. Sometimes these forces are place-specific and sometimes they are national (or even international). Projects can also have lives of their own and are reproduced in unpredictable ways as they come together

\(^{85}\) Thornton, above n 7, 228.
to constitute a particular institution. As the outcomes of our efforts and those of others become apparent, further critique and action may be called for, and our strategies and analyses of resistance may require revision.

For these reasons, we suggest that academic activists conceptualise the university as a set of practices that are historically contingent and capable of transformation. This perspective is important, first, because it brings into view the potential for alternatives to the prevailing state of legal education. In contrast, the construction of neoliberalism as ‘necessary and inevitable’ forestalls the possibility of resistance and makes critique appear foolish. Second, it means that resistance can also be nuanced and directed at particular structures, practices or values rather than at the university or the tertiary system as a whole. This has obvious implications for the prospects of successful action and for our sense of agency as activists.

The flip side to this conceptualisation is also important. Desirable changes in legal education as well as in Australian universities have taken place during the last few decades as neoliberal practices have also become more and more embedded. As academic activists we need to choose forms of resistance that we believe are ethical and meaningful. We are in no way obliged to oppose every form of change. We might instead choose virtuous compliance with changes we think are desirable, or support goals we believe are desirable while opposing forms of implementation we believe are not.

For example, the massification of the student population has increased diversity and the social mobility of individuals from lower socio-economic backgrounds. The way in which it has been implemented has brought increases in student–staff ratios and in administration. In choosing resistance to ever increasing student–staff ratios we need not lose sight of the positive aspects of increased access to higher education. Nor should we lose sight of the need to choose ethical strategies in resisting processes such as these: while academics may not wish to pay for the consequences of neoliberalism, it is difficult to see why students should be impacted in our place.

87 Davies and Petersen, above n 2, 84.
88 Ibid 93.
90 Thornton, above n 7, 13.
B Discourses for Resistance

If neoliberalism is not only an economic structure, but also a set of discursive strategies, it follows that we can resist it at the level of our engagements with these discourses and at the level of the construction of our subjectivities. If discourse is a ‘a series of discontinuous segments whose tactical function is neither uniform nor stable’, discourse is an instrument and an effect of power, but also a potential hindrance, a point of resistance, and a starting point for opposing strategies. Our efforts to resist should be recognised and could be consciously undertaken as forms of activism. If they were understood in this way, perhaps the evidence of academic resistance to neoliberalism would look quite different. We therefore wish to highlight some discourses for resistance that respond at the level of subjectivity, motivation and our values.

We have argued that individualism, competition and the adoption of market metaphors and processes as appropriate for all dimensions of life form key dimensions of neoliberalism. Individualism operates to isolate academics and predispose us to adopt understandings of the neoliberal university in which the difficulties we face are constructed as individual rather than structural or institutional. It is seen to follow that solutions must be found though individual effort and that our colleagues should be seen as our competitors. We propose the adoption of strategies which refuse individualism. Rather, we advocate that academics build relationships with one another and work collaboratively toward mutually agreed goals.

For example we can participate in the wider conversation about student wellbeing that has grown up in response to research and advocacy on law student depression. In doing so, we should contest conceptualisations of the problem and potential solutions which strengthen, rather than undermine, neoliberalism. A focus on student wellbeing offers multiple possibilities for conceptualising students as human beings rather than as potential sources of profit, and for critique and politicisation of the practices of the legal profession and the law school. Rather than treating students as problem-bearers or individual victims of mental illness, we can draw on responses which, instead of asking what students have done to make themselves sick, seek to ask how the law school, the university and the profession

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91 Davies and Petersen, above n 2, 87; Anderson, above n 22, 256.
92 Ibid.
93 Parker and Jary, above n 17, 320.
might be having this impact and how we can respond. These responses can offer our students paths toward critical engagements with the legal profession as well as offering strategies and tools for teachers who are seeking to support student wellbeing.

We can participate in wider discussions about the health and wellbeing impacts of a profession and workplaces that treat our graduates as a means for profit making at the expense of their wellbeing and their participation in their families and communities. We can be part of discussions questioning why the professions for which we are preparing our students have high rates of alcoholism, (mis)use of other drugs, anxiety, depression and suicide. Indeed, where we see these phenomena in our own lives and workplaces we might consider inquiring into, and politicising, their causes there. Rather than allowing these conversations to be drawn relentlessly down to the level of individualising and medicalising the problem, we can be looking to the causes of ill health and misery in our institutions and in the professions.

The US literature on humanising the law school forms another example of thinking about students and the profession from the perspective of thriving, with a focus on community service, ethical obligations, and turning critical thinking toward the practices of law schools and the profession. In the Australian context, the national Threshold Learning Outcomes and degree objectives related to critical thinking skills and social context may offer further options

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97 Ball, ‘Governing Depression’ above n 50, 297.


100 See for example, the Adelaide Law School Graduate Attributes <http://www.adelaide.edu.au/professions/downloads/gradattributes/law_llb.pdf>. They maintain that graduates will have ‘critical thinking and problem solving skills’ as well as ‘an understanding of social justice through the operation of law.’
for engagement with students and teaching which centralise social context and critique rather than a market based perspective.

However, we cannot participate in these (or any other) strategies on the basis that our actions can be innocent or neutral in the face of power. Psychological and pedagogical research which underpins much of the literature on law student depression and humanising the law school does not represent innocent knowledge — that is, some sort of truth which can tell us how to act in the world in ways that benefit or are for the (at least ultimate) good of all. Those whose actions are grounded in or informed by such truth will also have their innocence guaranteed. They can only do good, and not harm, to others.\(^\text{101}\)

Rather, we need to be constantly alert to the ways in which these projects may contribute to pressure for students to become ‘responsible, risk-managing and self-governing persons’ whose formation ‘reflect[s] and reinforce[s] advanced liberal government’.\(^\text{102}\) This is a process in which we may participate no matter how pure we feel our motivations are: our actions can never be innocent of power, and the outcomes engagement with power produces can never be entirely within our control. However, inaction in the face of neoliberalism also represents a relationship with power that is not innocent, a relationship with power which carries risks, as the qualitative research into academic life we have discussed above reveals.

If, as Butler suggests, we perform ourselves as neoliberal subjects, we can also choose to perform ourselves and our roles as academics in transformative and subversive ways.\(^\text{103}\) We can refuse the marketisation of everything we do in ways large and small. We do not need to continue to participate in the processes by which we (together with the rest of the Australian workforce) are rendered more and more ‘productive’ through overwork. We can participate in strategies like the Australia Institute’s ‘Go Home on Time Day’.\(^\text{104}\) We can encourage others to do likewise — and to question why there should be only one day of the year when we go home on time. We can reclaim lunch as an opportunity to have conversations away from the desk and computer. We can reclaim conversation with our co-workers as a pleasure rather than a limitation on productivity. We can constantly hold out the possibility for constructive solutions through collaboration and a determination to keep seeking alternatives to the aspects of our work and our institutions that do not work for students or for staff. We can think big, but we don’t have to wait for the day

\(^\text{101}\) Jane Flax, ‘The End of Innocence’ in Judith Butler and Joan Scott (eds), Feminists Theorise the Political (Routledge, 1992) 447.
\(^\text{102}\) Ball, ‘Governing Depression’ above n 50, 296.
\(^\text{103}\) Judith Butler, Undoing Gender (Routledge, 2004) 3.
\(^\text{104}\) Go Home on Time Day: http://www.gohomeontimeday.org.au/.
that neoliberalism grinds to a halt to act. We can begin at our own desktops and in our own tutorials and meetings. To the extent that we feel we have become ‘zombies’, we can begin to figure out — with our friends, at work and outside and with our families — what would need to be different for us to thrive and become agents in our own working lives, law school and institutions.

C Prefigurative Forms of Resistance

The existing literature offers a very narrow conception of the kinds of activities that academics are engaging in to resist undesirable neoliberal reform. Even Anderson’s more expansive study focuses almost exclusively on individual and sometimes hidden acts of protest. Reflecting rising pressure on academics and our perceived disempowerment, these accounts conceptualise resistance as primarily responsive or negative. Yet, once legal academics have begun to collaborate and engage with some of the discourses noted above, we might seek to expand their resistance and draw applicable lessons from successful social movements in broader society where the challenges are surely no smaller.

While it is varied, social movement literature has consistently highlighted the importance of positive projects that both galvanise support for their cause and create the kinds of social relations and institutions that participants would like to see an ideal future society embody. This kind of resistance is called ‘prefigurative politics’ because it is designed to create the conditions necessary to conceptualise different futures and acquire the skills needed to bring them about.

The notion of prefigurative politics emerged in the 1960s from the US student movement. As described by Wini Breines the term denotes ‘relationships and political forms’ that prefigure and embody ‘the desired society’. Central to this approach is the belief that the methods used for resistance are intimately connected with the ends toward which they are directed.

105 Ryan, above n 3, 3.
108 Ibid.
In the context of law schools, possibilities for prefigurative projects are significant. For example, Margaret Thornton has highlighted the impact of neoliberal reforms on the teaching of critical approaches to the law.\textsuperscript{110} Prefigurative projects for resisting the ‘jettisoning’ of critical perspectives might involve collaboratively learning techniques for teaching critical theory; mapping the prominence of critical theory in the compulsory LLB curriculum (both in terms of course content and assessment); and investigating opportunities for strengthening critical theory in the compulsory curriculum.\textsuperscript{111}

Another possibility for prefigurative work concerns the diminution of collegiality and collective decision-making within law schools. The concentration of power in management has contributed to the ‘sense of alienation and anomie that besets the contemporary legal academic.’\textsuperscript{112} While corporatisation is destructive of collegiality\textsuperscript{113} it has not yet eroded all opportunities for collective decision making in law schools. For example colleagues retain a significant level of autonomy in how we interact with each other in daily administration and the decision-making process for team teaching.\textsuperscript{114} While perhaps small, these examples are important for the personal practice in collegiality and collective decision making. They must also be seen in light of more forceful advocacy for the democratisation of universities.\textsuperscript{115} One visible example is the petition ‘Manifesto for Change’, which was signed by over 500 academics in the UK.\textsuperscript{116} The document calls on the coalition government and UK universities to reverse policies that are leading to the commercialisation of higher education. Part of the document demands that universities: ‘[Democratise] governing bodies through the allocation of equal votes to staff and student representatives, community members, and employers’ representatives.’\textsuperscript{117}

While we recognise existing constraints on academic activism, we contend that projects like these are a precondition for realising any radical alternative to the prevailing neoliberal form of university education. Prefigurative projects, both small and large, can also

\textsuperscript{110} Thornton, above n 7 chapter three.
\textsuperscript{111} See for example Gabrielle Appleby, Peter Burdon and Alexander Reilly, ‘Critical Thinking in Legal Education: Our Journey’ which is included in this volume.
\textsuperscript{112} Ibid 131.
\textsuperscript{113} Ibid.
\textsuperscript{114} Beyond governance, opportunities also exist for democratising the classroom. See in particular, Paulo Freire, \textit{Education for Critical Consciousness} (Bloomsbury Academic, 2005) and Ira Shor and Paulo Freire, \textit{Freire for the Classroom: A Sourcebook for Liberatory Teaching} (Heinemann, 1987).
\textsuperscript{115} See Richard Wolff, \textit{Democracy at Work: A Cure for Capitalism} (Haymarket Books) 34.
represent an affirmative form of resistance that is rewarding and gives energy to one’s work. Indeed, if undertaken collaboratively and with mutual respect, we contend that prefigurative acts of resistance can enrich the life of a law school and the educational experience of students.

D Accompanying

So far our characterisation of the academic activist has stressed the importance of breaking from the individualisation of neoliberalism and moving toward collective forms of resistance. Taking this further, we suggest that legal academics can learn from the practice of ‘accompanying’ and understand their activism as intimately connected to academics within other disciplines\(^\text{118}\) as well as other university workers and students.

The term ‘accompanying’ has a long history in social movements.\(^\text{119}\) Paul Farmer offered a useful description of the term during a commencement address for the Harvard University Law School. In the context of his work during the 2010 Haitian earthquake, Farmer states that ‘to accompany someone is to go somewhere with him or her, to break bread together, to be present on a journey with a beginning and an end.’\(^\text{120}\) Farmer indicates that we’re almost never sure about the end:

There’s an element of mystery, of openness, in accompaniment. I’ll go with you and support you on your journey wherever it leads. I’ll keep you company and share your fate for a while. And by “a while”, I don’t mean a little while. Accompaniment is much more about sticking with a task until it’s deemed completed by the person or persons being accompanied, rather than by the accompagnateur.\(^\text{121}\)

Labour-lawyer Staughton Lynd describes accompanying as a non-hierarchical practice that implicitly challenges individualisation and isolation. He suggests that ‘if accompanier and accompanied are conceptualised, not as one person assisting another person in need, but as two experts, the intellectual universe is transformed.’\(^\text{122}\) No longer do we have one kind of person helping a person of another

\(^{118}\) It is important to recognise that many other disciplines do not enjoy the same privileged position as law within the university and have had more significant funding and workload impacts. For an exploration of the impact of neoliberalism on the liberal arts see Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities* (Fordham University Press, 2008).


\(^{120}\) Paul Farmer, *Accompanying as Policy* (Office of the Special Envoy for Hairi, 2011) 1.

\(^{121}\) Ibid.

kind. Rather we have two collaborators who are exploring a path forward together.\textsuperscript{123}

In the context of law schools this reframing is important because it recognises that academics are not the only ones impacted by neoliberal reforms. Professional staff and students also have the opportunity to be involved in articulating potential solutions or methods of resistance. A serious process of accompaniment with these groups necessitates that artificial barriers of separation between academics and the rest of the university community be broken down. In particular, notions of superiority and illegitimate hierarchies\textsuperscript{124} are barriers to collective engagement and our ability to resist the individualisation of neoliberal discourse.

One potential barrier to student accompaniment is the fluctuating nature of the student cohort. Further, student organisations in most Australian universities in the era of Voluntary Student Unionism have very limited resources and little access to the collective memory of student movements of the past. Nevertheless, students continue to organise. Law students, in particular, form a relatively coherent cohort studying a largely shared set of topics, in which legal academics will often have multiple opportunities for contact. They are often organised even at institutions where the wider student body is less active, and they also have a national organisation with institutional memory.\textsuperscript{125} Opportunities for accompanying students who are seeking to improve legal education or the legal profession or who are responding to government policies are therefore more plentiful in law than in many disciplines.\textsuperscript{126}

For an accompanying approach to be successful, academic staff need to approach the process with humility and self-reflection as privileged and relatively powerful members of the university community. Academics should also acknowledge that when students pursue change, they are doing so in their own time and with limited resources. They are also breaking the mould of the ‘passive’ or ‘disinterested’ student and demonstrating a passionate concern for their own education. If we fail to engage with groups of students who seek to raise concerns or advocate for alternatives to the educational experience they are currently offered, we risk disempowering the student body and further inculcating a culture of disengagement with the learning community. Moreover, we lose the opportunity to model for our students (many of whom will go on to occupy positions of

\textsuperscript{123} Ibid.

\textsuperscript{124} Illegitimate hierarchies refer to relationships of ‘power over’ which cannot be justified. In proposing this idea we wish to highlight that not all hierarchical interactions between teachers and students are illegitimate. Common examples of ‘power over’ which could be justified include (but are not limited to) classroom interactions and marking assessment.

\textsuperscript{125} The Australian Law Students’ Association: http://alsa.net.au/.

\textsuperscript{126} For one example of such student activism at the level of a single law school see: Law School Reform, above n 9, xii.
authority) how a person with privilege could reflexively engage with those with less power than themselves.\footnote{See Nel Noddings, \textit{Education and Democracy in the 21st Century} (Teachers’ College Press, 2013).}

\section*{V Concluding Remarks}

This article seeks to begin a conversation about how academics might respond to the neoliberalisation of universities. This is a fundamentally different question from that addressed by the growing critical literature on legal education. It requires us to look backward at the reforms that have occurred over the past 30 years and also forward with recognition that we are implicated in and integral to the power dynamics of universities. How we navigate this space matters a great deal to the future of legal education and how our institutions function.

We have put forward an argument for conceptualising academics as activists — a term we used to encompass both direct action and prefigurative programs of resistance. There are multiple opportunities for individualised, subtle or hidden forms of protest, and these strategies form necessary and significant parts of responding to neoliberalism. They can undoubtedly be characterised as activism. There is evidence that these strategies predominate amongst those currently being deployed by Australian academics.

We would argue, however, that collaborative strategies also offer viable paths for expanding and strengthening our freedom or agency as individuals and as co-activists. More than ever, there is need for a ‘dissensual community’ in an environment where acquiescence has become the norm. We have an obligation as legal academics to begin a conversation about how we can uphold the university’s role as ‘critic and conscience of society’ and support colleagues and students to empower themselves to resist a vision of education which many believe is beyond reproach. As this article has demonstrated, there are choices about how to proceed and more opportunities will come into view as we work on this issue, build alliances and include new voices. One thing is clear: if we do nothing, we can guarantee that there will be no change for the better.