Foreword

Nick James 3

Capstones as *Transitional* Experiences
Judith McNamara, Rachael Field, Sandra Coe, Des Butler, Catherine Brown and Sally Kift 7

Law Student Mental Health Literacy and Distress: Finances, Accommodation and Travel Time
Nerissa Soh, Fiona Burns, Rita Shackel, Bruce Robinson, Michael Robertson and Garry Walter 29

Law Journals: From Discourse to Pedagogy
Ilija Vickovich 65

Indigenisation of Curricula: Current Teaching Practices in Law
Amy Maguire and Tamara Young 95

Towards a Pedagogy of the Integration of Clinical Legal Education Within The Law Curriculum: Using De-Identified Clinic Files Within Tutorial Programs
Rachel Spencer and Matthew Atkinson 121

(continued)
Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects

Francina Cantatore 147

‘Favourable Variations’: Towards a Refreshed Approach for the Interviewing Classroom

Jane Ching 173

More Than the Rules: Using Pleading Drafting to Develop Lawyering and Transferable Skills

Kate Curnow 203

Using Transactional and Experiential Techniques to Teach Corporations Law

Andrew Godwin 221

Legal Education, Legal Practice and Ethics

Maria Nicolae 237

Developing an Animal Law Case Book: Knowledge Transfer and Service Learning from Student-Generated Materials

Sophie Riley 251

Law Schools and the Market for International Postgraduate Students

Peter Devonshire 271
Foreword
Gabrielle Appleby, Alexander Reilly and Sean Brennan 295

Teaching Public Law: Content, Context and Coherence
Graeme Orr 299

Breadth, Depth and Form? Pitching Constitutional Law Content in the Classroom
Sarah Murray 317

Extending Public Law: Digital Engagement, Education and Academic Identity
Melissa Castan and Kate Galloway 331
The Legal Education Review is an independent referred 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. For enquiries about ALTA contact admin@alta.edu.au.

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FOREWORD

Welcome – finally – to the latest volume of the Legal Education Review. This volume of the Review, Volume 25, is as usual made up two issues, a General Issue and a Special Issue. The Special Issue contains three articles about the teaching of public law, and is introduced by a separate Foreword written by guest editors Gabrielle Appleby, Alexander Reilly and Sean Brennan. The General Issue is comprised of twelve articles that explore a variety of legal education topics, and is the focus of this Foreword.

The first article in the General Issue is concerned with curriculum design and the use of capstone programs. Capstone programs aid the transition of final year students to their post-university professional careers, but although they have a long history in other disciplines, they are a relatively recent inclusion in Australian law curricula. In ‘Capstones as Transitional Experiences’, Judith McNamara, Rachael Field, Sandra Coe, Des Butler, Catherine Brown and Sally Kift report on a project that identifies six key principles for the design of effective capstone programs – transition, integration and closure, diversity, engagement, assessment, and evaluation – and two themes underpinning capstone experiences that sit behind the six principles – integration and closure, and transition. In this article they focus upon the theme of transition and explain how the resources provided in their project ‘Toolkit’ can assist unit coordinators to design effective final year capstone programs.

The next article is concerned with the topical issue of law student wellness. In ‘Law Student Mental Health Literacy and Distress: Finances, Accommodation and Travel Time’, Nerissa Soh, Fiona Burns, Rita Shackel, Bruce Robinson, Michael Robertson and Garry Walter argue that law student distress has not been as well studied as medical and health science student distress, and that the impact of financial pressures, accommodation pressures and commuting on law student distress levels have not been considered carefully. They report on a 2013 survey of 579 law students at the University of Sydney that assessed their levels of psychological distress and examined a wide range of possible stressors. The authors discuss the implications of their findings, including the conclusion that gender appeared to be the only significant predictor of psychological distress after controlling for degree type: female students were significantly more distressed than male students.

In ‘Law Journals: From Discourse to Pedagogy’, Ilija Vickovich argues that student editorship of university law journals can be a valuable pedagogical tool. Ilija contrasts the debates about law journals in the US, the UK and Australia. In the US, the discourse is not only concerned with the proper role of law journals for academics and law reform, but also features a prolonged, heated and as yet unresolved debate about their editorship by unsupervised students. In the UK and Australia, however, the literature about law journals has focused almost exclusively on the place of journals in the development of the law. Ilija argues that law schools should learn from the discourse in order to focus on the
pedagogy, and outlines a model for a unit of undergraduate study centred on the publication of law journals that maintains their central function while accommodating student editorship with academic supervision.

In ‘Indigenisation of Curricula: Current Teaching Practices in Law’, Amy Maguire and Tamara Young explain how Indigenous peoples in Australia are typically disadvantaged in the higher education context, and argue that law schools have an obligation to increase participation rates and promote successful outcomes for Indigenous students. The Indigenisation of the curriculum is one of the ways in which more positive outcomes for Indigenous students can be achieved, and Amy and Tamara describe in detail what this might mean for law schools. They examine Indigenisation of the law school curriculum in four areas – Indigenous issues, Indigenous perspectives, Indigenous law and Indigenous law students – using the incorporation of Indigenous-related content and perspectives into the Newcastle Law School curriculum as a case study.

The next two articles are concerned with the role of legal clinics within the law school. In ‘Towards a Pedagogy of the Integration of Clinical Legal Education within the Law Curriculum: Using De-Identified Clinic Files within Tutorial Programs’, Rachel Spencer and Matthew Atkinson consider the benefits and implications of using de-identified client files from a law school clinic as teaching and assessment tools in other units. The authors describe how this is done at the University of South Australia, demonstrate how the use of real client files can assist unit co-ordinators with the challenge of thinking up endless new fact scenarios, and argue that these real legal problems are preferred by students over fictitious dilemmas. The authors also explain how the practice of using legal clinic files in other units can create a pro bono culture and a consciousness of access to justice issues not only for students in the clinical program but for all students in the law school.

In ‘Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects’, Francina Cantatore examines the benefits of adopting an experiential learning approach using a pro bono teaching clinic and considers the advantages of consciously incorporating service learning into such a clinic. Her examination is enlivened by a case study of the successful commercial law teaching clinic established at Bond University. Francina also examines the challenges inherent in establishing a teaching pro bono clinic within a law school, and suggests some practical solutions to ensure an effective model and enhanced student employability.

The next two articles focus upon the teaching of practical legal skills, namely interviewing skills and drafting skills. In ‘Favourable Variations: Towards a Refreshed Approach for the Interviewing Classroom’, Jane Ching considers the challenges associated with teaching the skill of client interviewing. She argues that over-reliance on interviewing protocols creates a risk that students will develop a rigid, rehearsed performance that does not effectively reflect the nuanced nature of legal practice or encourage them to develop a personal practice. Jane contends that client interviewing should be treated as a threshold concept or capability, and that variation theory can be a useful means of helping novice students to
understand the significance of the different variables in a client’s problem.

In ‘More than the Rules: Using Pleading Drafting to Develop Lawyering and Transferable Skills’, Katherine Curnow writes about teaching law students the specialised skill of pleading drafting. She proposes that pleading drafting exercises can be used to develop both lawyering skills and more generic transferable skills. Katherine explains how an experiential learning model can be used to teach pleading drafting, using the University of Queensland Civil Procedure unit as a case study.

In ‘Using Transactional and Experiential Techniques to Teach Corporations Law’, Andrew Godwin considers the benefits of teaching corporations law using transactional and experiential techniques. Andrew suggests ways in which the transactional aspects of corporations law can be better emphasised within the law school curriculum, and describes some useful transactional and experiential techniques including client-based problems, client interviews, drafting and negotiation simulations and facilitated reflection.

In ‘Perspective, Ethics and the Teaching of Law’, Maria Nicolae critiques the way in which legal ethics and professional conduct are typically taught in Australian law schools, and argues that the current approach is not adequate for two main reasons: (1) it does not account for the heterogeneity of the student body and the changing role of law schools; and (2) it promotes an understanding of and compliance with legal professional rules rather than preparing students for the wide variety of ethical dilemmas that arise in practice. Maria proposes that law students be introduced to a broader concept of ethics, that such exposure be scaffolded into all law units, and that experiential learning is the most efficient and expedient method of teaching ethics.

In ‘Developing an Animal Law Case Book: Knowledge Transfer and Service Learning from Student-Generated Materials’, Sophie Riley describes the development by students of an animal law case book as part of their studies in the unit Animal Law and Policy in Australia at UTS. Sophie argues that the Animal Law Case Book project demonstrates the benefits of practice-oriented learning to facilitate knowledge transfer and service learning, and how student work can lead to positive outcomes for not only the student’s own learning but also the field of study and the wider community.

Finally, in ‘Law Schools and the Market for International Postgraduate Students’, Peter Devonshire considers how Australian law schools might address the challenge of attracting international students for postgraduate study in an increasingly competitive market. He focuses on LLM coursework programs, which in many law schools account for the largest enrolment of postgraduate students, and explains why some law schools appear to be more successful than others. Peter offers some valuable suggestions about the characteristics of a successful LLM program, and about the ways in which law schools that are less successful in international rankings might nevertheless compete for international postgraduate students.
This volume of the *Legal Education Review* would not have been possible without the contributions of many committed academics, all of whom volunteered their time and expertise. Thanks are especially due to the members of the 2015 Editorial Committee for their hard work in bringing this volume together: Associate Editor Kate Galloway (Bond University), Executive Editor Michelle Sanson (Western Sydney University), and Editors Matthew Ball (Queensland University of Technology), Donna Buckingham (University of Otago), Allan Chay (Queensland University of Technology), Kristoffer Greaves (Deakin University), Anne Hewitt (University of Adelaide), Natalie Skead (University of Western Australia), and Sonya Willis.

I would like to thank our former Administrator, Paula Hudson, for her important contributions to Volume 25, and welcome to the journal our new Administrator, Hayley Vinnicombe, who will oversee the preparation of Volume 26 as well as the next phase of the *Legal Education Review*’s evolution into an open access journal. I would also like to thank Helen Anderson, ALTA Treasurer, for her careful management of the journal’s finances, and the ALTA Executive Committee for their ongoing financial support and encouragement.

All of the articles in the *Legal Education Review* are double blind refereed. Our referees spend many hours reading and providing feedback about our articles, and their efforts are genuinely appreciated by both the editors and 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 *Legal Education Review* has recently issued a call for submissions to Volume 26 of the journal, to be published in late 2016. The Editorial Committee welcomes the submission of research articles on current issues in legal education from all jurisdictions. Submissions are open until 30 May 2016. Please refer to the *Legal Education Review* website for more details: www.ler.edu.au.

The Editorial Committee also welcomes proposals to publish special issues of the Review containing articles on a theme written by groups of authors. Examples of recent special issue themes include the research/teaching nexus (2012), critical legal education (2013) and the teaching of public law (2015). Please note that all papers submitted for such special issues will still be independently referred prior to publication.

Professor Nick James
Editor-in-Chief
CAPSTONES AS TRANSITIONAL EXPERIENCES

JUDITH MCNAMARA,* RACHAEL FIELD,** SANDRA COE,*** DES BUTLER,† CATHERINE BROWN‡‡
AND SALLY KIFT‡‡‡

I INTRODUCTION

There is growing appreciation by the Australian legal education sector of the importance of providing students with culminating experiences that cap-off their university education. Despite a long tradition in other disciplines, the integration of final year capstone programs by Australian Law Schools has been slow, although momentum has been gathering in recent years.¹ The move into a new regulatory and quality environment, with its focus on academic standards and the demonstration of student acquisition of program learning outcomes, has generated a shift in the Australian higher education sector which has brought capstone experiences sharply into focus, especially for legal education.²

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In response to these changes, the *Curriculum Renewal in Legal Education* project (‘the project’) developed a principled framework to approach the design of capstone programs for the final year of the law curriculum. Although the focus of the project is legal education, the framework is transferable across disciplines and institutions, and can equally be applied to international contexts. The project synthesises final year curriculum innovations from other disciplines nationally and internationally and bridges the gap between curriculum theorising and practice through its identification of six capstone curriculum design principles. The principles are transition, integration and closure, diversity, engagement, assessment, and evaluation. It applies this principled approach to capstone design in legal education through its Toolkit outlining suggestions for subject models for law, along with examples of actual capstone programs in order to offer guidance to course convenors for the planning of capstone programs.3

The review of the literature indicates that although reflection is a significant feature of capstone programs, it is not of itself the underlying aim of the experience. Rather, integration, closure, and transition are often the objectives found in most capstone experiences. Therefore these three concepts are the main themes that influence the overall objectives of these programs. As integration and closure complement one another, they have been combined into one theme to be considered in a forthcoming publication. This article discusses the concept of *Transition* as a theme influencing capstone experiences. It explains how this theme underpins the curriculum design principles. It outlines how the components of the Toolkit complement one another in order to guide course convenors to design effective capstone programs intended to support students with the final year transition from undergraduate to emerging professional. The first section of the article discusses the notion of transition in higher education, particularly the understanding of final year students as students in transition. The next section outlines the notion of transition as it is conceptualised within the project and the remaining sections outline the approaches used in the Toolkit to address the transitional needs of final year students.

**II Final Year Students as Students in Transition**

Transition is becoming an increasingly important concept in higher education, with the concept generally associated with student needs. Often, however, students’ transitional needs are viewed from an entry perspective with a significant degree of the literature in education concerned with the needs of children as they transition between junior and senior education.4 It is now also widely accepted that transition from high

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school into university is particularly problematic for many students, thanks largely to Kift’s concept of transition pedagogy, which addresses the needs of first year students as they undergo this move. Gale and Parker argue that the concept of transition ‘has expanded beyond its traditional focus on access’ due to the massification of higher education and the push to enable ‘students from diverse backgrounds’ to ‘graduate and contribute to a global knowledge economy.’ This expansion has increased ‘the centrality and importance on student transition[s] in [higher education]’ with the concept broadened to include students’ ‘capability to navigate change’, and as a consequence transition has come to implicitly include ‘students’ capabilities.’

Although there is much discussion about the needs of students as they transition into new educational environments, what has remained relatively unacknowledged are the needs of final year students transitioning out of university and into the world of professional work. Gardner and Van der Veer first drew serious attention to the needs of final year students in 1998 in their book The Senior Year. They argue that universities should provide final year students with specific support to assist them to cope with the changes that occur as they complete their university studies and begin post-university life. The challenges students face as graduates moving from university and into the world of work are understood to be as significant as those facing students transitioning from school to university. Following Gardner and Van der Veer’s entreaties about the final year, awareness has been steadily growing as to the unique needs of final year students, with synergies established between the transitional needs of the first and final years in higher education.

Although there are challenges in transitioning both to the workplace and to further study, Jervis and Hartley argue the transition issues faced by students joining the professional workforce are particularly

7 Gale and Parker, above n 4, 736.
8 Ibid 736-7 – original emphasis.
significant. Hence the need is pressing for the intentional design and implementation of effective capstone programs that enhance students’ career readiness in order to ease their transition into the professional world beyond university. In legal education this need is particularly urgent: ‘the final year experience is currently an ill-established component of all curricula, but particularly so in law.’ Without such a capstone experience in the final year of their legal education, law graduates risk entering legal practice or other professional contexts without adequate understanding of their ethical and professional obligations and without a strong base for future professional learning and development. A well designed capstone experience will help to bridge the divide between a degree program that is designed to provide the intellectual requirements for admission to legal practice and the demands that many students will encounter in legal practice or other occupational settings.

The acknowledgement of final year students as students in transition recognises that, as such, ‘they have a unique set of needs that require specific attention to assist this transitional phrase.’ Final year students juggle ‘many competing priorities’ such as maintaining ‘progress to graduation,’ making ‘decisions on their future options,’ and competing with ‘fellow students’ for jobs. Moreover, many students find the transition to the workplace, with its ‘strict time schedules [and] lack of constant feedback,… independence or flexibility’ a ‘dramatic shift.’ In particular, students are often unprepared ‘to deal with the realities of stress, competition, aggression and tension’ that is present within the practice of law. Capstone units can provide students with invaluable and effective assistance as they negotiate the transition out of university by preparing them for the world of the graduate. Even when the objective of a capstone program is the integration of student learning, Ferren and Paris argue that underlying this objective is the belief that ‘a successful capstone is essential preparation for a successful transition to work and lifelong learning.’

12 Jervis and Hartley, above n 10.
13 Kift et al, above n 2, 43.
14 Kift, Field and Wells, above n 11, 5.
15 Kift et al, above n 2, 43.
16 Ibid 15.
17 Kift, Field and Wells, above n 11, 4.
Carefully and thoughtfully designed capstone experiences can ensure students are positively supported though their final learning experiences. Although the movement to incorporate capstone experiences into higher education curriculum can be traced back to the early 1980s in the United States,\(^\text{22}\) Ferren and Paris argue many institutions are now ‘recognizing the extraordinary learning experience that a capstone provides.’\(^\text{23}\) Capstones are acknowledged as ‘extraordinary learning experiences’ as the ‘intention is for students to be able to demonstrate in their final year their best work – the result of focused, intense, meaningful, and integrative intellectual activity.’\(^\text{24}\) Gardner and Van der Veer argue it is essential these learning experiences support students and foster their understanding of the impending change they are about to undergo from student to professional, and ‘how all aspects of their lives have contributed to their development as learners,’ in order to help them to ‘find connections between their academic experience and future plans.’\(^\text{25}\) It is therefore desirable that universities design and implement capstone experiences that meet the needs of students as they transition out of the institution and into the world of work.

As culminating experiences, capstone programs confer a number of benefits on final year students as they prepare for the transition out of university. These benefits include knowledge synthesis (especially as it relates to career preparation), promotion of holistic thinking, and increased confidence and self-efficacy.\(^\text{26}\) Core skills, such as problem-solving, decision-making, critical thinking, ethical judgment, and social and human relationship skills can also be enhanced by these programs.\(^\text{27}\) These skills are also vital in assisting students to cope with the challenges of change. Thus, capstone programs can serve as introductions for students to their professional working world.\(^\text{28}\) This potential is acknowledged in the Boyer Report, which recommends a culminating experience for all final year students in the United States.\(^\text{29}\) Consequently, the importance of effective capstone experiences in a student’s final year should not be underestimated.\(^\text{30}\)

\(^{22}\) Jill Abraham Hummer, ‘The Content and Integrative Component of Capstone Experiences: An Analysis of Political Science Undergraduate Programs’ (2014) 10(2) *Journal of Political Science Education* 222, 223.

\(^{23}\) Ferren and Paris, above n 21.

\(^{24}\) Ibid.

\(^{25}\) Gardner and Van der Veer, above n 9, 6.


\(^{27}\) Sandra Kerka, *Capstone Experiences in Career and Technical Education* (Office of Educational Research and Improvement, 2001) 2.


\(^{30}\) Kift et al, above n 2, 16.
III CURRICULUM RENEWAL TO SUPPORT TRANSITION

As outlined above, the final year is a critical period for students in higher education. They often have to deal with the stresses and frustrations associated with differences between academic life and workplace cultures. Universities can play a vital and unique role in facilitating this change in a number of ways. Firstly institutions can assist students to cope with the uncertainty, complexity and change occurring in their lives by drawing on their self-management and other skills. They can assist students to cultivate a sense of professional identity, and support them as they manage career planning and development. Finally, universities can nurture students’ employment preparedness by ensuring they have the appropriate skills sought by employers. Each of these issues is addressed separately below to illustrate how capstone experiences can aid these challenges.

A Dealing with Uncertainty, Complexity and Change

Uncertainty, complexity, and change are all features of the futures of new graduates in today’s globalised world. ‘[A]ll educational institutions and all fields of study … share in a common obligation to prepare their graduates as fully as possible for the real-world demands of work, citizenship, and life in a complex and fast-changing society.’31 Teaching students to effectively manage the challenges of modern life is essential to their success in their future professional lives.32 Holton claims that today’s graduates are likely to experience many changing roles throughout their careers, and therefore it is vital that students develop the skills to adapt to future transitions.33 This view is supported in the United States by Liberal Education and America’s Promise (LEAP) which claims that ‘[t]he world in which today’s students will make choices and compose lives is one of disruption rather than certainty, and of interdependence rather than insularity.’34 In the United Kingdom it is also acknowledged that students’ ‘[p]ost-graduation trajectories are likely … to be considerably diverse.’35 According to Heinemann, adaptability and flexibility should be recognised as important graduate outcomes as their success as practitioners will hinge on their ability to adjust their approach to accord with the changing needs of their profession.36 Capstone programs are excellent vehicles for providing students with opportunities to develop these skills. In particular, developing and managing their cognitive capacities can assist their recall of past experiences, help them

32 Kift et al, above n 2, 44.
34 LEAP, above n 31, 2.
36 Heinemann, above n 20.
to interpret given situations accurately, and apply their learning to new
and varying contexts. It is therefore desirable that capstone experiences
consolidate learning and equip students with the building blocks (ie,
cognitive, skilled and affective) to bridge the divide between student and
reflective professional.

The acquisition of life-long learning skills has been shown to smooth
the transition from university to post-university life. Attaining these
esential life skills can enhance motivation, initiative and creativity in the
workplace. Reflective practice has been recognised as an essential life-
long learning skill for law students and professionals. The Best
Practices Report from the United States claims that life-long learning is
essential for legal practitioners as they need to ‘realistically evaluate their
own level of performance and develop a plan for improving’ and updating
their skills in an ever changing environment. Reflective practice is
essential to this process and contributes to the acquisition and refinement
of higher order cognitive skills, including critical thinking skills.

Students therefore need to be provided with opportunities that encourage
them to consider and reflect on what they have learnt, and to contemplate
how their knowledge is or could be used in a professional context. Given
the importance of learning to manage uncertainty, anxiety and change as part of the transition to professional life, the role of reflective
practice in promoting life-long skills in the capstone experience is critical.

In addition to adaptability, flexibility and reflection, another core life-
long learning skill is resilience. Resilience has long been a topic of
professional consideration, however much of this work has occurred in
professions other than law such as nursing and medicine. Jackson,
Firtko and Edenborough define resilience as ‘the ability of the individual
to adjust to adversity, maintain equilibrium, retain some sense of control
over their environment, and continue to move on in a positive manner.’

37 Ibid.
38 Kift et al, above n 2, 44.
40 Kift et al, above n 2, 44.
42 Stuckey et al, ibid 67.
43 Kift et al, above n 2, 44.
A key aspect of resilience is the ability to cope with change. Regardless of how resilience is defined, we argue it is essential that law schools also prepare students for the considerable pressures inherent in legal practice and in other positions of responsibility which law graduates are likely to undertake. Such pressures include time demands and constraints, feelings of isolation and bewilderment, general stress, and the struggles of maintaining a healthy work-life balance. In addition to these general pressures, psychological distress and/or depression are increasingly acknowledged as significant issues for both law students and professionals, with Lamb asserting that ‘the largest difficulty facing the legal community is unhappiness.’ For all of these reasons and more, resilience should be viewed as an important life-skill for both law students and graduates.

Rather than promoting resilience, legal education often does much to undermine students’ self-efficacy. The competitiveness of law schools sends ‘negative messages to students about their competence and self-worth.’ Hall, O’Brien and Tang argue ‘it is important to engage in this process rather than avoid or resist change.’ They suggest resilience skills should be understood as ‘self-righting’ skills providing individuals with the capacity for ‘healthy growth and development, even in the face of challenges.’ They state that ‘positive environments offer individuals caring relationships, high expectation messages, and opportunities for participation and contribution.’ Students also need to be encouraged ‘to maintain their outside interests, leisure activities, and friendships.’ Law schools especially need to convey the message that ‘struggling with law school, making mistakes, or feeling anxious about study are not signs of inability or incompetence.’ Hall, O’Brien and Tang argue law schools need to ‘provide opportunities for students to form relationships with

48 Maute, above n 19.
51 Kift et al, above n 2, 45.
52 Stuckey et al, above n 41.
53 Hall, O’Brien and Tang, above n 49, 48.
54 Ibid.
55 Ibid 49.
56 Ibid.
57 Ibid 50.
faculty and staff that are marked by availability, positive regard, and an acknowledgement of the person and their strengths.\textsuperscript{58}

Capstone programs offer unique vehicles for addressing many of the concerns regarding the development of these life-long learning skills. In this way, they contribute to the development of graduate capabilities beyond what may be directly measureable in assessment tasks. Thoughtfully designed, capstones can promote holistic thinking, self-confidence and self-efficacy, better equipping students with the skills to deal with the challenge and change of the workplace.\textsuperscript{59} Incorporation of reflective practice and promotion of resilience should be key elements in the design of effective capstone experiences. Love and Mackert summarise the potential of capstones, stating that ‘[c]apstone courses at their best move students from the railroad tracks of a major sequence flowchart to the roller skates of the post-graduation world, promoting evolution from college to professional life.’\textsuperscript{60} Through the provision of these experiences, law schools fulfil their responsibility ‘to prepare the whole student for the process of leaving the institution.’\textsuperscript{61}

B Developing a Professional Identity

Over the course of the law school experience, students should develop an awareness of what it means to be a graduate of their discipline.\textsuperscript{62} They should also be encouraged and assisted in the formation of an emerging sense of professional identity that continues to develop past their university studies.\textsuperscript{63} The Carnegie Report found that a sense of professional identity was essential and necessary for individuals to answer such questions as: ‘Who am I as a member of this profession?’, ‘What am I like, and what do I want to be like in my professional role?’ and ‘What place do ethical-social values have in my core sense of professional identity?’\textsuperscript{64} Branch claims that the ‘development of a professional identity should result in students abandoning their novice view or anticipatory socialisation expectations of the profession for a new professional identity,’\textsuperscript{65} and that this shift in thinking should occur ‘throughout their education’ bringing the ‘novice view closer to the professional reality.’\textsuperscript{66} As a consequence, ‘students adjust their previous expectations of their

\textsuperscript{58} Ibid.

\textsuperscript{59} Bailey, Oliver and Townsend, above n 26; Dunlap, above n 44.

\textsuperscript{60} Brad Love and Michael Mackert, ‘Capstone and Building Block: Helping Students Manage Ambiguity About their Futures Through Writing’ (2013) 27(4) Communication Teacher 202.

\textsuperscript{61} Shea, above n 18.

\textsuperscript{62} Kift et al, above n 2, 45.


\textsuperscript{65} S Branch, ‘Who Will I Be When I Leave University? The Development of Professional Identity’ (Paper presented at Effective Teaching and Learning Conference, Brisbane, Australia, 2000).

\textsuperscript{66} Ibid.
future work role so that they are accurately matched to the reality’ of professional life.\footnote{67}

Well-designed capstone experiences aid this identity shift or transition by contributing markedly to the development of a strengthening sense of professional identity and purpose.\footnote{68} Hall, O’Brien and Tang argue that law school is an important contributor to the development of students’ professional identity, regardless of whether this contribution is acknowledged or intended.\footnote{69} A sense of professional identity is so important to an individual’s well-being that the Carnegie Report labelled it a ‘third apprenticeship’ – ‘the apprenticeship of identity and purpose.’\footnote{70} Sullivan et al make this point by stating that ‘legal education needs to attend very seriously to its apprenticeship of professional identity.’\footnote{71} The rules of professional responsibility and the moral development of legal professionals are both included in this ‘apprenticeship’ with the report referring explicitly to matters of character and responsibility for clients.\footnote{72} According to Sullivan et al, this ‘third apprenticeship’ ‘introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.’\footnote{73} This is because ‘it opens the student to the critical public dimension of the professional life.’\footnote{74} Hence, the essential goal of legal education ‘is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.’\footnote{75} For these reasons, care must be taken to ensure that the professional identity encouraged by law schools is adequate to prepare students for their future professional lives as empathetic and resilient practitioners.\footnote{76}

Although the literature acknowledges the role capstone learning experiences play in assisting students to develop a professional identity as they transition out of university,\footnote{77} it is less clear on how this objective is achieved.\footnote{78} Capstone programs operating in disciplines with long established histories of these learning experiences (such as medicine and engineering) have, over time, developed ways to address this issue. However, for disciplines such as law where the use of capstones is a fairly new learning approach (especially in Australian law schools), careful thought needs to be given to how these programs will contribute to the development of law students’ professional identity across the entire degree course.\footnote{79}

\begin{footnotes}
\item[67] Ibid.
\item[69] Hall, O’Brien and Tang, above n 49.
\item[70] Sullivan et al, above n 64, 128.
\item[71] Ibid.
\item[72] Ibid 129-132.
\item[73] Ibid 128.
\item[74] Ibid.
\item[75] Ibid.
\item[76] Kift et al, above n 2, 46.
\item[77] Branch, above n 65.
\item[78] Kift et al, above n 2, 46.
\item[79] Ibid.
\end{footnotes}
In Australia, the issue of professional identity development is discussed in a report by Davis et al (the ‘Law DBI report’).

It notes that the majority of Australian law schools teach ethics and professional conduct as a combined subject in the final year as a means of addressing this matter. Ethics and professional conduct are key aspects in the development of professional identity and it is generally in the courses that teach these topics that students first reflect on the concept of their professional identity. In contrast to the teaching practices of most Australian law schools, the report asserts that the best practice for teaching ethics and professional conduct is for these matters to be embedded and scaffolded across the entire law curriculum. It further argues that experiential learning models are effective learning experiences for these purposes.

It is acknowledged that while professional identity should be developed throughout the degree, capstones play an essential role in focusing students’ attention to their emerging professional identity at the critical time of making the transition to their professional lives.

An essential component that assists students to develop their professional identity is reflection. Reflective practice facilitates both personal and professional development by encouraging individuals to give thoughtful consideration to contexts, themselves, and their roles. It contributes to the acquisition and development of higher order cognitive skills such as critical thinking. Reflective practice promotes self-awareness and can facilitate personal transformation, a sense of purpose, and a sense of citizenship. For law students, reflective practice is essential to assist them to develop professional identities that are ethical and socially responsible.

Given the important role law schools play in contributing to the development of professional identity in students, it is essential that capstone experiences build on earlier student learning in order to assist students to shift their thinking from that of a novice to that of a professional. Reflective practice is an effective means of facilitating this shift in perception.

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81 Davis et al, above n 80, 94.


84 Hovorka, above n 39.

C Managing Career Planning and Development

Capstone programs are ‘both forward- and backward-looking’ with integration and closure addressing the ‘backward-looking aspect and transition the forward. As a transition experience, a capstone program utilises a forward-looking perspective that should be designed to facilitate career planning and development processes. It should also ‘provide opportunities for students to consider how their own knowledge and skills might interact with professionals with different skill sets.’ By ‘[i]ncorporating career planning into the educational experience’ universities increase ‘a student’s level of preparation and understanding about the job search process.’ By doing so, institutions positively assist students to make the transition into the world of work.

Career development planning can be easily incorporated into final year capstones programs. For example, supplying students with information about the graduate destinations of previous students enables them to consider potential career paths they may not have otherwise considered. It also shows them their likely career path based on their abilities, the current employment market, and economic climate. Likewise, providing assessment exercises involving personal reflections on results from individual aptitude and interest tests, self-description of employment qualifications, and detailed career objective plans assists career development learning.

Career planning may also be facilitated in the context of practical work experiences such as work integrated learning (WIL) and problem based learning (PBL). Smith et al assert that ‘[c]areer development learning enhances: student engagement; the student experience; student transitions; and contributes to workplace productivity.’ They also assert that ‘[i]t is valuable to provide a wide spectrum of workplace experiences to facilitate student participation in work related learning’ in order to make available as many different career paths for students as is reasonably possible. In addition to career planning, employment

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86 Rosenberry and Vicker, above n 20, 269.
87 Kift et al, above n 2, 47.
88 Ibid; Gardner and Van der Veer, above n 9.
89 Shea, above n 18.
91 Joseph B Cuseo, ‘Objectives and Benefits of Senior Year Programs’ in John N Gardner and Gretchen Van der Veer (eds), The Senior Year Experience: Facilitating Integration, Reflection, Closure, and Transition (Jossey-Bass Publishers, 1998) 21, 27. This example was offered in the curriculum at Kean College of New Jersey senior elective program Career Management.
92 Kift et al, above n 2, 47; McNamara, Field and Brown, above n 85; Love and Mackert, above n 60.
94 Ibid.
preparation skills such as resume writing, interviewing skills and business etiquette are useful to enhance students’ career development learning.95 The responsibility of law schools to prepare students for graduate destinations extends beyond preparing them for legal practice. Law graduates frequently choose career paths in other sectors such as the public sector, accountancy, and management.96 With a much longer history of use, United States law schools design capstone programs using diverse work environments to accommodate the diversity of graduate destinations.97 This practice also opens avenues to students they may not have previously considered for future employment. Although the diversity found in graduate destinations may not currently be as varied in Australia as it is in the United States, the Law DBI report found that at least 40 per cent of graduates work outside the legal profession: approximately 20 per cent in government positions and 20 per cent in business or similar occupations.98 With the current economic and job climate, this figure may be increasing. Shea claims that the ‘reality demonstrates that many graduates are forced to look outside their field of study for their first job.’99 Therefore it is incumbent on law schools in Australia to consider the diverse destinations of their graduates and tailor experiences accordingly. They may also consider designing capstone programs to better reflect their own school mission and context, for example by including legal theory, law reform and/or understanding law in its social, political and economic context.100 Well-designed capstones facilitate positive transitions to professional life by incorporating career development planning that encompasses diverse potential graduate destinations. This is especially the case when assessment is combined in meaningful ways, such as encouraging reflection on students’ individual capacities and interests while also developing career plans.

D Work-ready Graduates

In the United States there has been a general criticism of the level of graduate preparedness for professional life.101 Criticisms have also been directed specifically at law schools, leading Allen to assert that the
‘extensive scrutiny’ of legal education suggests ‘it is under attack.’ These vocal criticisms have been less apparent in Australia, both in regards to higher education generally and legal education more particularly. Nonetheless, being ‘work-ready’ is an issue for final year students, regardless of their discipline, as the ‘primary motivation’ for undertaking higher education studies ‘is related to job preparation and increasing earning potential.’ Higher education in the United Kingdom has also been subjected to scrutiny and criticism with ‘an increasing number of initiatives focussing upon the role that higher education institutions can and/or should play in relation to graduate employment.’ Although these comments have been applied to university education in general they apply equally to legal education. It is therefore unsurprising that ‘[c]laims are made that law schools are not doing the job they are meant to do: train the next generation of lawyers.’ Allen asserts ‘we cannot bury our heads in the sand and pretend that legal education can simply proceed as if no one ever raised the issues on the table.’ Consequently, law schools, if they want to remain competitive, must ‘process a new reality that calls for relevance and effective professional preparation’ and employment preparedness.

The scrutiny on higher education in general is predicated on the notion that society has a broader interest in graduate outcomes and life-long learning. Holmes states the post-graduation lives of graduates ‘significantly affect wider society, the economy and the political order, as graduates take on influential roles in those domains.’ Holmes argues that ‘[a]s increasingly greater economic investments by governments have been made in higher education, largely on the basis of a human capital investment rationale, an increased focus has been placed on post-graduate employment outcomes.’ He argues that ‘[t]his has been further emphasised where governments have sought to expand higher education whilst limiting or reducing public expenditure.’ Holmes outlines these ‘investments’ at both the macro and the micro levels:

At the macro level, national and regional governments and their agencies, inter-governmental agencies, and institutions and agencies interacting with government, will be particularly concerned with the identifiable economic and social benefits of higher education in relation to the funding provided, and with the governance of higher education system. At the micro level, students (and their families) will be concerned with the extent to which their ‘investment’ (including time and effort) in their degree studies does lead on to desirable employment, and employers will be

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103 She, above n 18.
104 Holmes, above n 35, 540.
105 Allen, above n 102, 547.
106 Ibid 548.
108 Holmes, above n 35, 538.
109 Ibid 539.
110 Ibid.
concerned with the extent to which they are able to recruit and employ graduates they deem capable of undertaking the work roles available.\(^{111}\)

A variety of stakeholders (such as professions, employers, and governments) have a ‘legitimate concern’ for how ‘higher education institutions help prepare students for their post-graduation lives’\(^{112}\) regardless of students areas of study. In other words, all students in all disciplines need to be provided with opportunities to ensure they graduate with the necessary skills to be both productive professionals and good citizens.

The influence of prospective employers is slowly gaining prominence in the debate about graduate outcomes and employment preparedness. Cord, Sykes and Clements argue that ‘academics typically prioritize comprehensive disciplinary and technical knowledge’ while ‘employers, committed to addressing current business needs, emphasize that graduates must not only have the requisite disciplinary and technical skills, but also the “soft” skills commensurate with job-readiness.’\(^{113}\) The influential United States report by Peter D Hart Research Associates Inc found that United States employers indicated graduates possessed skills necessary for entry-level positions within their companies only, with less confidence expressed that graduates’ skills prepared them for advancement or promotion once employed.\(^{114}\) Far more damning, however, was the report’s finding that one-third of business executives surveyed maintained that recent graduates did not ‘have the requisite skills and knowledge’ for even entry level positions.\(^{115}\) With this in mind, LEAP argues that ‘[t]he challenge is to help students become highly intentional about the forms of learning and accomplishment that the degree should represent.’\(^{116}\)

Not only do students need to become more intentional, but universities also need to take responsibility to ensure their graduates are work-ready. This emerging view will change the focus of undergraduate education as institutions respond to the growing demands by professions, industry, governments, the public and, most importantly, students for a relevant education designed to meet the challenges of a changing employment environment.

Although many of these comments relate more generally to the fields of business and commercial enterprise, they are just as relevant for law professionals. The diverse range in graduate career destinations highlights the importance of law schools preparing students for employment beyond legal professional practice. The flexibility capstones offer makes them useful mechanisms for addressing the transitional needs of final year students as they prepare for the world of work. Importantly, thoughtfully

\(^{111}\) Ibid.
\(^{112}\) Ibid 538.
\(^{114}\) Peter D Hart Research Associates Inc, above n 101, 2.
\(^{115}\) Ibid.
\(^{116}\) LEAP, n 31, 2.
designed capstones can equip students with important life skills that take them beyond their entry positions.  

IV CURRICULUM RENEWAL IN LEGAL EDUCATION TOOLKIT

The project identified from the literature the important role capstones perform in facilitating students’ transition from their identity as a student to their post-university careers. It also noted, however, the existence of limited practical suggestions as to how this can be achieved. A significant outcome from the project is the creation of a ‘Toolkit’ designed to facilitate the development of capstone programs in legal education specifically, and in higher education more generally. The Toolkit addresses students’ final year transition needs in a number of ways. First, it advocates the use of capstone experiences to facilitate a smooth transition from university to work. As experiential learning experiences, capstones bridge ‘the gap between university learning … and the application of learning in the workplace’118 in order to promote work-ready graduates. The Toolkit outlines two vital components for successful capstone learning experiences: the ‘principles’ and the ‘favourable conditions’. These conditions have been identified as necessary to promote successful capstone experiences. Briefly, the favourable conditions advocate the use of whole-of-program approaches with scaffolded learning, and committed faculty.119

The Toolkit also proposes five subject models designed to assist educators to develop their own capstone programs. The five capstone subject models are problem-based learning; work integrated learning; project-based learning; alternative dispute resolution; and practical legal training. The models were designed to cover most areas of legal education in Australia’ and may provide the best opportunities for the introduction of a complete and authentic capstone experience.’120 In addition, a template has been provided for educators wanting to design their own capstone program.

The Toolkit also outlines 16 examples of actual capstone programs that have been implemented by various law schools in Australian and the United States. These examples are offered to show educators the variety of ways capstone experiences can be or have been implemented into curriculums. Although these programs offer a variety of learning experiences, as students are required to ‘possess quite an extensive body of legal knowledge,’121 it is essential careful consideration is given to how a program is developed to ensure required skills are scaffolded into earlier

118 Bailey et al, above n 26, 67.
120 Sally Kift, Des Butler, Rachael Field, Judith McNamara, Catherine Brown and Cheryl Treloar, Curriculum Renewal in Legal Education: Toolkit (Office for Learning and Teaching, 2012) 1.
121 Ibid 72.
subjects in the program. As transition focused experiences, the over-riding aim of programs ‘is to develop the student’s appreciation of workplace culture and to develop practical and employment-oriented skills.’

This section briefly discusses the models as they address students’ transition needs. Two capstone subject models in the Toolkit specifically address transition: work integrated learning (WIL) and practical legal training (PLT). Both the research project and the alternative dispute resolution models can also address transition as well as integration and closure (or both) depending on how the subjects are designed. Although some argue problem-based learning prepares students for the real world of employment as they ‘are forced to deal with ambiguity and the reality that life post-university contains fewer problems with defined answers or direction,’ the project team advocate the use of this subject model for integration and closure purposes with WIL a companion subject. The two transition-focused models, WIL and PLT, are discussed briefly below.

A Work Integrated Learning Capstone Subject

WIL programs play ‘a significant role in preparing students for professional practice.’ These programs can ‘help students adjust to their role as professionals, become better legal problem solvers, develop interpersonal and professional experience and learn how to learn from experience.’ With the growing pressure to produce work-ready graduates, ‘WIL is [becoming] increasingly important in undergraduate law programs.’ WIL programs prepare ‘students for legal practice by providing a context for them to develop their legal and personal skills and to see the link between theory and practice, and by supporting them in making the transition from university to practice.’ Internships or work placements are resource-effective means for providing WIL-based learning experiences. Work placements have been used extensively in the United States and are gaining acceptance in Australia, with the ‘potential to combine community service with student learning’ an appealing benefit.

The suggested WIL capstone subject model proposed in the Toolkit requires students to undertake a placement in a legal office under the supervision of a practicing lawyer. The purpose of curriculum programs such as WIL ‘is to create real-life contexts typical of those in

122 Ibid.
123 Love and Mackert, above n 60.
125 Ibid 230; Stuckey et al, above n 41.
126 McNamara, above n 124, 229.
127 Ibid.
129 Kift et al, above n 120.
which the student will work after graduation.’ As a curriculum strategy, WIL ‘incorporates high-authenticity real-world experiences into the curriculum.’ It is an ideal vehicle for addressing students’ transitional needs as not all will experience a smooth transition into work. Placements like WIL assist students to ‘develop a different mind-set’ to support this transition. Shircore et al, reporting on a series of WIL capstone programs initiated at James Cook University (JCU) School of Law, state that ‘transition is provided through an intentional focus on professional identity development, graduate attributes and authentic project/tasks undertaken with industry and community partners.’ As a best practice, the JCU program was developed with a ‘backwards’ approach ensuring the necessary skills required of students to successfully complete the programs were embedded and scaffolded into the curriculum from first year.

An essential additional requirement of the WIL subject model is reflection compelling students to contemplate their experience both independently and with peers. Reflection is necessary as it helps students to draw together and make connections between the practical experience of the placement and ‘broader concepts, knowledge and understanding’ from their studies. Through this process, students ‘gain a rich insight into the skills required to perform such roles and also the responsibilities they entail.’ Reflection is a vital component of the suite of WIL capstone programs recently introduced at JCU. Shircore et al argue that ‘students who understand the nature of reflection and are able to effectively engage in reflective practices will navigate the complexities of experiential learning and the world of professional work more successfully.’ As discussed above, reflective practice is a necessary aspect of capstones in order to assist students to reflect on their learning, their impending transition as emerging professional, and their future role as law professional.

All models in the Toolkit provide suggestions for student learning outcomes and assessment. The recommended learning outcomes for the models have been designed to align with the Australian Threshold Learning Outcomes (TLOs). The suggested learning outcomes for the WIL model are as follows:

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131 Ibid.
132 Shea, above n 18.
133 Ibid.
134 Shircore et al, above n 1, 127.
135 Ibid.
137 Ibid.
138 Shircore et al, above n 1, 128.
139 Sally Kift, Mark Israel and Rachael Field, Learning and Teaching Academic Standards Statement December 2010 (Australian Learning and Teaching Council, 2010).
• ‘Reflect on and assess your own capabilities and performance as regards your application of discipline specific and professional knowledge and skills and implement personal learning strategies (TLO6)’.

• ‘Reflect on and learn from experience individually and in collaboration with students, work colleagues and placements supervisors (TLO 5; TLO6)’.

• ‘Take responsibility for your own workplace skill development, professional learning and career management (TLO6)’.

• ‘Make connections across diverse areas of legal knowledge and skills and demonstrate the practical application of legal knowledge and skills (TLO1; TLO3)’.

• ‘Recognise, reflect on and respond to professional and ethical issues that arise in a legal workplace, your developing professional identity and your professional values (TLO2)’.

• ‘Communicate effectively, appropriately and persuasively with other professionals and clients from a diverse range of cultural backgrounds (TLO5)’.

• ‘Demonstrate career development learning (TLO6)’.

Although many of the tasks for this model are set by the supervising lawyer at the placement organisation, the model also provides recommendations for appropriate assessment tasks that are within the control of the teaching coordinator. The first of these tasks should include placement preparation, with assessable tasks being the development of a plan that includes personal learning objectives. The model necessarily requires attendance and work undertaken at the placement.

This aspect of the model lends itself to assessment via student reflection on their learning both during and on completion of the placement. These reflections could be included in a final portfolio that includes a supervisor’s evaluation and statement by the student as to their attainment of their personal objectives as set out in the placement plan. An extension of the reflection tasks is to include group reflections. The model also recommends students complete a cross-cultural communication course in order to promote cultural competencies. These skills are necessary for professional practice as students engage with diverse clients, colleagues and other professionals.

The WIL model integrates the Boyer Report proposal that final year capstone experiences ‘should allow the student to understand her or his potential for serious work and develop the aspiration to do it well.’ Experiential learning programs are underpinned by the concept that ‘knowledge creation involves active transactions between the student and

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140 Kift et al, above n 120, 50-51.
141 Ibid.
142 Ibid.
143 Boyer Commission, above n 29, 28.
the environment being studied.' As an experiential learning and high-impact learning experience, WIL facilitates students’ transition into the world of work by immersing them in this world with a supervision ‘safety net’.

B Practical Legal Training Capstone Subject

The Toolkit provides a suggested model for PLT, integrating the six capstone principles. It requires students to manage a range of activities that would normally occur in legal practice. Such activities range from registering their own practice or business name to interviewing clients, drafting wills, incorporating companies, drafting an agreement for the sale or purchase of a business, and managing property settlements. The model encompasses the professional areas of property practice, corporate and commercial practice, and wills and estates practice. These areas of practice cover the core competencies required of practical legal training other than civil litigation, with the addition of wills and estates, which is one of the elective areas of competency. The particular practice areas may be varied according to the context of the degree program in which the capstone experience is included. The teaching and learning approaches engage students as ‘emergent professionals’ while providing a safe environment to practice their legal skills. The subject should provide as ‘real world’ an experience as possible within the resource constraints of individual university contexts. The model specifies the use of mentors (such as volunteer legal practitioners) for students in order to immerse them into the culture of the legal profession. The use of mentors has the double benefit of cultivating students’ professionalism in parallel with the core aims of the curriculum.

The model suggests a virtual legal practice with students taking on roles as members within the practice and working both individually and as part of a team as they manage their clients’ matters. It is recommended that students be allocated multiple clients in order to more authentically replicate professional practice. The model supports students to work independently and take responsibility for their learning, and blends face-to-face and online learning environments. The model emphasises the need for both peer interaction and individual self-reflection.

The suggested learning outcomes for the PLT model are as follows:

- ‘Apply knowledge of the statutory and common law requirements and processes relating to transactional practice (TLO1)’.
- ‘Demonstrate the competence required of an entry level legal practitioner in conducting a commercial transaction, setting up standard commercial structures, dealing with loans and securities, transferring title, creating leases, creating and releasing securities, advising on land use, drafting wills, administering deceased estates, taking action to resolve wills and estates problems, advising on

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144 Mitchell et al, above n 136, 72.
145 Kift et al, above n 120.
146 Ibid.
revenue law and practice in relation to commercial and other property transactions, drafting documents related to transactional practice (TLO1; TLO3; TLO5)’.

- ‘Communicate practical legal advice for the resolution of complex legal issues (including offering creative solutions) effectively, appropriately and persuasively (TLO5; TLO3)’.

- ‘Recognise, reflect upon, and to respond to, ethical issues likely to arise in professional contexts (TLO2)’.

- ‘Reflect on and assess your own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development (TLO6)’.

- ‘Collaborate effectively (TLO6)’.  

As this model is based on a PLT model, its competencies are based on Transactional Legal Practice with the criteria recommended being those necessary for admission to legal practice. Consequently, the recommended assessment tasks are primarily formative, with skills demonstrated via the accurate completion of documentation and tasks. The model also recommends some summative assessment such as peer review and individual performance appraisals. These forms of evaluation mimic real world work environments with professionals expected to work to the standards set by the practice.

Experiential learning programs are widely recognised as high-impact, value-laden learning experiences for law graduates. These programs insert experience into the learning process and, in doing so, assist students to develop essential work-ready skills. Experiential learning programs such as PLT assist students to ‘make the transition from classroom to workplace’ and, in the process, help them overcome some of the challenges often experienced with this transition. As such, these invaluable authentic learning experiences equip students with work-ready skills and prepare them for professional practice.

V CONCLUSION

This article has discussed the important issue of transition for final year students as they move beyond higher education into the work of professional employment. Regardless of their future destinations, transition is an unavoidable process every higher education student faces upon graduation, with adjusting to a new job only part of this transition. Shea argues that a ‘student’s state of readiness for a successful transition

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147 Ibid 67.
148 Ibid 67-68.
149 Mitchell et al, above n 136, 72.
150 Ibid.
152 Ibid.
153 Shea, above n 18.
is not realized simply by the timing of graduation.'154 Echoing John Gardner’s assertion that ‘higher education has a moral obligation to pay more attention to students’ preparation for practical success beyond graduation,’155 Cord, Sykes and Clements argue that institutions have an inherent ‘duty of care’ to their students that they fail to discharge when they do not provide students with learning experiences that address their transitional needs.156 They further argue this duty of care ‘might be enlarged to include care for the development of students’ skills and capabilities.’157 Authentic experiential learning programs fulfil these obligations, equipping students with invaluable experiences and preparing them for professional practice.158

This article has shown how intentionally designed capstone experiences can assist students to navigate the transition process from university to work. It has discussed the growing criticisms from the broader community that higher education needs to be more responsive to the needs of employers and create ‘work-ready’ graduates.159 With employability defined in terms of ‘certain characteristics of individuals graduating from higher education,’160 programs must facilitate professional skills training for students.161 Part of the value of experiential learning programs is that they engage students in active learning.162 As law schools begin to process the new reality of ‘relevance and effective professional preparation’163 the value of experiential learning programs such as capstone experiences becomes apparent.

This article has showcased the Curriculum Renewal in Legal Education Toolkit as a means of addressing some of the criticisms levelled against legal education and discussed how the Toolkit provides capstone subject models designed specifically to attend to the transitional needs of final year students. As such, the Toolkit is an invaluable addition to curriculum design both in Australia and internationally by making accessible the constituents of intentionally designed high-impact learning experiences for final year students.

154 Ibid.
155 Gardner, above n 20, 6.
157 Ibid.
159 David Sill, Brian M Harward and Ivy Cooper, ‘The Disorienting: The Senior Capstone as a Transformative Experience’ (2009) 95(3) Liberal Education 50, 50; Allen, above n 102, 548.
160 Holmes, above n 35, 542.
161 Barry, above n 107, 247.
162 Mitchell et al, above n 136, 72.
163 Barry, above n 107, 252.
LAW STUDENT MENTAL HEALTH LITERACY AND DISTRESS: FINANCES, ACCOMMODATION AND TRAVEL TIME

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I INTRODUCTION

University students often have higher levels of psychological distress than the general population.1 Ibrahim et al in 20132 conducted a systematic review of literature from 1990-2010 dealing with the prevalence of depression in university students generally. Twelve of the studies related to medical students and eleven related to data from a range of different faculties. The studies, which were drawn from a wide range

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of countries, reported the prevalence of depression in undergraduate students as ranging from 10% to 84.5%. Studies confirming that university students have high distress levels have investigated such matters as demographic factors, students’ history of mental illness, the stigma surrounding mental illness, and students’ treatment-seeking behaviours. Earlier studies about distress levels of university students focused more on medical students and health related disciplines rather than other disciplines in the humanities like law, or addressed university

3 Ibid 394.
5 Andrews and Wilding, above n 4, 514; Schwenk, Davis and Wimsatt, above n 4, 1185.
7 Verger et al, above n 4, 197; Chew-Graham, Rogers and Yassin, above n 6, 875–6; Stallman, ‘Psychological Distress in University Students’, above n 1, 254; Norm Kelk et al, Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners (Brain and Mind Research Institute, 2009) 21–27 (‘Courting the Blues’).
mentally distressed student populations as a whole without demarcating students’ specific areas of study — thus conflating possible discipline related differences. More recently, a number of studies have included law student populations, with several large-scale studies focusing specifically on law student distress. The Brain and Mind Institute Report, published in


2009, found that 35% of law students recorded high or very high levels of psychological distress as measured by the K-10 test. The literature since then has generally affirmed the findings of the Brain and Mind Research Institute report, similarly finding high levels of psychological distress amongst the law student population. For example, several studies reported that about 25% of law students report severe to extremely severe symptoms on at least one of the test’s subscales, and/or that approximately 25-30% of students scored in the moderate to extreme ranges for depression, and the same number for anxiety. Correspondingly, one study found that 51.7% reported in the normal or mild range for all three subscales, with another reporting that less than half of students were in the normal range for all three measures of the DASS-21 test.

That said, the literature also indicated that law students as a group do not necessarily experience more psychological distress than non-law university students. For example, Larcombe, Finch and Sore found that veterinary medicine students at the University of Melbourne had higher levels of psychological distress. However, law students did record higher levels of stress than certain other cohorts, such as biomedicine, engineering and science. Mean scores on the DASS-21 stress scale were higher for law students than for non-law students, but there were only small differences for anxiety and depression. Moreover, when looking at the odds of reporting a severe or extremely severe score on any of the three DASS subscales, there were no significant differences between law and non-law students. Indeed, 25.8% of university students sampled in one study recorded severe or very severe symptoms on at least one of the DASS-21 measures.

This paper compares findings of a survey of law students conducted in 2013 with an earlier survey of medical students conducted in 2011 at the same University. The law student survey was modelled on the medical student survey to permit a direct comparison between the two groups of students. Though experiences of law students and medical students are likely very different, a comparison between these two groups of students is arguably a particularly interesting one, as both groups represent high performing students undertaking a demanding professional degree.

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12 Kelk et al, *Courting the Blues*, above n 7, 10–12.
14 Larcombe, Finch and Sore, above n 10, 259; Skead and Rogers, ‘Stress, Anxiety and Depression in Law Students’, above n 11.
16 Larcombe, Finch and Sore, above n 10, 260.
17 Ibid.
18 Ibid 262.
19 Larcombe et al, ‘Prevalence and Socio-Demographic Correlates’, above n 1, 27.
20 See, eg, entry requirements for Law and Medicine at GO8 universities. Though it varies across universities, for those with undergraduate law programs that use the ATAR criterion, the minimum ATAR requirements in 2015 ranged from 95 at the University of Adelaide to 99.7 at the University of New South Wales:
studies have directly compared and contrasted law students with other professional degree students,\textsuperscript{21} thus this research builds on existing findings and understanding of law student distress by asking whether and how it compares to that of other similar cohorts of students – in this case medical students.\textsuperscript{22} In its comparison the study examines a number of factors related to student living conditions including finances, accommodation and travel time. These factors may contribute to mental stress in university students but more research is needed which looks specifically at these factors.\textsuperscript{23} This study also adds to the understanding of how such factors may impact on law student distress.

Following this introduction, Part II of the paper reviews the existing literature on medical student and law student distress. Part III details the study’s method. The results of the study are outlined in Part IV, followed by their discussion in Part V. Part VI of the paper makes some concluding comments.

II REVIEW OF EXISTING LITERATURE

A Medical Students and Distress

As mentioned already, there is a sizeable literature on mental stress in medical students from Australia and internationally which reports that a large proportion of medical students have elevated levels of mental distress compared to the general population.\textsuperscript{24} Though a US study found that upon entering medical school, students had a similar rate of emotional distress to the normative population,\textsuperscript{25} the bulk of the literature suggests this does not hold true throughout the degree, as confirmed by literature reviews.\textsuperscript{26} For example, one UK study found that through terms 1 to 3 of their university year, the incidence of psychological morbidity as well as the mean GHQ-12 scores increased

\begin{itemize}
  \item \textsuperscript{21} Leahy et al, above n 1; Skead and Rogers, ‘Comparative Study’, above n 10; Larcombe, Finch and Sore, above n 10.
  \item \textsuperscript{22} See Leahy et al, above n 1.
  \item \textsuperscript{23} Larcombe, Finch and Sore, above n 10, 423; Tang and Ferguson, above n 11, 45.
  \item \textsuperscript{24} See above n 8.
  \item \textsuperscript{25} Carol Klose Smith et al, ‘Depression, Anxiety and Perceived Hassles Among Entering Medical Students’ (2007) 12 \textit{Psychology, Health and Medicine} 31, 36.
  \item \textsuperscript{26} Liselotte N Dyrbye, Matthew R Thomas and Tait D Shanafelt, ‘Medical Student Distress: Causes, Consequences, and Proposed Solutions’ (2005) 80 \textit{Mayo Clinic Proceedings} 1613; Liselotte N Dyrbye, Matthew R Thomas and Tait D Shanafelt, ‘Systematic Review of Depression, Anxiety, and Other Indicators of Psychological Distress Among U.S. and Canadian Medical Students’ (2006) 81 \textit{Academic Medicine} 354.
\end{itemize}
significantly. 27 Australian studies have also confirmed that medical students suffer higher distress levels than the normative Australian adult population, 28 though it is comparable to age-matched student peers. 29 
Soh et al in 2011 investigated mental distress levels in medical students at Sydney Medical School in relation to financial stress, housing circumstances and travel times. 30 The findings of this research, consistent with the findings of previous studies, revealed that medical students were more distressed than the general population and that being female, living in rental accommodation, and being younger in age than their fellow medical students were factors associated with greater distress levels. 31

The association between housing and travel and student wellness or distress are two areas that have received limited attention in the literature generally. 32 The Soh et al study was the first to investigate the association between psychological distress and duration of travel between home and places of study in university students. This study found that medical students who travelled more hours each day to the site of study were more likely to suffer greater distress levels than fellow medical students who travelled fewer hours per day. 33 As few studies have specifically examined the association between housing and travel and student wellness and distress, the current study builds on the work of Soh et al in relation to law students.

**B Law Students and Distress**

The professional and general media has, in the last decade, increasingly recognised that mental health distress is a significant issue facing the legal profession. 34 The high level of stress faced by law

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27 Katrina J Moffat et al, ‘First Year Medical Student Stress and Coping in a Problem-Based Learning Medical Curriculum’ (2004) 38 Medical Education 482, 482. The GHQ-12 is an English screening instrument that measures psychological morbidity. It is closer to the K-10 than the DASS-21 in that it tests for non-specific psychological distress. See D P Goldberg et al, ‘The Validity of Two Versions of the GHQ in the WHO Study of Mental Illness in General Health Care’ (1997) 27 Psychological Medicine 191.


29 Slonim et al, above n 28.

30 Nerissa Li-Wey Soh et al, ‘Mental Distress in Australian Medical Students and its Association with Housing and Travel Time’ (2013) 1 Journal of Contemporary Medical Education 163.


33 Soh et al, above n 30, 168.

students, although mostly discussed in academic literature, is increasingly also the focus of media reports in Australia and overseas.\(^{35}\) Research in this area has confirmed that rates of depression and mental health distress are high amongst law students,\(^{36}\) and seem to increase at least through the early stages of law studies.\(^{37}\) Greater awareness of law student distress has prompted legal educators to ask why law students may be stressed at law school;\(^{38}\) what factors may be contributing to their stress;\(^{39}\) and what

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38 See, eg, Townes O’Brien, Tang and Hall, above n 11, 159–160.
strategies may be needed to better support law student wellness at law school. \textsuperscript{40} Law school has been described as a ‘breeding ground for depression, anxiety and other stress-related illnesses’. \textsuperscript{41}

Much of the early work on mental health of law students was undertaken in the United States. A longitudinal study led by G Andrew H Benjamin investigated 320 graduate law students in the US over four years. \textsuperscript{42} For first year students, somatisation, obsessive-compulsive symptoms, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, psychoticism and global severity index, as assessed by Brief Symptom Inventory scores, \textsuperscript{43} all increased between pre-enrolment and six months into their studies after first exams. \textsuperscript{44} Symptoms at enrolment were within the normal range but within six months, the students’ scores were two standard deviations above normative data, \textsuperscript{45} suggesting a clinically important increase in symptomatology. However, the mean Beck Depression Inventory score in these first few months was 8.85, \textsuperscript{46} below the 15 point cut-off which is used as an indication that the general population (including law students) should seek professional help. \textsuperscript{47} In a study of first-year students, testing was undertaken over the second half of the academic year and found no difference between the two time points, suggesting changes in psychological symptoms occur in the early months of law school. \textsuperscript{48}

Another longitudinal study of law students at the University of Michigan in the 1990s involved five sequential waves of study, including a pre-


\textsuperscript{41} Larcombe et al, ‘An Empirical Study’, above n 11, 430.

\textsuperscript{42} Benjamin et al, above n 37.


\textsuperscript{44} Benjamin et al, above n 37, 237–40.

\textsuperscript{45} Ibid 240.

\textsuperscript{46} The Beck Depression Inventory score is a self-report measure of symptoms of depression: Aaron Beck et al, ‘An Inventory for Measuring Depression’ (1961) 4 Archives of General Psychiatry 561.

\textsuperscript{47} Benjamin et al, above n 37, 230 (cohort 3).

\textsuperscript{48} Ibid 240 (cohort 1).
orientation wave, two waves during the first year of study, one at the end of second year and one at the end of third year. The study found that the proportion of students with depression and the intensity of depressive symptoms increased from enrolment to the end of the first year, plateauing throughout the remainder of the three-year course. Together with the Benjamin et al 1986 study, it suggested that the period of greatest increase in stress is the first six months of the first year of law study.

More recent US studies have affirmed these findings. For example, Sheldon and Krieger found that at the outset of law school, the students surveyed had a higher subjective well-being than their control sample; but that at the end of their first year of law school there was a decline in this subjective well-being, as well as in positive affect, and significant increases in negative affect, depression and physical symptoms.

Though law students in the US face an educational and professional context different to that faced by Australian law students, the findings of research conducted in the US on law student distress may be useful to help us unpack the issues that Australian law students face.

In view of the significant and influential US literature on the subject of the mental health of law students, it is not surprising that Australian researchers began to explore the Australian situation. Fundamentally, there is a correlation between Australia and the US in the sense that a number of Australian studies have found that Australian law students also suffer mental health distress, sometimes at the level of their US counterparts. At the forefront of research was the ground-breaking study of the Brain and Mind Research Institute in 2009, which surveyed 741 law students from eight universities and found that 35% of the students recorded high or very high levels of psychological distress as measured by the Kessler-10 test. Notwithstanding the significance of this finding, it did not and could not provide a complete picture. Accordingly, since that study, Australian researchers have continued to grapple with a number of important aspects of law students’ mental health. For current purposes, it is important to note that five research trends (which have not necessarily been consistent, complete or complementary) have become evident in the published research. First, a number of studies have confirmed that law

49 Of the 370 students enrolled in first year, the first wave comprised 175 students, the second wave comprised 136 and the third 244. Wave 4 had 74 responses and wave 5 had 118 responses: Reifman, McIntosh and Ellsworth, above n 37, 99–100.
51 Ibid 101.
52 Above n 37.
53 See Reifman, McIntosh and Ellsworth, above n 37, 99; Benjamin et al, above n 37, 240–1, 343.
55 Kelk et al, Courting the Blues, above n 7, 11.
students do suffer high levels of stress, anxiety or depression, thereby deepening the psychological profile of the law student cohort.  

Second, several studies have compared and contrasted students from other disciplines with law students. Skead and Rogers undertook a comparative study of law and psychology students and found that law students had higher mean anxiety and higher mean depressive scores than psychology students. So too, law students have been found to have higher levels of stress in contrast to biomedicine, engineering and science students. However, this is not always the case. Studies have also found not only that university students as a whole suffer from higher levels of stress or depressive symptoms than the Australian community, but that there were students from other disciplines who indicated levels of severe stress, anxiety or depression that were equal to or exceeded that manifested by law students. For example, Soh et al have found that 37% of medical students had high or very high stress levels, a figure comparable to the Brain and Mind Research Institute study. Therefore, it has been suggested that investigations into the characteristics of legal education or the kinds of persons attracted to the study of law may not be helpful because studying in the university sector is marked by above average stress levels.

Third, researchers have asked whether there are factors within the law school environment that may contribute to or exacerbate stress, anxiety or depression. Although the data is not necessarily complete, studies suggest that there are a number of potential factors. For example, studies have found that law students can be notoriously competitive amongst each other, leading to a sense of exclusion for some. Students are required to undertake a demanding core professional curriculum and associated assessment, creating concerns about the level of support available in law schools. Some studies have focused on whether the nature of legal reasoning or the legal curriculum is an underlying cause of mental health problems. Indeed, a study conducted at Monash University reported a statistically significant increase in symptoms of depression in law students from the beginning to the end of the first year of law school. By the end of the first year of law school 15% of the sample surveyed reported symptoms indicating moderate to very high levels of depression.

56 Larcombe, Finch and Sore, above n 10, 260.
57 Skead and Rogers, ‘Comparative Study’, above n 10, 2.
58 Larcombe, Finch and Sore, above n 10, 260.
59 Larcombe et al, ‘Prevalence and Socio-Demographic Correlates’, above n 1, 2 5-5.
60 Larcombe, Finch and Sore, above n 10, 260.
61 Soh et al, above n 30, 165; Kelk et al, Courting the Blues, above n 7.
62 Larcombe, Finch and Sore, above n 10, 266.
66 See, eg, Townes O’Brien, Hall and Tang, above n 11.
which would warrant further clinical investigation compared to only 8.5% at the beginning of first year. 68 These findings suggest that the psychological distress of law students increases immediately from the time of entry to law school. However, it has been suggested that a good law school experience in terms of small seminar class sizes and strong social connections with first year lecturers may not necessarily correlate with lower stress or anxiety scores.69

Fourth, some researchers have considered the broader socio-economic context in which law students are located in order to ascertain whether there are predictive patterns for stress, anxiety and depression. What the studies highlighted was that socio-economic factors such as youth,70 gender,71 the number of hours worked72 and carer responsibilities73 could contribute to higher levels of stress, anxiety and depression, but that care needed to be taken before making broad assumptions. 74

Finally, researchers into student mental health have re-evaluated and criticised the conclusions drawn from empirical studies measuring stress, anxiety and depression. In the law context, Parker has contended,75 inter alia, that studies that stress that law in terms of the nature of legal thinking or the law school experience may be the ‘problem’ have missed the wider picture. Rather, she warns that mental distress is a society-wide issue. A neo-liberal approach to mental distress ought to be eschewed. Mental distress ought not to be simply treated as something that can be successfully and clinically treated at an individual level. 76 Parker’s warning is particularly salient, as mental health and mental literacy generally have taken a centre-stage outside or irrespective of the context of university education.77

III METHOD

The study that is the subject of this article was framed in view of several of the research trends outlined above. The study of the law and medical students was inspired by significant and consistent reports that these students suffered from high levels of stress, anxiety and depression. Therefore, the surveys were framed to (i) determine whether there were similar levels and kinds of stress amongst law and medical students at the

70 Larcombe et al, ‘Prevalence and Socio-Demographic Correlates’, above n 1, 3, 14.
73 Larcombe and Fethers, above n 11, 419.
76 Ibid 1123-1129.
same institution, and whether the trends reported in earlier literature were
evident in these student cohorts; (ii) test a variety of socio-economic
factors some of which had not been tested previously (such as housing
and travel); and (iii) consider the nature and extent of mental health
literacy amongst law and medical students.

The study reported in this paper descriptively compares data collected
from law students in 2013 to data that was collected from medical
students at the same university in 2011, using similar questionnaires and
techniques. The survey assessed psychological distress using the Kessler-
10 and collected data on students’ self-rated distress and socio-
demographic data. The association between psychological distress and
socio-demographic variables were analysed. The full study had two parts.
The present paper reports only on the quantitative data collected from a
cohort of law students. The second component focuses on qualitative data
collected from the same cohort of students, but is not discussed in this
article and will be published separately.

A Participants

All undergraduate and postgraduate students enrolled at Sydney Law
School were invited to participate in the survey. According to Sydney
Law School enrolment data, in second semester 2013 there were 1,360
LLB, 617 Juris Doctor, 386 Masters of Law by Coursework and 345
Specialist Masters students enrolled in the faculty.

B Survey

The study was conducted as an anonymous online survey over six
months from June until the end of November 2013. Students were made
aware of the study by advertising on the Law School’s electronic
noticeboard, notification via emails sent to students each month for the
first four months (four emails in total), and an advertisement placed in the
law students’ society weekly electronic newsletter.

The survey collected demographic data including: age; gender; the
degree in which the student was enrolled; year of enrolment; category of
student (domestic/international); course enrolment (full time/part time);
and whether the student was a parent. Socio-economic factors that were
the subject of consideration included accommodation type (family home,
own residence or renting); number of people living at the same residence;
travelling time to site of academic study; paid work; and type of financial
support received during their studies. To allow comparison with the 2011
medical student study, the survey largely followed the medical student
survey.

Mental distress was measured using the Kessler-10 as was done in the
2011 medical study survey. The Kessler-10 has been widely used

78 Soh et al, above n 30.
79 Sydney Law School enrolment data, 2013.
80 This was sent to subscribed students on 10 June 2013.
internationally, including in Australia,\textsuperscript{81} and measures non-specific psychological distress in the previous 30 days.\textsuperscript{82} It yields a score between 10 and 50 points, and higher total scores indicate higher levels of psychological distress. The Kessler-10 has excellent internal consistency (Cronbach’s alpha = 0.93) and has good discrimination for severe cases of mental illness as defined by Global Assessment Functioning scores (area under curve = 0.955), for anxiety and mood disorders, and for non-affective psychosis as diagnosed by the Structured Clinical Interview for DSM-IV (area under curve = 0.876).\textsuperscript{83} The Kessler-10 was chosen for both the medical student and law student surveys because it has been used in other Australian studies as well as by the Australian Bureau of Statistics, thereby allowing a comparison and contrast of the results of the study with Australian population data.

C Statistical Analyses

Statistical analyses were conducted using IBM SPSS Statistics (Version 21, 2012: Armonk, New York). Responses were excluded if they did not contain measurable values or were implausible.

Multiple linear regression of K-10 scores was undertaken against the main variables: type of accommodation during the study semester; number of bedrooms in the residence; number of people also living in the residence; type of degree the student was enrolled in; and total travel time to site of study. Co-variables included for face validity were age and gender. In addition, potential confounding variables were tested using backwards elimination: the amount of money spent on alcohol during the past four weeks; using recreational drugs during the past four weeks; doing paid work of any kind; having dependent children; having other dependents; receiving economic support from family; whether the student studied full or part time; time spent on independent study per week; year of study; and whether the student was domestic or international. The study tested two interaction terms: the number of people also living in the student’s residence x number of bedrooms, and the type of degree the student was enrolled in x year of study.

In addition, students were asked questions about their mental and emotional state, knowledge of support services, and certain lifestyle issues.\textsuperscript{84} The K-10 questions asked students to rank perceived level of


\textsuperscript{83} Ibid.

\textsuperscript{84} Garry Walter, ‘Medical Students’ Subjective Ratings of Stress Levels and Awareness of Student Support Services About Mental Health’ (2013) 89 Postgraduate Medical Journal 311.
stress from lifestyle issues and to indicate: (i) their awareness and use of services for mental health issues; (ii) their concerns about emotional state; and (iii) whether they considered terminating their studies. The questions were the same for both law and medical students.

D Ethics Approval

The study was approved by the Human Research Ethics Committee of the University of Sydney.85 Participation was voluntary and completion of the survey was taken as an indication of consent. The data was collected anonymously. At the end of the survey, participants were given the opportunity to enter a lucky-draw to win one of 50 cinema tickets as reimbursement for the time spent completing the survey.

E Limitations of Study

This study has several limitations. First, law students are a more diverse student population than medical students, given the range of different courses and levels of study students may enrol in.

Second, although this study included students from four different degrees and the analyses controlled for degree type, the small number of students may have contributed to type II error (false negative): very unwell students may not have had the capacity to respond and very well students may have viewed the survey as irrelevant to them. The multiple linear regression analyses were conducted on a small subset of responses, owing to incomplete data, and so may not be representative of the entire study sample. Third, the low response rate due to the voluntary nature of this study also means that the results may not be representative of the entire university’s law student population. The cross-sectional study design did not allow for determining cause and effect.

Fourth, Sydney Law School may have some unique cultural and demographic characteristics that may limit the generalisability of the findings to all law schools. On the one hand Sydney Law School students may, for example, experience less distress compared to other law students from other universities, if Sydney Law School graduates fair better in gaining employment during or after their law studies.86 On the other hand, Sydney Law School students may be more distressed compared to comparable law student cohorts, as it is very competitive to gain entry into some degree programs, which are limited to students with very high ATAR scores and/or high academic achievement.87 These students may

85 Study Protocol Approval Number 03–2011/13517.
87 In 2015 the ATAR cut-off for LLB (Combined) programs at the University of Sydney was 99.5, which is at least several percentage points higher compared to most other law
enter law school with already elevated levels of distress, as they may have experienced high levels of stress during high school in achieving such high academic results. Arguably, these high performing students may not have experienced many previous academic disappointments prior to entry into law school. They may feel pressured to perform at law school and may have less resilience with which to respond to academic and professional disappointments. It is likely, however, that other law school cohorts face similar problems in a competitive degree program and profession.

IV Results

In this paper we present only a selection of the study’s findings. The study examined a broad range of variables, all of which cannot be adequately discussed in this publication. We have therefore focused on those aspects of the study that we consider would be of most interest to this journal’s readership and which are most interesting in comparison with medical students. Other aspects of the study will be published elsewhere. Results not reported upon here are noted below for readers’ information.

A Demographic and Descriptive Data

In total, 610 students responded to the survey. Two hundred and six respondents were male, 397 female, and seven answered ‘no gender’. Two hundred and eighty-eight respondents were enrolled in the LLB combined degree, 172 in the Juris Doctor (JD), one in the Masters by Research, 67 in the Masters by Coursework, 54 in the Specialist Masters, 11 in the Graduate Diploma, 16 in the PhD and one in the Doctor of Juridical Studies. Given the small number of respondents who were enrolled in the Masters by Research, PhD, Graduate Diploma and Doctor of Juridical Studies program, analyses were restricted to respondents enrolled in the LLB combined degree, Juris Doctor, Masters by Coursework and Specialist Masters. No respondents reported being enrolled in the Masters of Criminology. LLB and JD respondents comprised 78% of the study sample. In 2013, Sydney Law School had 1200 LLB students and 250 JD students enrolled in CSP. There were 69 LLB and 252 JD students enrolled as domestic full fee paying students and 248 LLB and 113 JD students were enrolled as international full fee paying students.88

The mean age of the respondents for LLB, JD, Masters by Coursework and Specialist Masters degrees (N = 579) was 24.8 years (SD 8.6 years).89 Table 1 shows the mean age by enrolled degree.

schools in NSW and many other degree programs at the University of Sydney. For students starting in 2011 and 2012, the cut off was 99.7 and in 2009 to 2010 it was 99.65.
88 Sydney Law School enrolment data, above n 79.
89 Two of the respondents did not report their age.
Table 1: Mean Age by Degree Type

<table>
<thead>
<tr>
<th>Degree</th>
<th>N</th>
<th>Total enrolled in Semester 2 2013</th>
<th>% response</th>
<th>Mean age of respondents (years) (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>LLB</td>
<td>287</td>
<td>1,360</td>
<td>21.1</td>
<td>20.7 (2.0)</td>
</tr>
<tr>
<td>Juris Doctor</td>
<td>171</td>
<td>617</td>
<td>27.7</td>
<td>26.5 (5.9)</td>
</tr>
<tr>
<td>Masters of Law by Coursework</td>
<td>67</td>
<td>386</td>
<td>17.4</td>
<td>31.3 (6.5)</td>
</tr>
<tr>
<td>Specialist Masters</td>
<td>54</td>
<td>345</td>
<td>15.7</td>
<td>32.7 (8.0)</td>
</tr>
</tbody>
</table>

One-way analysis of variance showed a significant difference in age across the degree types ($F_{3,575} = 166.99, p<0.001$). Post-hoc Scheffe tests showed LLB students were significantly younger than students enrolled in the other three degrees ($p<0.001$). JD students were also significantly younger than Masters by Coursework and Specialist Masters students ($p<0.001$). There was no significant difference in age between Masters by Coursework and Specialist Masters students ($p = 0.4$). *Tables 2 and 3* show descriptive data for both continuous and categorical variables.
### Table 2: Descriptive Results for Independent Study Time, Travel Time, Hours of Paid Work, Alcohol and Recreational Drug Use, Number of Bedrooms in Residence and Number of People Living at the Residence

<table>
<thead>
<tr>
<th></th>
<th>Law Students</th>
<th>Medical Students&lt;sup&gt;90&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>Mean (SD)</td>
</tr>
<tr>
<td><strong>Independent study (h/week)</strong></td>
<td>460</td>
<td>19.1 (14.8)</td>
</tr>
<tr>
<td><strong>Total travel time (min)</strong></td>
<td>495</td>
<td>43.2 (37.0)</td>
</tr>
<tr>
<td><strong>Paid work (h/week)</strong></td>
<td>389</td>
<td>20.2 (16.8)</td>
</tr>
<tr>
<td><strong>Number of standard drinks per week</strong> &lt;br&gt;(examples of a standard drink are 1 schooner light beer, 1 middy regular beer, 100ml glass of wine, 30ml nip of spirits or 60ml glass of sherry or port)</td>
<td>338</td>
<td>6.0 (6.4)</td>
</tr>
<tr>
<td><strong>Money spent on alcohol per week (A$)</strong></td>
<td>338</td>
<td>33.2 (36.9)</td>
</tr>
<tr>
<td><strong>Money spent on recreational drugs per week</strong></td>
<td>35</td>
<td>12.3 (16.7)</td>
</tr>
<tr>
<td><strong>Number of bedrooms in residence</strong>&lt;sup&gt;***&lt;/sup&gt;</td>
<td>495</td>
<td>12.6 (45.1)</td>
</tr>
<tr>
<td><strong>Number of people living at the residence, apart from the respondent (including any children)</strong>&lt;sup&gt;**&lt;/sup&gt;</td>
<td>495</td>
<td>11.2 (44.3)</td>
</tr>
</tbody>
</table>

* Comparable medical student data was not available.
** Some respondents lived in student residences or dormitories. The maximum number of bedrooms reported was 300 by law students and 286 by medical students.

<sup>90</sup> Medical student data sourced from Soh et al, above n 30, 166.
<sup>91</sup> For medical students ‘independent study’ includes time spent on face to face teaching, independent studying and clinical placements: Soh et al, above n 30. Unpublished study data provided to the authors also found that independent study alone accounted for 17.1 h/week (SD 11.2) for medical students: Sanna Norgren, *The Impact of Socio-Economic Factors on Mental Distress Levels in Australian Medical Students* (Coursework, Karolinska Institute, 2012) xiv.
Table 3: Descriptive Results for Categorical Data: Full Versus Part Time Study, Site of Study, Domestic Versus International, Having Dependents, Financial Support, Alcohol and Recreational Drug Use, Living Arrangements

<table>
<thead>
<tr>
<th></th>
<th>Law students N (%)</th>
<th>Medical students N (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Full time</strong></td>
<td>474 (82.1%)</td>
<td>519 (99.4%)</td>
</tr>
<tr>
<td><strong>Part time</strong></td>
<td>103 (17.9%)</td>
<td>3 (0.6%)</td>
</tr>
<tr>
<td><strong>Main site of study</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Main campus</td>
<td>563 (97.6%)</td>
<td>301 (57.7%)</td>
</tr>
<tr>
<td>Other</td>
<td>14 (2.4%)</td>
<td>221 (42.3%)*</td>
</tr>
<tr>
<td><strong>Domestic student</strong></td>
<td>429 (86.8%)</td>
<td>398 (82.9%)</td>
</tr>
<tr>
<td><strong>International</strong></td>
<td>65 (13.2%)</td>
<td>82 (17.1%)</td>
</tr>
<tr>
<td><strong>Do you have dependent children?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>517 (89.6%)</td>
<td>498 (95.4%)</td>
</tr>
<tr>
<td>Yes</td>
<td>60 (10.4%)</td>
<td>24 (4.6%)</td>
</tr>
<tr>
<td><strong>How are you financially supported through your studies?</strong> (more than one response permitted)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family or domestic partner</td>
<td>246 (49.7%)</td>
<td>287 (59.8%)</td>
</tr>
<tr>
<td>Paid work</td>
<td>335 (67.7%)</td>
<td>223 (46.5%)</td>
</tr>
<tr>
<td>Student allowance</td>
<td>138 (27.9%)</td>
<td>222 (46.3%)</td>
</tr>
<tr>
<td>Other</td>
<td>45 (9.1%)</td>
<td>83 (17.3%)</td>
</tr>
<tr>
<td>Scholarship</td>
<td>86 (17.4%)</td>
<td>86 (18.0%)</td>
</tr>
<tr>
<td><strong>Have you used alcohol in the past 4 weeks?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>342 (69.4%)</td>
<td>382 (79.7%)</td>
</tr>
<tr>
<td>No</td>
<td>151 (30.6%)</td>
<td>97 (20.3%)</td>
</tr>
<tr>
<td><strong>Have you used recreational drugs over the past 4 weeks?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>39 (8.0%)</td>
<td>29 (6.1%)</td>
</tr>
<tr>
<td>No</td>
<td>450 (92.0%)</td>
<td>449 (93.9%)</td>
</tr>
</tbody>
</table>
Table 3 continued

<table>
<thead>
<tr>
<th>Living arrangements during semester***</th>
<th>Law students</th>
<th>Medical students</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family home</td>
<td>190 (38.2%)</td>
<td>142 (29.5%)</td>
</tr>
<tr>
<td>Renting</td>
<td>250 (50.3%)</td>
<td>298 (62.0%)</td>
</tr>
<tr>
<td>Own residence</td>
<td>57 (11.5%)</td>
<td>41 (8.5%)</td>
</tr>
</tbody>
</table>

* Includes teaching hospitals (220 responses) and ‘other’ (1 response).
** Law students 495 respondents.
*** Law students 497 respondents.

Of the law student respondents who answered the question about having other dependants (N = 567), 480 reported none, 70 reported parents, 13 reported grandparents and 13 reported ‘other’, which included aunts, cousins, siblings, domestic partners, pets, and adult child and partner.

Forty-five law students reported other types of financial support: own savings (16), government student loans or HECS or FEE-HELP (6), non-specified loans (5), bank credit line (2), disability allowance (2), employer (2), rental income (2), disability support pension together with inheritance (1), Newstart allowance (1), own business (1), parents (1), pension (1), family loan (1), university student loans (1), redundancy payout (1), sold real estate (1), and inheritance (1).

Of the recreational drugs used, respondents reported cannabis (n = 27), ecstasy (n = 11), cocaine or other amphetamine-like substances such as ice (n = 9), and other drugs (n = 5). The categories of residents who live with the respondents were also examined but are not reported upon in this paper.

B Kessler 10 – Measuring Psychological Distress

Of the students enrolled in LLB, JD, Masters by Coursework and Specialist Masters degrees, 526 completed the K-10. Of these, 85 (16.2%) had low levels of psychological distress, 154 (29.3%) had medium levels of distress, 144 (27.4%) had high levels of distress, and 143 (27.2%) had very high levels of distress. Table 4 shows K-10 categories of distress in male and female law students, with medical student and Australian population data for comparison. The study also probed students’ self-ratings for stressors, however these findings will be reported in a separate publication.
Table 4: Kessler 10 (K-10) Categories in Male and Female Law Students,\(^{93}\) with Medical Student\(^{94}\) and Australian Population\(^{95}\) Data for Comparison

<table>
<thead>
<tr>
<th>K-10 scores</th>
<th>Male (Law student)</th>
<th>Male (Med student)</th>
<th>Aust (Pop)</th>
<th>Female (Law student)</th>
<th>Female (Med student)</th>
<th>Aust (Pop)</th>
<th>Male (Total)</th>
<th>Female (Total)</th>
<th>Aust (Pop)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low (10-15)</td>
<td>36 (20.1%)</td>
<td>73 (32%)</td>
<td>48 (14.1%)</td>
<td>63 (24%)</td>
<td>67 (16%)</td>
<td>84 (27%)</td>
<td>136 (71%)</td>
<td>71</td>
<td></td>
</tr>
<tr>
<td>Medium (16-21)</td>
<td>63 (35.2%)</td>
<td>73 (32%)</td>
<td>88 (25.9%)</td>
<td>101 (38%)</td>
<td>21 (7%)</td>
<td>151 (29%)</td>
<td>175 (20%)</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>High (22-29)</td>
<td>42 (23.5%)</td>
<td>71 (31%)</td>
<td>101 (29.7%)</td>
<td>69 (26%)</td>
<td>8.5 (3%)</td>
<td>173 (35%)</td>
<td>140 (6.9)</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Very-high (30-50)</td>
<td>38 (21.2%)</td>
<td>13 (5.7%)</td>
<td>103 (30.3%)</td>
<td>33 (12%)</td>
<td>3.1 (1%)</td>
<td>141 (27%)</td>
<td>46 (9.3%)</td>
<td>2.6</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>179 (100%)</td>
<td>340 (100%)</td>
<td>519 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 5 shows the students’ self-rated concerns about their mental and emotional states. Table 6 shows respondents’ awareness of available services for mental health. Tables 7 to 8 show the proportion of students who have received treatment for mental and emotional issues and the types of services they have patronised.


\(^{94}\) Soh et al, above n 30, 166.

<table>
<thead>
<tr>
<th>How concerned are you about your mental or emotional state?</th>
<th>Not at all</th>
<th>A little</th>
<th>Somewhat</th>
<th>A lot</th>
<th>A great deal/always</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>75 (15.2%)</td>
<td>91 (19.0%)</td>
<td>152 (30.8%)</td>
<td>199 (38.0%)</td>
<td>1.48 (25.7%)</td>
<td>123 (25.7%)</td>
<td>80 (16.2%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Did you ever feel you had to CONCEAL mental or emotional problems while at university?</th>
<th>Not at all</th>
<th>A little</th>
<th>Somewhat</th>
<th>A lot</th>
<th>A great deal/always</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>140 (28.9%)</td>
<td>151 (31.7%)</td>
<td>133 (27.4%)</td>
<td>138 (28.9%)</td>
<td>84 (17.3%)</td>
<td>91 (19.1%)</td>
<td>86 (17.7%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>While at university, how SUPPORTED do you feel, mentally and/or emotionally?</th>
<th>Not at all</th>
<th>A little</th>
<th>Somewhat</th>
<th>A lot</th>
<th>A great deal/always</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>146 (30.1%)</td>
<td>89 (18.7%)</td>
<td>176 (35.6%)</td>
<td>170 (24.9%)</td>
<td>121 (22.0%)</td>
<td>137 (24.5%)</td>
<td>38 (7.8%)</td>
</tr>
</tbody>
</table>

Medical student data sourced from ibid, 313.
Table 6: Before Today, Which of the Following University Services Were You Aware of? (more than one response permitted)

<table>
<thead>
<tr>
<th>Service</th>
<th>Law students (n=441)</th>
<th>Medical students (n=477)</th>
</tr>
</thead>
<tbody>
<tr>
<td>University student counselling services</td>
<td>327 (74%)</td>
<td>358 (75%)</td>
</tr>
<tr>
<td>Students services websites</td>
<td>259 (59%)</td>
<td>199 (42%)</td>
</tr>
<tr>
<td>Student association services (eg student representative council, caseworkers, student advice and advocacy officer)</td>
<td>226 (55%)</td>
<td>177 (37%)</td>
</tr>
<tr>
<td>Financial assistance office</td>
<td>236 (54%)</td>
<td>309 (65%)</td>
</tr>
<tr>
<td>Disability services</td>
<td>227 (51%)</td>
<td>149 (31%)</td>
</tr>
<tr>
<td>University medical centre (GPs)</td>
<td>254 (28%)</td>
<td>433 (91%)</td>
</tr>
<tr>
<td>University psychology clinic</td>
<td>92 (21%)</td>
<td>92 (19%)</td>
</tr>
<tr>
<td>International student support unit</td>
<td>89 (20%)</td>
<td>123 (26%)</td>
</tr>
</tbody>
</table>

Table 7: Are You Currently Receiving Treatment for a Mental or Emotional Problem?

<table>
<thead>
<tr>
<th></th>
<th>Law students</th>
<th>Medical students</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>67 (13.9%)</td>
<td>57 (11.9%)</td>
</tr>
<tr>
<td>No</td>
<td>414 (86.1%)</td>
<td>421 (88.1%)</td>
</tr>
</tbody>
</table>

One hundred and sixty-three out of 481 law students (33.9%) reported having received treatment for mental or emotional reasons while at university; for medical students, the number was 151 out of 477 (31.7%).

---

97 Ibid. In addition, 127 (26.6%) medical students were aware of student support services at their hospital or clinical school. This item was not relevant to law students.

98 Ibid 312.

99 Unpublished study data provided to the authors by Sanna Norgren (Karolinska Institute, Sweden).
Table 8: If You Have Ever Received Treatment, Please Tick Which Services You Have Used (you may tick more than one)

<table>
<thead>
<tr>
<th>Service</th>
<th>Law Students (n = 481)</th>
<th>Medical Students (n = 151)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I have never received treatment</td>
<td>293 (61%)</td>
<td>__<em>101</em></td>
</tr>
<tr>
<td>GP</td>
<td>105 (22%)</td>
<td>106 (70%)</td>
</tr>
<tr>
<td>Private psychologist</td>
<td>91 (19%)</td>
<td>62 (41.1%)</td>
</tr>
<tr>
<td>Private psychiatrist</td>
<td>46 (9.6%)</td>
<td>30 (19.9%)</td>
</tr>
<tr>
<td>Private counsellor</td>
<td>34 (7%)</td>
<td>11 (7.3%)</td>
</tr>
<tr>
<td>Other</td>
<td>17.3 (3.5%)</td>
<td>10 (6.6%)</td>
</tr>
<tr>
<td>Lifeline</td>
<td>7 (1.5%)</td>
<td>7 (4.6%)</td>
</tr>
<tr>
<td>University counsellor</td>
<td>4 (0.8%)</td>
<td>67 (44.4%)</td>
</tr>
<tr>
<td>Student association services</td>
<td>4 (0.8%)</td>
<td>4 (2.6%)</td>
</tr>
<tr>
<td>International student counsellor</td>
<td>3 (0.6%)</td>
<td>8 (5.3%)</td>
</tr>
</tbody>
</table>

Law students reported that ‘other services’ included inpatient treatment, antidepressant medication, chaplain, workplace counsellor, herbal medications, crisis centre, student residence vice principal, other telephone hotlines and police help.

Of the 481 law students who responded to the question ‘If you have never received treatment for a mental or emotional problem, have you CONSIDERED seeking treatment?’, 24.7% responded ‘yes’, 40.3% responded ‘no’, and the remaining 34.9% said they had received treatment.

18% (n = 85) of law students reported they had taken time off from their studies while 82% (n = 387) reported that they had not.

Table 9 shows the proportions of respondents who had considered dropping out of their course.

Table 9: How Seriously Have You Considered Dropping Out of Your Course Over the Last 12 Months?

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Law students (n = 472)</th>
<th>Medical students (n = 475)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not seriously/never</td>
<td>301 (63.8%)</td>
<td>375 (78.9%)</td>
</tr>
<tr>
<td>Somewhat seriously</td>
<td>128 (27.1%)</td>
<td>90 (18.9%)</td>
</tr>
<tr>
<td>Seriously (discussed with university officials)</td>
<td>22 (4.7%)</td>
<td>6 (1.3%)</td>
</tr>
<tr>
<td>Very seriously (took time off)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

*100 Ibid 313.
*101 Medical students were not asked this question.
*102 Unpublished data from study reported in Soh et al, above n 31.
C  *Multiple Linear Regression Model*

Only 245 respondents provided sufficient data for multiple linear regression. *Table 10* shows the final multiple linear regression model.

*Table 10: Multiple Linear Regression Model ($F_{19,225} = 1.69, p = 0.04$, $R^2 = 0.125$)*

<table>
<thead>
<tr>
<th></th>
<th>Partial regression coefficient</th>
<th>$t_{225}$</th>
<th>$P$</th>
<th>95.0% confidence interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age (y)</td>
<td>-0.19</td>
<td>-1.14</td>
<td>0.3</td>
<td>-0.52, 0.14</td>
</tr>
<tr>
<td>Gender (reference male)</td>
<td>2.87</td>
<td>2.58</td>
<td>0.01</td>
<td>0.68, 5.06</td>
</tr>
<tr>
<td>Living arrangements (ref = living at family home)</td>
<td>$F_{2,225} = 1.69$</td>
<td>0.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many people APART FROM YOURSELF also reside where you are living?</td>
<td>-0.07</td>
<td>-1.55</td>
<td>0.1</td>
<td>-0.15, 0.02</td>
</tr>
<tr>
<td>Number of bedrooms</td>
<td>0.07</td>
<td>1.65</td>
<td>0.1</td>
<td>-0.01, 0.15</td>
</tr>
<tr>
<td>What year of your course are you in?</td>
<td>0.36</td>
<td>0.82</td>
<td>0.4</td>
<td>-0.51, 1.24</td>
</tr>
<tr>
<td>Total travel time (min)</td>
<td>-0.03</td>
<td>-1.83</td>
<td>0.07</td>
<td>-0.06, 0.002</td>
</tr>
<tr>
<td>Domestic versus international student (reference domestic)</td>
<td>2.60</td>
<td>1.07</td>
<td>0.3</td>
<td>-2.19, 7.38</td>
</tr>
<tr>
<td>Dependent children (No = 0, yes = 1)</td>
<td>2.43</td>
<td>1.03</td>
<td>0.3</td>
<td>-2.24, 7.09</td>
</tr>
<tr>
<td>Do you have other dependants? (No = 1; Yes = 0)</td>
<td>-2.67</td>
<td>-1.49</td>
<td>0.1</td>
<td>-6.20, 0.86</td>
</tr>
<tr>
<td>Supported by family (No = 0, Yes = 1)</td>
<td>-0.59</td>
<td>-0.50</td>
<td>0.6</td>
<td>-2.96, 1.77</td>
</tr>
<tr>
<td>Paid work (h/week)</td>
<td>0.04</td>
<td>.72</td>
<td>0.5</td>
<td>-0.07, 0.15</td>
</tr>
<tr>
<td>Money spent on alcohol per week (A$)</td>
<td>0.03</td>
<td>1.77</td>
<td>0.08</td>
<td>-0.003, 0.06</td>
</tr>
</tbody>
</table>
The co-variables for domestic versus international student status, having dependent children, having other dependants, being financially supported by a domestic partner or family, hours of paid work, working full or part time, and hours spent in independent study were not significant in themselves, but were found to be confounders during the backwards elimination process and so were retained in the final model.

V DISCUSSION

A Levels of Stress

A key finding of the study, confirming the findings of previous research, was that a high percentage (27%) of law students had very high distress levels (K-10 scores = 30-50), which indicates the presence of a serious mental illness. In contrast, less than 10% of medical students surveyed at the same university fell into this category, and only 2.6% of the Australian general population reported very high distress levels (Table 4).

The study also found that 60% of law students scored 22 or above on the K-10 (high to very high distress levels), which is consistent with the earlier results of Leahy et al where 58% of law students scored above 22. Larcombe et al reported less than half of their sample of Australian law students were in the normal range for all three DASS subscores. Kelk et al reported 13.3% of law students had very high K-10 scores, with 35.2% having scores of 22 or higher. Larcombe and Fether’s results found that in a predominantly JD sample, 34% of the students had anxiety, depression or stress while 66% had increased levels of at least two out of the three DASS scales. 37% of medical students at the same university as the present study’s law students scored 22 or above on the K-10. Therefore, the proportion of medical students having high to very high

103 Stallman, ‘Psychological Distress in University Students’, above n 1.
104 Soh et al, above n 30.
105 Australian Bureau of Statistics, above n 94.
108 Kelk et al, Courting the Blues, above n 7.
109 Larcombe and Fether’s, above n 11.
110 Soh et al, above n 30, 166.
levels of distress is lower than that of law students, but is still substantially greater than the 9.5% in the general Australia population with high levels of distress.\textsuperscript{111} In contrast, Stallman found 19.2% of university students, from a range of disciplines, had very high distress levels (K-10 scores 30-50) indicative of a severe mental illness,\textsuperscript{112} which is lower than the 27% of law students in the present study but higher than the 9.3% in medical students at the same university (Table 5).

This high level of distress in law students appears to carry over to legal practice: in Australia, 31% of solicitors and 16.7% of barristers in the Kelk et al study scored 22 or over on the K-10,\textsuperscript{113} indicating high to very high psychological distress levels.

\textbf{B What Were the Associations between Psychological Distress and the Stressors Which Were Surveyed?}

\textbf{1 Travel Times and Family}

There has been little consideration of the effect of travel times on stress and family life. Feng and Boyle conducted a large longitudinal study of commuting durations and psychological distress in the general adult population in the UK (n = 5,216).\textsuperscript{114} Feng and Boyle reported that travel time and transport time were associated with significantly greater mental distress in women, but not men.\textsuperscript{115} They were unable to explain why this was the case, but reported that for the same commute times, women living with children either as single parents or with a domestic partner had greater stress levels than women living with a partner and without children.\textsuperscript{116}

Our study of law and medical students indicated that average travel times were similar for the two sets of students (43.2 min and 39.2 min per day respectively) (Table 2), but when this was examined in relation to Kessler-10 distress scores, longer travelling times were weakly associated with less stress in law students, which is the opposite of the observation in medical students.\textsuperscript{117} It is not clear why longer travel times were associated with less psychological distress for law students. One possibility is that some modes of travel may be conducive to relaxation, or indicative that

\textsuperscript{111} Australian Bureau of Statistics, above n 95, 40.
\textsuperscript{112} Stallman, ‘Psychological Distress in University Students’, above n 1. Note that Stallman did not report the proportions of respondents by faculty.
\textsuperscript{113} Kelk et al, Courting the Blues, above n 7, 11.
\textsuperscript{114} Zhiqiang Feng and Paul Boyle, ‘Do Long Journeys to Work Have Adverse Effects on Mental Health?’ (2014) 46 Environment and Behaviour 609.
\textsuperscript{115} Ibid. In contrast, Humphreys, Goodman and Ogilvie reported no association between commute time and mental wellbeing in David Humphreys, Anna Goodman and David Ogilvie, ‘Associations between Active Commuting and Physical and Mental Wellbeing’ (2013) 57 Preventive Medicine: An International Journal Devoted to Practice and Theory 135. However, this study, also from the UK, was cross-sectional and the authors noted that the study population (n = 989) was relatively affluent and that results may have been different in lower socioeconomic populations.
\textsuperscript{116} Feng and Boyle, above n 114.
\textsuperscript{117} Soh et al, above n 30.
the students live in a home environment that is supportive, rather than stress enhancing.

2 Dependents

The present study controlled for gender and dependents through the multiple linear regression model, including dependent children. Having dependents was not significant in the present statistical model for law students, but was still a confounder and so was retained in the final model (Table 3). This aligns with Larcombe and Fethers’ findings that caring for family was significantly associated with increased depression, anxiety and stress in law students. Having dependents was not significantly associated with psychological distress in medical students. This difference between law students and medical students is not easily explained. It may be that the nature of the carer responsibilities differs between law and medical students, for example, caring for older sick family members rather than children. Little research has directly addressed this issue. As Larcombe and Fether indicate, more research is needed on this, as well as on any potential connections between this variable and financial stress.

3 Living Arrangements and International or Domestic Student Status

It has been reported that Australian students living with other people (eg, with parents, with a partner and/or children or in university accommodation) had lower than expected frequencies of high or very high distress levels, while students living alone or in other types of off-campus accommodation had higher than expected frequencies of high or very high levels of distress.

In this study, the law students’ living arrangements were similar to that of medical students, with more than half renting during semester. However, the type of residence was not significantly associated with distress scores in the final model. In contrast, the findings in relation to medical students conformed to previous studies so that renting was associated with greater distress compared to living in the family home or living in one’s own residence.

Whether or not a law student was a domestic or an international student was not significantly associated with psychological distress in the final statistical model, but was a confounder and so was retained. However, being an international student may still have important

118 Larcombe and Fethers, above n 11.
119 Soh et al, above n 30. This factor was removed from the model in this earlier study of medical students.
120 Soh et al, above n 30.
121 Stallman, ‘Psychological Distress in University Students’, above n 1.
122 Faiza Rab, R Mamdou and S Nasir, ‘Rates of Depression and Anxiety Among Female Medical Students in Pakistan’ (2008) 14 Eastern Mediterranean Health Journal 126.
123 Soh et al, above n 30.
124 Ibid.
influences on psychological distress, as these students will usually be living away from the family home. In medical students at the same university, international students had significantly greater psychological distress compared to domestic students.\textsuperscript{125}

The lack of consistency can be seen in other studies. For example, Said, Kypri and Bowman, in their recent cross-sectional study of over 6,000 students at an Australian university, reported significantly greater odds of depression in domestic students compared to international students and in undergraduate students compared to postgraduate students.\textsuperscript{126}

International studies have also yielded mixed results. In Pakistan, female medical students living in dormitories were significantly more depressed than those who resided at home.\textsuperscript{127} The Verger et al study in France found that the combination of low income and living away from home was associated with increased risk of major depressive disorder in first year students.\textsuperscript{128} In contrast, a study by Shariati, Yunesian and Vashin in Tehran found that accommodation type was not associated with mental distress.\textsuperscript{129} However, the impact of different cultural factors on these findings is very difficult to determine.

4 Age

The evidence on age and risk of mental distress is inconclusive. Younger age in university students has been associated with significantly greater risk of high distress levels,\textsuperscript{130} although other studies have not found a link between age and depression.\textsuperscript{131} Younger age was associated with greater distress in medical students,\textsuperscript{132} but was not significantly associated with distress of law students in the present study. However other studies suggest there is a relationship between age and mental distress for law students.\textsuperscript{133}

5 Finance and Paid Work

Compared with medical students at the same university, law students tended to rely more on paid work for financial support (68%), although half also received financial support from their families and 28% received student allowances. Medical students were mostly supported by their families or domestic partner (60%), paid work (46%) and by student allowances (46%).\textsuperscript{134}

\textsuperscript{125} Ibid 166.
\textsuperscript{126} Said, Kypri and Bowman, above n 8, 938. Note that only 7% of those who responded to this survey were international students.
\textsuperscript{127} Rab, MAMDou, and Nasir, above n 123, 128.
\textsuperscript{128} Verger et al, above n 4.
\textsuperscript{129} Shariati, Yunesian, and Vash, above n 8.
\textsuperscript{130} Cvetkovski, Reavley and Jorm, above n 1, 465.
\textsuperscript{131} NiGAR Khawaja and Krystle Duncanson, above n 10, 198.
\textsuperscript{132} Soh et al, above n 30, 166.
\textsuperscript{133} See, eg. Tang and Ferguson, above n 11, 42.
\textsuperscript{134} Ibid.
Unfortunately the study did not provide further data that would explain why there was such a difference in the source of financial support between the two cohorts, nor the kind of paid work that was undertaken. However, there may be a couple of possible explanations. First, the curricula and learning and teaching models for both disciplines are different. Law students are taught in lectures, tutorials and seminars, but are required to undertake significant reading and studying on their own. Therefore, there is opportunity to undertake some paid work between classes, particularly paid work as clerks or paralegals in law offices. In contrast, medical students are required to undertake a more clinically based education which requires them to be on campus or in medical settings for tuition. Second, in recent years the number of law students graduating from law school has mushroomed. Generally, it is not sufficient for law students to just obtain good marks. The competitiveness of the employment market and the profession has placed pressure on law students to acquire law related work experience during law school in order to compete for jobs after finishing their degrees, as well as the need to support themselves. Therefore, law students may be pressured into work arrangements that destabilise academic life and study. Moreover, they may be exposed to professional stressors by having to work alongside legal practitioners who are also potentially suffering from high levels of psychological distress. However, another Australian study found that university students who worked 1 to 39 hours per week in paid work had significantly higher distress.\textsuperscript{135}

6 Substance Misuse and Abuse

Said, Kypri and Bowman reported in their 2013 study of over 6,000 students at an Australian university that there were significantly greater odds of reported harmful alcohol consumption in men compared to women,\textsuperscript{136} 17–24 year olds compared to other age groups,\textsuperscript{137} students born in Australia or New Zealand compared to students born in other countries,\textsuperscript{138} students who undertook paid work for more than 20 hours per week, and students who identified as bisexual.\textsuperscript{139}

In the present study, the amount of money spent on alcohol was weakly associated with distress levels. The proportions of law students reporting the use of alcohol and recreational drugs were similar to that reported by medical students (Table 3).\textsuperscript{140} The study of law and medical

\textsuperscript{135} Cvetkovski et al, above n 1. Students in this study were university students assessed in the 2007 Household, Income and Labour Dynamic in Australia (HILDA) survey, the 2007-8 National Health Survey (HS) and the 2007 National Survey of Mental Health and Wellbeing (NSMHWB).

\textsuperscript{136} Said, Kypri and Bowman, above n 8, 938.

\textsuperscript{137} Ibid.

\textsuperscript{138} Ibid.

\textsuperscript{139} Ibid 938, 941.

\textsuperscript{140} One study found that 6.1% of medical students reported using recreational drugs and 79.7% reported using alcohol in the 4 weeks previous to the survey: Soh et al, above n 30, 165–6.
students did not explicitly assess for substance misuses or abuse. Nevertheless, it remains an issue in relation to students generally and the legal profession in particular. Jolly-Ryan states that alcohol and substance abuse are ‘not uncommon’ in the legal profession.141 A recent study conducted by the University of NSW reported that close to one-third (32%) of the nearly 1,000 Australian legal practitioners surveyed in 2012-13 were medium or high risk drinkers. A significant difference was found between males and females, with 43% of males compared to 26% of females being in the medium and high risk groups.142 Only a small proportion of sampled lawyers reported using drugs once a month or less (7%). The vast majority of lawyers (89%) surveyed stated they had not used drugs in the past year.

7 Gender

The multiple linear regression analysis demonstrated that for law students, only gender remained significant: women were more distressed than men, although the difference was not large. This finding is consistent with other studies and is not restricted to law students.143 Leahy et al found a difference in distress by gender, although the magnitude of the difference was also not large.144 Several recent studies have not found gender to be significantly associated with moderate or severe levels of distress.145 Larcombe et al reported no gender differences for anxiety or depression in their sample of law students, though female students scored higher (at a statistically significant level) on the DASS-21 stress scale than males. This was with the caveat that it was only a small effect and female students were overrepresented in the study sample.146 In one study, across several university populations, students who recorded their gender as ‘other’ had a relatively higher likelihood of reporting DASS-21 stress when compared to males.147

However, it should also be noted that some literature has indicated that female students experience higher levels of depression148 and/or mental distress in general;149 this is true of the larger population as well.150

141 Jolly-Ryan, above n 36, 138.
143 Stallman, ‘Psychological Distress in University Students’, above n 1; Baldassin et al, above n 8; Shariati, Yusensive, and Vash, above n 8.
144 Leahy et al, above n 1.
145 Larcombe and Fethers, above n 11, 419; Townes O’Brien, Tang and Hall, above n 11, 158.
148 Khawaja and Duncanson, above n 10, 204.
149 Stallman, ‘Psychological Distress in University Students’, above n 1, 255.
150 Ibid.
C Mental Health Literacy and Use of Mental Health Services

In contrast to previous studies of student health and wellbeing, this study considered the mental health literacy of law and medical students. In this respect, there are two issues.

First, there is the question of what constitutes mental health literacy. Mental health literacy has been defined as ‘knowledge and beliefs about mental disorders which aid their recognition, management and their prevention.’ \(^{151}\) A number of components have been identified as constituting positive and pro-active literacy, namely:

(a) the ability to recognise specific disorders or different types of psychological distress; (b) knowledge and beliefs about risk factors and causes; (c) knowledge and beliefs about self-help interventions; (d) knowledge and beliefs about professional health available; (e) attitudes which facilitate recognition and appropriate help-seeking; and (f) knowledge of how to seek health information. \(^{152}\)

Second, there is the issue of what constitutes a mental health service. For the purpose of this article, mental health service is inclusive so that it includes not only traditional sources of mental health services such as hospitals and consultations with medical specialists and general practitioners, \(^{153}\) but also those services provided at the University of Sydney. \(^{154}\)

1 Awareness of Counselling and Medical Services at the University

The study indicated that law students potentially lack the mental health literacy that may be expected of students in health and medical sciences in the sense that while they were willing to assert that they felt stressed or anxious, a significant proportion did not have fundamental knowledge about where they could seek assistance for their mental stress from the university based mental health services. \(^{155}\) Nearly half of the respondents were not aware of the existence of student association services, disability services, the university medical centre, finance assistance, the student services website and the student counselling services. In contrast, well over half of the medical students at the same

\(^{151}\) Jorm, above n 77, 196. The term was introduced in A F Jorm, A E Korton and P A Jacomb, ‘Mental Health Literacy: A Survey of the Public’s Ability to Recognise Mental Disorders and their Beliefs about the Effectiveness of Treatment’ (1997) 166 Medical Journal of Australia 182.

\(^{152}\) Jorm, above n 77, 196.


\(^{154}\) The University offers a wide range of services including Doctors and allied healthcare, and Counselling and Psychological Services (CAPS) that includes one to one counselling, online resources and workshops: <http://sydney.edu.au/campus-life/health-wellbeing-success/counselling.html>.

\(^{155}\) Medical students will study psychiatry as part of their curriculum and students of other health professions will likely be exposed to social workers’ and psychologists’ clinical work during their training.
university were aware about the medical centre, counselling service and financial assistance.\textsuperscript{156} Knowledge of the medical centre and counselling services may stem from medical curricula and training. The university’s psychological service was the least known by both groups, suggesting that this service may need to be better promoted to students as an option for treatment.

2 Accessing Treatment for Mental Health Issues

A recent Australian study of university students from a variety of faculties reported that the most common service consulted for mental health issues were GPs (30%), followed by psychologists (29%), psychiatrists (19%) and counsellors (18%).\textsuperscript{157} This is not unusual and correlates with the general Australian population who utilise mental health services. For example, in 2007, 71% of the Australian population consulted a general practitioner, 38% consulted a psychologist and 23% consulted a psychiatrist.\textsuperscript{158}

Of the 481 law students who answered the question on ever receiving treatment for mental or emotional reasons, about one-third reported they had received treatment (\textit{Table 1}). At the time of the survey, 14% were currently receiving treatment (\textit{Table 10}). This data indicates that a sizeable portion of law students evidenced the mental health literacy necessary to seek and obtain professional assistance. However, in view of the fact that 60% of law students evidenced high to very high stress levels, the level of mental health literacy of the cohort as a whole may not be high.

The main mental health services patronised by law students were private psychologists and psychiatrists, and GPs (\textit{Table 12}). In contrast, medical students tended to utilise the university’s GP service, university counsellors and private psychologists in that order.\textsuperscript{52} It is unclear why law students were less likely to use university counsellors, since, as stated above, they are aware of this service and it is also free. One reason may be that the counselling service lacks capacity to cater for the number of students who would like to seek help. Another reason may be that students are concerned about preserving confidentiality about their condition and feel more confident about doing so with a private medical practitioner. There appears to be a significant stigma associated with mental health issues in the law profession and its possible negative impact on future careers.\textsuperscript{159} This is likely to hamper efforts to prevent or treat

\textsuperscript{156} Walter, above n 84, 313.
\textsuperscript{157} Dianne Wynaden, Helen Wichmann and Sean Murray, ‘A Synopsis of the Mental Health Concerns of University Students: Results of a Text-Based Online Survey from One Australian University’ (2013) 32 \textit{Higher Education Research & Development} 846, 855.
\textsuperscript{158} Australian Institute of Health and Welfare, above n 154.
mental problems. Such a stigma should be addressed when planning and implementing interventions. For example, assuring students of confidentiality may be beneficial.\textsuperscript{160}

3 \textit{Student Concerns about Their Mental Health Status}

Two hundred and twelve of the 485 law students who responded (44\%, Table 10) reported they wished to conceal mental health or emotional problems while at law school, which is a slightly higher proportion than the 188 out of 477 (39\%) in medical students at the same university.\textsuperscript{161} Law students were also more concerned about their mental or emotional state, as 24\% reported they were concerned a lot or a great deal with this in contrast to 14\% of medical students.\textsuperscript{162} However, the problem is that a student’s concern about his or her mental or emotional state, may not translate into positive action towards or evidence of mental health literacy. The student may assume that the kind of distress that he or she is suffering is the norm or have no understanding of the kinds of risk factors that may be involved. It also ought not to be assumed that the lower concern amongst medical students necessarily indicates that they are mentally healthier; they may have derived resilience from better mental health literacy (based on professional knowledge and greater access to treatment services).\textsuperscript{163}

4 \textit{Students’ Perceived Support}

A very high percentage of law students in the study (66\%) felt not at all or only a little supported at university; the proportion of medical students who felt the same way was also high (54\%).\textsuperscript{164} Indeed, 9\% of law students were considering ‘seriously’ to ‘extremely seriously’ dropping out of their course (Table 13). These were surprising results for both cohorts in view of the extensive array of counselling and medical services available. The survey did not ask the respondents what kind or intensity of support would alleviate their distress. However, even if the kind or level of support necessary was quantified, there is the broader question whether the university facilities and Faculties would be able to offer that kind of practical support to students.\textsuperscript{165} This is an area that needs further investigation.\textsuperscript{166}
VI CONCLUSION

This study has highlighted three matters. First, consistent with other research, a sizeable proportion of law students are very distressed and some may have a serious mental illness. Second, the demographic or educational factors that were surveyed – such as living arrangements, degree type and age – were not significantly associated with psychological distress. Only gender remained statistically significant, with females more distressed than males, but the magnitude of difference was not large. The amount of money spent on alcohol and shorter travel times were weakly associated with psychological distress, but did not reach statistical significance. To put the present study’s results into context, using the multiple linear regression model, a hypothetical female law student who spends $70 per week on alcohol and does not travel to her site of study would score 5.8 points higher on the K-10 than a male student who travels 40 minutes to his site of study and does not spend money on alcohol. However, this difference of 5.8 points on the K-10, while slightly more than 10% of the K-10 scoring scale, is less than one standard deviation of the law students’ mean K-10 score. Thus, the magnitude of the difference in psychological distress by gender, travel time and the amount of money spent on alcohol is not large, although gender was statistically significant and travel time and the amount of money spent on alcohol were weakly significant. It also suggests that other factors such as study and exams, other aspects of financial stress not included in the regression model, and/or factors specific to the study of law may have greater associations with psychological distress in law students.

Third, it is highly doubtful that law students have acquired the level of mental health literacy as a foundation for wellbeing. The study has identified that a large proportion of the cohort suffer from high to very high stress levels, yet they did not appear to be proactive from the perspective of mental health literacy. Although the study was limited to five questions concerning knowledge and access to mental health services, it was clear that over half of the cohort did not understand or ignored the full range of services that were available to students.

The high levels of distress in the present study’s sample of law students may lead to adverse consequences in terms of degree progression, their experiences of legal and tertiary education and learning, and the resources the university may need to deploy in supporting distressed and dissatisfied students more generally. However, the conclusions of this study are subject to the limitations of the study’s design and study sample. The present study does not provide information about what kind and level of support would be necessary to alleviate stress, or whether in the current environment it would be possible for universities to provide the necessary resources. Nevertheless, the creation and management of rational and reasonable student expectations and the nurturing of resilience in law
students may go some way to redress mental health issues. The experience of medical students suggests that strategies at law school that seek to build mental health literacy and knowledge amongst law students may be useful.

LAW JOURNALS: FROM DISCOURSE TO PEDAGOGY

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I INTRODUCTION

Law journals are a seemingly perennial feature of the university law school landscape in common law jurisdictions. To an uninformed observer, they may appear as benign manifestations of university life and as refined vehicles for academic debate about theory and policy. This image belies the fact that they have been the subject, especially in the United States, of highly polemical and often vociferous battles about their worth and proper role. A large amount of literature has been published in American law journals about the journals themselves. The academic literature on Australian law journals, by contrast, has to date been relatively undeveloped. Law journals in Australia and the United Kingdom have attracted little attention and have tended to escape the prolonged controversies surrounding their publication in the United States.

1 The term ‘law journals’ used here is generally coterminous with ‘law reviews’ as used more frequently in the United States. Although most readers of law journals will understand what is meant by the term, it is instructive that the definition of a law journal seems to be at least partly dictated by the jurisdiction in which it is published. For instance, Black’s Law Dictionary defines it as ‘[a] periodic publication of most law schools containing lead articles on topical subjects by law professors, judges or attorneys, and case summaries by law review member-students’. This American definition restricts the journal to university faculties and pre-empts its contents and structure. A more inclusive definition recognises that ‘[t]oday, a law review is more properly defined as a periodic publication which may be general in scope or may focus on a particular area of the law, edited by students, and which may contain lead articles, essays, and book reviews as well as student written articles and case summaries.’: Michael L Closen and Robert J Dziemlak, ‘The History and Influence of the Law Review Institution’ (1996-97) 30 Akron Law Review 15, 17.


3 Law journals in Australia are published as either generalist or specialist journals and may be produced totally by law schools or business schools, either solely or in partnership with internal or external research centres, or by professional, industry and
on student involvement, the maintenance of standards, and peer review, the focus on our law journals has primarily been on their real or imagined benefits for academics and law schools. However, it appears that little has been written about their pedagogical value and the role they can play in the education of law students.

There is no doubt that the immediate function of a law journal is to publish the research output of academics and researchers. However, this article argues that the principal benefit of law journals is educative, and that this has been undervalued in the discourse to date. Student work on the production and publication of law journals, directed to specific pedagogical ends, is capable of providing tangible benefits as a learning tool, an investment in the intellectual future of law schools and a transition to workplaces of vital interest to the law in the broadest sense. If appreciated as a form of pedagogy, as well as a vehicle for research, scholarly journals create opportunities for achieving a wide range of important learning and teaching objectives for law.

The educational benefits to students of law journals work should prompt law schools to learn from the discourse and focus on law journal pedagogy. Of course, its focus is on journals associated with university law schools and faculties rather than research centres and other institutions. The argument will be presented in three parts, beginning with an overview of the primary discourse to date about law journals in the United States, the United Kingdom and Australia. This will demonstrate that the discourse in the US has been derailed by the question of what students have done to the journals rather than on what the journals can do for them. In the UK and Australia, most of the literature has focused on what the journals can do for judges and academics. The article will then posit a model for a unit of undergraduate study centred on the publication of law journals that maintains their central function and overcomes the weaknesses of exclusive student editorship. It will in the final part outline the pedagogical benefits of such a unit of study, addressing the Threshold Learning Outcomes for Law, capstone possibilities and transition to work through experiential learning.

**II LAW JOURNALS DISCOURSE**

An ongoing debate about law journals has been engaged in by academics in the English-speaking common law world for most of the twentieth century. However, this debate has been singularly pronounced in the US which, for a variety of uniquely historical reasons, has

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research bodies. They are variously run by faculty staff or student editorial teams (or a combination of both), or by editorial boards of the respective research organisations. For a relatively comprehensive list of law journals in Australia, refer to the ‘Law Journals’ link on the website of the Australian Legal Information Institute at <http://www.austlii.edu.au/au/journals/>. See also the list of law journals in the Appendix to Michael Kirby, above n 2. In addition, professional bodies such as state law societies and bar associations publish a variety of journals and bulletins aimed mainly at their professional memberships.

4 See Kirby, above n 2, and the response to him by John Gava (2002), above n 2, both of which will be discussed in greater detail in Part II below.
developed a law review culture centred on the primacy of unsupervised student editorship. The students rarely, if at all, seek the advice of experts in article selection and have been regarded as exercising a heavy-handed approach to technical and substantive editing.

A Law Reviews in the United States

In 1936 Professor Fred Rodell of Yale University famously declared he no longer wished to contribute to law reviews, which had become ‘quantitatively mushroom-like’ and ‘qualitatively moribund’. Ventsing his frustration with the state of American law reviews in particular, Rodell forged an unforgettable place in law journal folklore with the following censure:

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground … [I]t is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style.

For Rodell, verbose and pretentious expression, timidity of ideas, obsequiousness to precedent and lack of interest in reform had made the law reviews redundant. However, in the same edition of the Virginia Law Review, Garrard Glenn warned that journals which ‘discard all traditions’ and eschew civility between academics would not last long. On the other hand, David F Cavers presented a more conciliatory perspective, emphasising that the reviews were ‘an integral part of the American system of legal education’, with student editorship benefiting the profession as a whole:

[It is from this group that the law teachers of today and those other members of the profession given to law review writing are recruited. They who have served their apprenticeship as student editors continue to write notes and comments. These are now expanded to more formidable dimensions …

These quotes bear witness to the diversity of views in the abundant literature on law reviews in US jurisprudence. American law journals, characterised by commentary and opinion about judicial decisions, emerged in the mid-nineteenth century. Originally, students were

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6 Ibid.
9 Ibid 4.
10 It was not until the 1870s that the first student-run journals emerged, starting with the Albany Law School Journal in the state of New York, and followed by similar publications at the Harvard and Columbia law faculties: Closen and Dzielak, above n 1, 34. These provided the template not only for many US reviews, but also the Cambridge Law Journal in England in 1921 and Australian law journals that emerged following the Second World War: Closen and Dzielak, above n 1, 41. The authors claim that the University of Tasmania Law Review in 1958 and the Melbourne University Law Review in 1960 were directly modelled on American lines, and that the Monash University Law
recruited essentially to provide doctrinal fodder and commentary for the bench through the journals, which were ‘aimed at use by the thinking practising attorney’ whose practical needs were not being met by the formal treatise. The primary aim of the law review was to serve judges and practising lawyers, rather than the professors, by offering careful doctrinal analysis, noting, for example, divergent lines of authority and trying to reconcile them.

Over time, the journals developed into vehicles for a wide array of general and specialised legal topics and themes, ranging from the narrowly doctrinal to the vastly cross-disciplinary. From the 1930s New Deal period onward, they increasingly incorporated critical perspectives on the law and law reform. Benjamin Cardozo, an Associate Justice of the US Supreme Court during the New Deal era and an apparently keen user of law review ideas and arguments, relished the notion that the judges were inevitably passing the baton of legal thought to the professors and that ‘academic scholarship [was] charting the line of development and progress in the untrodden regions of the law’. By the end of the Second World War, the training of US lawyers was almost totally in the hands of a new wave of university law schools, with many of their law reviews increasingly becoming vehicles for law reform. There has been ongoing debate about the role of the reviews, with growing recent criticisms aimed at getting the reviews ‘back to basics’. It is true that the pedagogical benefits of law journals have been acknowledged by many observers and commentators. Earl Warren, Chief Justice of the United States, expressed in 1953 the view that legal education is probably their primary end:

The American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge, whose decisions provide grist for the law review mill, the review may be both a severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students who participate in its writing and editing.

Review specifically referred in its first issue to the US tradition of all law schools having law reviews under student editorship: Closen and Dziela, above n 1, 42.

Cavers, above n 8, 4-5.


For example, Harry Edwards, a circuit judge of the US Court of Appeals for the District of Columbia Circuit, expressed concern in 1992 that much law review literature is ‘impractical’ scholarship with ‘theory wholly divorced from cases’: Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992-93) 91 Michigan Law Review 34, 46. Similarly, James Lindgren of the University of Texas Law School notes that what is reflected in many law journals is symptomatic of the fact that ‘some judges feel a bit left out by the law faculties becoming more theoretical, more trendy, and less doctrinal.’: James Lindgren, ‘Reforming the American Law Review’ (1994-95) 47 Stanford Law Review 1123, 1125.

Similarly, Closen and Dzielak point out that ‘an important aspect of the law reviews is their function of training future lawyers, judges, and the law professors … This practical aspect of law review membership exposes students to the legal profession before graduation’. However, there has been little attention paid in the US – and none in Australia – to the precise nature and extent of the pedagogical benefits.

The learning and teaching aspects of law journals have largely been sidelined in the American debate, which has paradoxically been characterised by widespread disappointment with student editorship. The single most prevalent and vexed issue in the US commentary on law journals, unresolved over the preceding century, has been the virtually exclusive and unsupervised editorship of students and the concomitant lack of academic peer review. The criticism, a constant over many decades, has come mostly from academics. James Lindgren of Chicago-Kent College of Law went so far as to promulgate in 1994 an ‘author’s manifesto’ because ‘our scholarly journals are in the hands of incompetents’ who

often select articles without knowing the subject, without knowing the scholarly literature, without understanding what the manuscript says, without consulting expert referees, and without doing blind reads. Then they try to rewrite every sentence.

Such views have characterised the debate in recent times. Lindgren later identified three fundamental problems with law reviews – prose editing, article selection, and education and supervision – and posited four models for improving law reviews, focusing on ‘an educational approach to the problem of competence’ by which students could

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16 Closen and Dzielak, above n 1, 24.
17 Two short anecdotes, several decades apart, may serve to illustrate the problem. In 1911 Justice Oliver Wendell Holmes of the US Supreme Court is said to have admonished an attorney who cited a law review article, which he saw as the ‘work of boys’. Holmes also ‘thought the limit had been reached when what he had said in his judicial opinions was approved by the students as being “a correct statement of the law”’. Over forty years later, the renowned theorist H L A Hart withdrew an article from the Harvard Law Review after it was substantially rewritten by a student editor who had attempted to improve the piece. It was finally published, after editorial board intervention and prolonged negotiations, under the title ‘Positivism and the Separation of Law and Morals’.
18 Typical of these numerous complaints are the following: Harold Havighurst of Northwestern University in 1956 pointed out that law reviews were not cited in the Supreme Court nearly as much as the treatises and legal encyclopedias, and that, ‘whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.’: Harold C Havighurst, ‘Law Reviews and Legal Education’ (1956) 51 Northwestern Law Review 22, 23. Thirty years later, Roger Cramton of Cornell University declared that the law review institution had been undermined by the evolution of the law, which had become ‘too complex and specialized’, and modern legal scholarship, which was ‘too theoretical and interdisciplinary’ for student editors to handle: Roger C Cramton, ‘”The Most Remarkable Institution”: The American Law Review’ (1986) 35 Journal of Legal Education 1, 5.
20 Lindgren, above n 14, 1124.
overcome the grievances of academics. More recently, Ross P Buckley proposed a solution to the seemingly intractable problem of US law reviews based on practice in the UK and Australia: ‘If one or two such journals were to announce they were now faculty-edited and credible submissions would be peer-reviewed … then others would likely follow.’ In 2009, John Doyle of the Washington and Lee University School of Law confirmed the perennial problems and wondered whether ‘some other system is capable of replacing the one we know as we move further into an online information world.’

There have also been efforts to better understand the contentious image of the reviews and to find a solution to the impasse. In 2007, a Minnesota study of law review article selection concluded that, despite frequent lack of merit, ‘author credentials, topics, and other factors like format, timing, and thoroughness influenced student editors as they made publication decisions.’ This underscored the strong perception that the time for mandatory peer review had finally arrived. Changes in publishing technologies also have tended to add a further element of uncertainty about the future of the law review. Much of the recent discussion, therefore, has focused on mandating peer review, instilling academic supervision, introducing codes of conduct for editors and fostering open access in the internet age.

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23 Doyle argued ‘the standard law review criticisms have been of excessive article length, an overabundance of footnotes, a lack of publication speed, an overly theoretical emphasis, overediting by students, and a lack of student knowledge sufficient to select and edit articles … But while law reviews have frequently been berated, little has changed …‘: John Doyle, ‘The Law Reviews: Do their Paths of Glory Lead but to the Grave?’ (2009) 10(1) Journal of Appellate Practice and Process 179, 180.


B Law Journals in the United Kingdom and Australia

The body of literature concerning law journals in the United Kingdom and Australia has been far less prolific and heated although, again, relatively little attention has been paid to the benefits for students. The primary focus of the discourse has been the purpose of the journals and the role of academics in legal education. In the British case it seems also to have been characterised by two concerns: to extract a degree of unrequited respect for academics from the wider legal profession, and to introduce a critical aspect to legal literature.

In England, legal periodicals before the Victorian era were few and far between.26 Vogenauer notes that ‘[i]n standard accounts of legal history, law reviews are barely mentioned’.27 There was little interest for them, since there were already collections dealing with judicial decisions by professional court reporters, and there were occasional published collections of legislation. In the mid-nineteenth century a number of commercial periodicals publishing case notes, book reviews and occasional doctrinal issues of interest to lawyers began but mostly folded quickly.28 Some publications aimed at facilitating legal training and study.29 Of course, the writing of treatises and legal texts developed greatly in the final quarter of the nineteenth century, although these were again written mostly by and for legal practitioners rather than academics.30 Students had no discernible role in the production of these journals.

This may not be surprising, since legal training was historically conducted by the inns-of-court, with law schools as such appearing only towards the close of the century.

With the study of law moving slowly to the universities, a new kind of law journal emerged on the English scene. The first law periodical that was devoted to legal commentary, critique and research in the modern sense was the Oxford-based Law Quarterly Review (LQR), which began in 1885 and belonged to a new era, being ‘both a product of and a catalyst for the new profession of the legal academic.’31 The journal was seen by

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26 In 1827, the publisher of the first recognised law journal, The Jurist, lamented this fact: ‘In a country which boasts of the richness and variety of its Periodical Literature … it is somewhat singular that Jurisprudence, a science in itself so interesting, and in its application so closely connected with the well-being of society, should be absolutely without any regular organ of communication with the public. Such, however, is the case with respect to England.’: (1827) 1 The Jurist iii.
29 These included The Law Student’s Magazine (1844), The Examination of Articled Clerks (1851-56), The Telegram (1859-79), The Legal Examiner (1862-68), The Bar Examination Journal (1871-99), The Law Students’ Journal (1878-1917) and others.
30 This prompted American jurist Grant Gilmore to famously describe English legal textbooks as ‘plumbers’ manuals’ for lawyers: Grant Gilmore, Ages of American Law (Yale University Press, 1977) 3.
31 Vogenauer, above n 27, 48. On the occasion of its jubilee celebration in 1935, Sir Frederick Pollock wrote that the journal was founded in order to supplement the legal literature of the period, which ‘was still sadly lacking in instruments both of exposition
the 1930s as having inspired key American publications such as the Harvard Law Review, the Yale Law Journal and the Columbia Law Review.32 Pollock’s jubilee encomium to the LQR did not refer to its educational role or to law students, other than to mention that developments such as the journal meant students had ‘little to complain of in the materials of their professional outfit’.33 Paradoxically, it was the adoption of the ‘American model’ in the early twentieth century that heralded the limited emergence of student editors, although under academic supervision.34 By the time the Modern Law Review (MLR) was founded in 1937, its editor R S T Chorley declared it to be a vehicle principally for promoting law reform.35 On the occasion of the MLR’s fiftieth anniversary, Glasser explained that the journal was influenced by continental jurisprudence and aimed to put law faculties at the forefront of legal education so as to gain acceptance from a legal profession sceptical of civil law influences and politicised argumentation.36 It is apparent here again that the primary focus of the literature was the role of law and the status of law academics, with the journals seen as a kind of testing ground for ideas about legal systems and the wider function of law.

Like the English experience, ‘the history of law journals in Scotland remains largely unwritten’.37 It has been noted there were attempts in the early nineteenth century to establish two journals, the Law Chronicle and the Edinburgh Law Journal, both of which were short-lived.38 Further attempts later saw the emergence of the Scottish Law Magazine, the Journal of Jurisprudence and the Poor Law Magazine, all of which focused on legal issues for practising lawyers and suffered from lack of dedicated attention from ‘professional men during the hurried intervals of

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32 Pollock, above n 31, 10.
33 Ibid 5.
34 When the Cambridge Law Journal was commenced in 1921, with mostly student editors, it was seen as part of ‘a marked legal renaissance throughout the civilized world’ and ‘the natural out-growth of … broader conceptions of the place of the law and of the lawyer in national and international life’: Harold D Hazeltine ‘Foreword’ (1921) 1 Cambridge Law Journal 1.
35 Chorley wrote that ‘English legal periodicals have hitherto dealt almost exclusively with the technical aspects of the law treated from such varying points of view as the historical, analytical, or descriptive. [This approach] … isolates the law too much from those contemporary social conditions in which it must always operate, and cannot therefore be safely used as an exclusive method of legal thinking …’: Robert Chorley, ‘Editorial Notes’ (1937) 1 Modern Law Review 1.
38 Ibid 16. Zimmermann has attributed their failure to the prior existence of ‘law tracts’ devoted specifically to topics of Scots law; the ready availability of law book reviews in popular general audience periodicals such as the Edinburgh Review; the very small number of legal practitioners in Scotland at the time; and the tradition of ‘oral disputation and discussion’ in Scottish clubs and societies that displaced any demand for written discourse.
business of more pressing importance’. This was exacerbated by the few law academics at the time working simultaneously as practitioners. It was only much later, and into the twentieth century, that more successful publications managed to establish reputations because of the growth of law schools with tenured academics. The Scottish experience to a large degree mirrors that in England. Journals focused on practical issues for legal practitioners, including coverage of court decisions, up to the emergence of an academic cadre. Students largely were not part of the scene.

In Australia, the literature about Australian law journals has also been limited and, apart from occasional routine acknowledgment, their pedagogical role has largely been neglected. Only occasional references to our journals may be found at all, and mostly in works focusing on the history of legal education, on judicial decision-making, the writing of judgments and the training of judges. The sole exception is a well-noted 2002 exchange between Hon Michael Kirby and academic John Gava, in which neither author cites a single article or book devoted to Australian law journals, despite the apparently marked influence of American journals on the law journal experience in Australia.

It is firstly noteworthy that Kirby’s article ‘Welcome to Law Reviews’ was written in 2002 as a ‘riposte to perhaps the most famous law review article of them all: “Goodbye to Law Reviews”, written by Fred Rodell in 1936’. That it took over six decades for this to occur demonstrates the lack of urgency and interest in Australia on the topic. Kirby acknowledges Rodell’s frustration with law reviews and presents his own list of their ‘ten deadly sins’. However, Kirby’s article proceeds then to offer ‘words of praise’ for law journals against Rodell’s condemnation. The real advantage of the journals, in Kirby’s view, is that they contribute to the development of the law and to law reform. Pointing to illustrative decisions of the Mason High Court, Kirby asserts that judges have finally been liberated from the reasoning techniques of the past, a process to which ‘essays of analysis and criticism’ in the law journals have contributed.

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39 (1857) 1 Journal of Jurisprudence iii (quoted in Zimmermann, ibid, 18)
40 For eg, the Juridical Review, the Scottish Law Review and the Edinburgh Law Review (beside several professional law society publications).
42 See Closen and Dziela, above n 1, at 41-42 on the influence of the American law review model on the formation of the University of Tasmania Law Review, the Melbourne University Law Review and the Monash University Law Review.
43 Kirby, above n 2, 1.
44 Ibid 1-6. These are: publishing for the sake of it; publishing boring and excessively lengthy articles; writing uncritical, unoriginal articles for law reviews that publish them; publishing articles that are ‘useless’ and do not ‘add something new to legal knowledge; setting up editorial advisory boards that do nothing; ignoring economic demands in publication decisions; publishing to gather dust; pandering to mere needs for academic publication; ignoring costs; and failing to embrace electronic publication strategies that are ‘kinder to the trees’.
46 He argued that ‘[t]he overthrow of the declaratory theory of law has led to the recognition by scholars, practitioners and judges that law is expounded by judges who
information about ‘the history of the relevant branch of the law, the conceptual weakness of past authority, and the social and economic context in which the law must operate.’

On the other hand, Gava argues that Kirby is promoting ‘an instrumental view of the judicial role which is at odds with the traditions of the common law.’ He contends that journals used in this way ‘harm our law schools’ because they are diverting academics from an objective ‘search for truth’ and turning them into advocates. Notably, Gava does not address the pedagogical benefits of law journals, although Kirby does acknowledge they can ‘provide fine training for good legal writing and editing.’ Notwithstanding the limited Kirby-Gava exchange, which was concerned primarily with opposing views about the utility of law journals for the judiciary and academia, their contribution to student education has largely been taken for granted or ignored.

The only other discernible issue that has appeared in Australian law journal literature is that of citation analysis – which again focuses on what journals may offer for academics and judges.

Building on American ‘most-cited articles’ literature, much of this analysis focuses on who might be reading law reviews, which courts have cited law journal articles and which journals might advance the profiles of researchers and academics in law. The first such analysis in Australia was undertaken in 1996 and published in a library association journal. The useful work done by Ramsay and Stapledon also added value to citation analysis by providing information about ‘impact factors’ from publication in law journals, such as the disciplines from which law academics were obtaining their ideas and the research areas in which particular journals


48 Gava (2002), above n 2, 565.

49 Ibid, 569.

50 Ibid.

51 Kirby, above n 2, 10.

52 Citation analysis may refer to the citation practices of courts in citing superior court decisions, the decisions of other courts within and outside jurisdiction, and academic writings: Russell Smyth, ‘The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court’ (2000) 9 Griffith Law Review 25. See also Russell Smyth, ‘Citation of Judicial and Academic Authority in the Supreme Court of Western Australia’ (2001-2) 30 University of Western Australia Law Review 1. It also refers to the analysis of academic writings themselves and ‘measures the influence of journals by studying the number of citations to articles published in those journals’: Ian Ramsay and G P Stapledon (1997), above n 2, 676.


55 Ramsay and Stapledon, above n 2.
were having most impact. This information was designed to assist academics in choosing journals in which to publish.

III LAW JOURNALS PEDAGOGY: THE MODEL

Much of the opprobrium generated in the US for student-run journals may be overcome if a curriculum design model is adopted that accommodates student editorship under academic supervision. Although some Australian law school journals adopt a comparable approach, others are organised around volunteer work. The model recommended here is premised on the production and publication of a law review within a formal undergraduate unit of study. The most obvious benefit of such a model is that it would teach students how to edit law journals by allowing them to engage with the publication process. But editing articles for publication would ideally form only part of the curriculum. What follows is an attempt to suggest a learning and teaching model that has been introduced, and at times modified, by the author at final year undergraduate level in a metropolitan law school.

A Learning Outcomes

There is no reason in this context to depart from sound and currently endorsed pedagogical theory and practice. Law graduates have to meet not only admission requirements but also legal education standards at the national level as well as graduate attributes set by their universities. It is beyond reasonable question now that a learner-centred strategy is at the core of an outcomes focused approach to attaining these requirements, standards and attributes. The outcomes for law students pertain certainly to content knowledge, but equally to skills and capacities to transition successfully to work and between different kinds of work. For a unit of study encompassing law journals work, it is essential to aim for appropriate learning outcomes and assessment tasks that will constructively align with those outcomes.

Learning outcomes for a law journals unit should focus on the skills that final year students may amplify on the foundation of already internalised content. Various iterations of Bloom’s taxonomy identify these as higher order skills that allow students to analyse, synthesise, evaluate and create. Biggs reminded us that we need to articulate the required skills so they may be understood as measures of comprehension:

[Teachers] do not know how to descend from the rhetoric of their aims to the specific objectives of a given course or unit … To do so, they need a

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56 As Ross P Buckley admits for the American reviews: ‘The solution to “the editors don’t know how to edit” part of the problem is conceptually simple – teach them. If one would expect this to be fairly obvious to universities, one would be wrong. While the lamentations regarding student-edited law reviews are legion, very few law schools teach their student editors formally how to do their job.’: Buckley, above n 22, 7.

57 See Sharon Christensen and Sally Kift, ‘Graduate Attributes and Legal Skills: Integration or Disintegration?’ (2000) 11(2) Legal Education Review 207 at 208 for the graduate skills law students should acquire.

58 Benjamin S Bloom et al, Taxonomy of Educational Objectives: The Classification of Educational Goals (Longmans Green, 1956).
framework of some kind to help them operationalise what ‘understanding’ might mean in their particular case.59

In the model used by the author, students ideally arrive at ‘understanding’ through a variety of tasks aimed at honing their writing, researching, critical analysis and editing skills in the context of real communications with external stakeholders. These skills are essential to a variety of employment destinations that are critical to the sustainability of the legal profession and the rule of law: academic work; legal research and policy (in government, non-government organisations and business); legal communications; and legal publishing. Biggs’ ‘Structure of the Observed Learning Outcome’ (SOLO) indicates that various aspects of a single task (such as working on the production of a law journal edition) may be experienced at different levels of understanding.60 The quality of a task may range from the unistructural (such as identifying key characteristics of scholarly publishing) to the most complex extended abstract applications (that may involve creating, theorising or reflecting in the critical analysis of articles for publication or the writing of a critical review). Such a structure presupposes also that learning outcomes should be expressed in terms of ‘verb, object and condition’.61 In the current context, and combining a variety of student work qualities, the curriculum to be designed could include learning outcomes such as the following:

(1) To recognise and identify the fundamentals of legal academic publishing. Some introductory content would be useful to equip students with an appreciation of the history of law journal publication, the principal issues facing law journals (students often express surprise at the disparity between American and Australian discourses about law reviews), and the main features of scholarly publishing compared to popular or professional publications. This requires them also to reflect on those who write for the various forms of publication (their qualifications, reputation and sources), the editorial models behind their production, the demands of their readership, their content and their characteristics in appearance and style.

(2) To appreciate and describe the production and peer review processes of an academic law journal. Before students are given responsibility for the carriage of articles to publication, it will be necessary to introduce them also to an agreed process by which this will happen.

61 Most universities in Australia have adopted this method of describing the essential outcomes students are expected to attain in individual courses or units of study. For further information about the pedagogical justification for this approach see Karen Hinett and Alison Bone, ‘Diversifying Assessment, Developing Judgement’ in Roger Burridge et al (eds), Effective Learning and Teaching in Law (Routledge, 2002) 55.
Confusion dissipates about the publication process, the nature of peer review, the interactions between stakeholders and the timing of the editing work when students are introduced to the structure of the publishing cycle within a semester-long unit. This should ideally cover the concrete steps taken in the three major parts of the process (pre-peer review, peer review and post-peer review), and could be accompanied by reference to templates for correspondence and documentation, which students could be asked to draft and amend as required.

(3) To demonstrate a capacity to proofread and edit legal academic works for publication. Requiring student editors to examine submissions for publication should be a major learning outcome and a principal component of the work they are asked to perform. This will of course demand some level of training and practice. To this end, the author has convened revision classes for the cohort on legal writing, substantive editing, technical editing and legal referencing (with emphasis on the Australian Guide to Legal Citation (AGLC)). Students have also been encouraged to present aspects of the AGLC to the class. De-identified extracts from previously unsuccessful submissions have been distributed and discussed in detail as editing and proofing exercises.

(4) To critique legal academic articles and other works. If students are to be given the editorial carriage of articles by academics submitted for publication, they should be asked to carefully read them and become familiar with their structure and the author’s argument and style. This will equip students to appreciate and place in context the comments and suggestions of reviewers and to inform the academic supervisor (who would normally act as editor in chief) and the cohort (as a de facto editorial board) of the article’s suitability for publication. The author has used this student experience as the basis for a major assessment task, namely a critical review of the article of which students have carriage.

(5) To produce written academic work to a publishable standard. To work on a law journal has been seen in Australia and overseas as an activity reserved for the ‘best’ students who wish to impress future academic supervisors and employers. Applicants are usually high achievers with strong literacy and intellectual maturity and discipline. As discussed below when addressing assessment, requiring students to submit one or two written works to a high standard capable of publication brings together many of the skills honed in the unit. Exceptional works could be rewarded with publication, if appropriate, in the law school journal or recommended for publication elsewhere. In addition to the critical review, these could include case notes, book reviews, research notes, literature reviews and others.

(6) To demonstrate a capacity to collaborate effectively and develop interpersonal and communication skills as part of an editorial team.
Working on the production of a law journal edition necessarily throws student editors into ‘real life’ situations with internal and external lines of communication to a variety of stakeholders. They are required to cooperate with the editor in chief and others in the editorial team towards a concrete end with defined deadlines. They must establish working relationships with authors and their reviewers, and all work has to be documented in information systems for which the university is ultimately responsible. They need to maintain high standards visible to the outside world and be mindful of ethical duties in resolving problems as they arise. This adds to resilience and emotional maturity and enhances written and oral communication skills comparable to employment standards.

In summary, the learning outcomes congregate around two strategic goals: firstly, the acquisition and refinement of high order skills, transferable to the legal workplace, that focus on legal writing, editing, research and analysis; and secondly, student participation in the production cycle of a law publication, inclusive of external stakeholder relationships, that replicates the workplace experience.

**B Assessment**

With the identified strategic aims in mind, the next challenge is to align assessment strategies that maximise the desired outcomes, and reliably measure what students have achieved against those outcomes. With constructive alignment, the learning outcomes or objectives outline what students should achieve; the learning and teaching activities support the attainment of those outcomes; and the assessment regime measures the extent to which they have achieved the outcomes. The fine tuning of these elements of alignment should also be a continuing process, informed by feedback and reflection. Since law journals work is usually housed within a final year elective unit for high achieving students, the balance between formative and summative assessment may not be comparable to that of core law units earlier in the law degree. Various combinations around the two strategic aims, customised to law school needs and resources, should be tried. One method is predicated on a course outline and structure that requires students to participate in group discussions or ‘classes’ on legal writing, editing, referencing and the publishing process earlier in the semester, with a focus on the production of the journal edition later in the semester. It is not only the balance that has to be tried and tested, but also the sequencing of assessment tasks and their weighting. A constant challenge is linking the formal assessment requirements to the practical exigencies of producing a journal edition.

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Another is monitoring the need, if any, to differentiate between *formative* and *summative* assessment.63

An equal balancing of written work and journal production work may present a viable solution for assessing the two main goals. A model that has been tried asks the students to produce two written works of equal weighting, one requiring independent research and the other being linked to the journal edition in production. An example of the former is to produce a case note, to a publishable standard, on an important and current superior court decision. An example of the latter is a critical review of the submitted article for publication the student is editing. There are many variations possible on this theme: case studies, literature reviews, research notes, legislation notes, articles or book reviews and others. The two writing tasks are summative in the sense that they evaluate the superior writing and research skills that the students have attained throughout their law degree and brought with them. They should then be graded for each task according to known rubrics or marking criteria. Of course, formative assessment takes place spontaneously during the legal writing classes and discussions, unit convenor consultations and in the marking and feedback on the written works.

The remaining assessment could be linked to the second strategic outcome, the students’ participation in the journal production process. Again, this may entail several components and alternatives, so that it may, for example, encompass a class participation mark to cover readings, discussions and editing exercises in class. But the largest component should be reserved for the handling of the editor’s role in the production cycle. This includes communications with authors and reviewers, presentation of reports on the submissions to the editorial meetings, the technical editing of the articles, the meeting of journal deadlines, and the management of documents and time, for example. The unit convenor (and editor in chief) ideally has electronic access to all communications and acts as supervisor and adviser in relation to all actions. Formative assessment takes place at all given points of the production and publishing process in dialogue (unstructured or otherwise) between editor and supervisor. The end of the cycle results in summative assessment based on shared criteria, such as participation in the editorial meetings, carriage of submitted works, communications with authors and reviewers and attendance to journal production matters in a competent and timely manner. It is also beneficial to formalise reflection into this process by way of a student editor portfolio or reflective journal, which could be graded. It could require students to construct a body of evidence, via a medium of their choice, of their activities and communications and of their reflections on substantive matters, the journal production process, and personal progress and growth.

63 It is generally understood that summative assessment is customarily reserved for the conclusion of a semester, and is aimed at evaluating acquisition of skills and knowledge for the recording of formal grades. On the other hand, formative assessment occurs throughout a teaching period and is aimed at feedback and teaching modifications to ensure that students are learning as planned.
C Collateral Design Issues

The structure of a functioning law journals unit for student editors under academic supervision presents challenges and logistical issues that are not normally experienced in law unit curriculum design. This is mainly because the conduct of such an academic unit of study, with credit point outcomes, needs to be coordinated with the production of a law journal edition. Three collateral challenges should be kept in mind, and monitored between unit iterations.

The first relates to cohort selection. Since the nature of law journal participation is not appropriate for large cohorts, and necessitates advanced skills, the composition of the student editorial team has to be addressed. The author has used a model based on a selection process for a small group of student editors. Relevant selection criteria could involve consideration of academic record (a grade point average minimum in law may be an option), submission of completed academic writing in a law unit, experience with writing and editing of student and other publications, and stated motivations for involvement. This may to some extent be influenced by the theme of the imminent edition, so that a particular interest in and record of achievement, for example, in human rights law, international law, economics or science may tip the scales in their favour. Experience here and overseas demonstrates that competition for selection to this kind of activity is pronounced, so difficult choices often need to be made.

The second collateral design issue relates to the coordination of the formal unit of study with the publication of the journal. It should be explained to students, in the selection process, that the publication of a journal edition may not align neatly with the conclusion of the law school semester. Editors may need to work beyond the close of semester to accommodate publishing demands, author availability and a range of other technical issues, mostly unanticipated. This in turn will be influenced by whether the journal is published online or in hard copy, or perhaps both. The increasing trend to online open access publication minimises logistical problems with external designers and printers and facilitates the model under discussion here. What has worked well in the author’s experience, in relation to an annual journal edition, is the following time cycle. The first stage is the issue of a call for papers soon after the publication of an edition. This allows several months for potential authors to prepare submissions. The second stage is the coordination of the submission deadline with the beginning of semester, at which time the cohort selection process has been completed and classes have begun. As submission are received, they are allocated to student editors who immediately commence communications and enter the production cycle. The third stage is the running of writing, editing and referencing classes (for a limited number of weeks) during the peer review process. This could include the first written work. The fourth stage is the management of the editorial and production cycle (with no further classes) in the second half of the semester. The second written work and reflective portfolio could be timed for the close of semester and the law school examination period.
The third design challenge relates to the equitable division of production tasks, which are to be translated into fair and transparent grading outcomes. From the perspective of an editor in chief, the ideal scenario includes a healthy number of good journal submissions, an efficient and prompt peer review process, and a small number of dedicated student editors who each experience the full production cycle, including the carriage and editing of an article to publication. This will not always occur. Problems arise when student A’s allocated article proceeds to publication while student B’s does not. Conceivably, student A will have put in a far greater number of hours of work by semester’s end. All options should be explored, and ideally students should participate fully in a transparent discussion about equitable outcomes. Internal communications have to be fine-tuned to avoid confusion and inefficiency in such cases. One option is to ask student B to lessen A’s load by sharing editing or communication tasks. Student B may be given the task of checking footnote references while student A executes the technical edit of the text. A third student editor C may then have to share tasks if another submission is rejected after peer review. Other adjustments to student workload may then need to be made. Another option is to allocate to students B and C the task of preparing layout, design and formatting of the journal for publication. This occurs at semester’s end as authors complete their amendments and final proofs are authorised. The capacity of students to handle design issues by way of electronic desktop publishing software and other media forms could also be considered when selecting the cohort and planning substantive class content.

IV LAW JOURNALS PEDAGOGY: THE BENEFITS

The material so far demonstrates that literature about law journals has focused on their role in the development of the law and of legal research, and the highly contentious role of students as editors. A model for the editorship of law journals by student editors under academic supervision within formal study was outlined in Part Three. This Part will identify three critical areas with pedagogical value, each of which should be explored more fully with further research. The first focuses on how law journal work fosters the attainment of the Threshold Learning Outcomes (TLOs) for law. The second highlights the potential for transitioning to work through experiential learning. The third explores the capstone learning possibilities of units premised on the model outlined in Part Three.
A Threshold Learning Outcomes and Graduate Skills

It is by now well established that the study of law entails not only what law graduates need to know but also what they need to be able to do.\(^64\) Calls for embedding legal skills and attributes in university legal education coincided largely with the demands of governments, employers and educational bodies to ensure, through an integrative approach to education, that students attain ‘graduate attributes’. These equate to the qualities and skills graduates need to be able to participate fully in their chosen lines of work, and as citizens. As Kift has suggested, such an integrative approach emphasises

the inculcation of ethical values in preparation for a lifetime of personal and professional citizenship, and a genuine commitment to developing robust intellectual capacities that extend beyond mere technical knowledge and narrow vocational training.\(^65\)

The approach requires the infusion of skills and competencies across a degree program, with the appropriate scaffolding of attributes as students make progress towards graduation. Christensen and Kift have traced the movement to integrate legal knowledge and legal skills in the UK and the US,\(^66\) and they have argued for the fusion of generic graduate skills and specific legal skills in our law school programs. Specific legal skills include legal reasoning, research and problem solving, while generic graduate skills encompass communication, time management, document management and computer skills.\(^67\) On the basis that \textit{doing} is just as important as \textit{knowing} for effective transition to work in law, the authors argue that

procedural knowledge is just as important as conceptual knowledge and that a curriculum which successfully integrates and fosters the development of a combination of personal qualities and meta-cognitive functions (particularly self-reflection) will produce a highly desirable graduate.\(^68\)

The academic requirements for admission to practise as a legal practitioner in Australia are located in the Bachelor of Laws (LLB) degree, which must (since 2010) meet six threshold learning outcomes that represent what law graduates should know, understand and be able to do.\(^69\) The TLOs relate to knowledge, ethics and professional responsibility, thinking skills, research skills, communication and collaboration, and self-management. What follows is an elaboration of the principal tasks for student editors that the model demands, and their


\(^{65}\) Kift (2008), above n 64, 1.

\(^{66}\) Christensen and Kift, above n 57, 208-210.

\(^{67}\) Ibid 212.

\(^{68}\) Ibid 213.

\(^{69}\) Australian Learning and Teaching Council (ALTC), \textit{Bachelor of Laws Learning and Teaching Academic Standards Statement} (2010) 1.
linkage to the TLOs for law. The unit of study model incorporates work by students on the cycle of production for an edition of a law journal. The TLOs will now be addressed in terms of their relatedness to three stages of law journal production (pre-review, review and post-review) and in general overview.

1 Pre-Review

A call for papers will generally be issued in the preceding semester and submissions may be anticipated for the beginning of the following study term. Upon receiving a submission, the editor in chief will usually check that the article complies with formalities and is suitable for peer review. At this point the submission may be allocated to a student editor who should be encouraged to verify the author’s details and check that the written work is within his or her research area. A plagiarism check should routinely follow and the article should be carefully read by the student editor to become familiarised with its argument and style. At this early stage, TLO 1 (Knowledge) and TLO 2 (Ethics and professional responsibility) are engaged. More will be said about TLO 1 later.

TLO 2 (Ethics and professional responsibility)\(^70\) develops the ethical and professional dimensions of the study of law. In the course of working on the production of a law journal edition, student editors are frequently confronted with the necessity to exercise professional judgement and make ethical decisions. This may relate to a range of situations including, in the pre-review stage, checking the integrity of submitted works from academics (which do on rare occasions raise issues of plagiarism or lack of attribution), selecting peer reviewers who will not be faced with conflicts of interest or institutional bias, and carefully de-identifying submitted works for peer review. The principal focus of the first step is preparation for the peer review process.

2 Review

The peer review process, generally on a double blind basis in Australia, is the key integrity factor that ensures the sustainability of law reviews. It is fundamental also to the engagement of student editors in the editorial process because they will need to identify relevant experts as potential peer reviewers, enter into communications with them, and engage them for the reviews with the appropriate documentation. This stage requires students to attend to the following tasks: liaise with academic experts at a respectful and collegial level; ensure that the peer review brief is satisfied; assess reviewers’ comments for adoption by the editorial team and decide on their possible redaction for communication to authors; decide upon the criteria for selecting submissions for

\(^70\) ‘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, ethical issues likely to arise in professional contexts, (c) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and (d) a developing ability to exercise professional judgement.’
publication; maintain the integrity and confidentiality of the review process with all relevant stakeholders; and resolve related incidents or problems that may arise as the publication is prepared. The focus on ethical decision-making and professional judgments foreshadowed by TLO 2 is continually exercised in this intermediate phase.

Further, by becoming familiar with the submitted work and its peer reviews, student editors should be prepared to argue at editorial meetings for its inclusion or rejection in the edition. TLO 3 (Thinking skills) is concerned with graduates’ capacity to reason, analyse, research and be creative with legal concepts and issues. Graduates should be able to ‘engage with the law in an analytical and critical way’ and to have the ‘cognitive skills to critically review, analyse, consolidate and synthesise knowledge’. Student editors are typically required to familiarise themselves with submitted articles in order to: identify the stated aims of the piece and its theoretical underpinnings; locate and analyse the central arguments and methodologies; assess the provided evidence; appraise the author’s standard of communication and fluency; place the article in the context of the wider literature of the topic; and undertake other analytical and critical functions if they are to produce a critical review of the piece. All of this, and any written assignments they will have to submit, will require compliance with recognised forms of advanced legal writing that will engage students’ creativity and their analytical and critical skills.

3 Post-Review

It is in the third stage that most of the editorial activities take place. The editor’s role comprises both substantive and technical editing, with the former comparable to the peer review in which the submitted article is analysed as a whole. But the technical edit provides the necessary editorial assistance authors often require prior to publication. TLO 5 (Communication and collaboration) focuses on oral and written communication skills and team work. Law journals work promotes high level communication and collaboration in several ways. In the technical editing stages, the students are primarily proofreading submitted articles and checking carefully for errors, discrepancies, inconsistencies and ambiguities in style, grammar and syntax. Where fidelity to the

71 ’Graduates of the Bachelor of Laws 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.’


75 ’Graduates of the Bachelor of Laws will be able to: (a) communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences, and (b) collaborate effectively.’
Australian Guide to Legal Citation\textsuperscript{76} is paramount, the style guide should be studied in detail. This frequently requires discernment and high level language skills; the editing of views, language or images that may be offensive, discriminatory or potentially defamatory; discussion in the editorial team; and communication with the author.

The students’ course work will usually demand superior undergraduate legal writing skills, ‘a knowledge and ability to work in plain English, as well as the use of legal, specialist terms where appropriate’.\textsuperscript{77} If they are working on an interdisciplinary edition, they may be required to deal with technical terms from economics, sociology, science or other unfamiliar disciplines and assess their usage for a legal audience. Oral communication skills are continually stimulated and nourished at editorial meetings where the above matters are debated. Working as a team towards the fulfilment of a joint project with a finite end typifies the collaboration and team work that are anticipated by TLO 5. Again, the demands of ethical decision-making may frequently arise. Even though TLO 2 (Ethics and professional responsibility) is concerned with a ‘developing ability’, many of the situations referred to require mature and sophisticated reflection and consideration of stakeholder interests. Many of the issues that arise do so ‘in relation to the duties owed by lawyers … and may involve conflicts of professional values.’\textsuperscript{78} Students often have to consider the relative interests of the journal, the law school, the university, authors, reviewers, researchers and the profession as a whole.

Verifying sources is an important part of this third stage, which fine tunes research skills perhaps already acquired earlier in the degree. TLO 4 (Research skills)\textsuperscript{79} overlaps with TLO 3 (Thinking skills) but its focus appears to be on equipping students with the capacity to locate information in a technologically changing environment and to discriminate between reliable and unreliable sources. This underpins one of the principal justifications for student involvement in law journal work – maintaining a scholarly standard in the face of the increasing ‘democratisation’ of the written word.\textsuperscript{80} Law graduates are meant to acquire certain skills directed to information literacy in order to select and use ‘appropriate’ information sources and ‘determine their authority’.\textsuperscript{81}

\textsuperscript{76} Melbourne University Law Review Association, \textit{Australian Guide to Legal Citation} (Melbourne University Law Review Association, 3\textsuperscript{rd} ed, 2010).

\textsuperscript{77} ALTC, above n 69, 21.

\textsuperscript{78} ALTC, above n 69, 15.

\textsuperscript{79} ‘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.’

\textsuperscript{80} Larry Sanger, a co-founder of Wikipedia, has articulated the issue: ‘[W]e are now confronting a new politics of knowledge, with the rise of the Internet and particularly of the collaborative Web—the Blogosphere, Wikipedia, Digg, YouTube, and in short every website and type of aggregation that invites all comers to offer their knowledge and their opinions, and to rate content, products, places, and people … The collected content and ratings resulting from our individual efforts give us a sort of collective authority that we did not have ten years ago.’: Larry Sanger, ‘Who Says We Know? On the New Politics of Knowledge’ \textit{Larry Sanger’s Edge Bio Page}, <http://www.edge.org/3rd_culture/sanger07/sanger07_index.html>.

\textsuperscript{81} ALTC, above n 69, 19.
Editors necessarily will need to discern what is authoritative and reliable in law. Much of the work done by student editors involves precisely these skills – comprehending and paraphrasing documents, referencing sources, ensuring academic integrity and managing information. They are called upon to locate and verify each source claimed by an author, and to request clarifications where required. This activity is replicated in the students’ own written works, through which they develop a sensibility for not only authoritative legal sources but also factual and policy information, the provenance of which may at times be questionable.

4 General Overview

In general terms, exposure to law journal work places students in the position of acquiring advanced contextual knowledge of an interdisciplinary nature by reading, discussing, critiquing and editing submissions from academics on a wide variety of topics and issues. TLO 1 (Knowledge) focuses on legal knowledge and the context in which that knowledge is found. Most of this knowledge, of course, covers ‘fundamental areas’ acquired through core units. But, more importantly, it is very common for submissions to law journals to be concerned with ‘the broader contexts within which legal issues arise’ and how they relate to principles and values of justice and ethical practice in a range of lawyering roles. It has been noted by the Council of Australian Law Deans (CALD) that the ‘broader contexts’ encompass ‘political, social, historical, philosophical, and economic context’. The ethical rules and responsibilities that are to be understood relate to the legal profession in the widest possible sense, including not only practitioners but also, inter alia, ‘government counsel … academics, and legal publishers’. Law journal student editors are ideally readied for transition to these kinds of legal work.

Furthermore, law schools are constantly challenged to provide opportunities for students to depend less on teachers, develop self-reliance and ‘manage their study and time autonomously and effectively.’ TLO 6 (Self-management) fosters personal growth, fulfilment and reflection that prepares law graduates for a life of learning. Although law journal editors work closely with a production team, they will invariably need to create their own time and agenda to complete their editing tasks. Much of this is determined by the nature of the work being edited and the timetables and demands of other stakeholders, primarily

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82 Ibid.
83 ‘Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes: (a) the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts, (b) the broader contexts within which legal issues arise, and (c) the principles and values of justice and of ethical practice in lawyers’ roles.’
84 CALD, above n 72, para 2.3.3a.
85 ALTC, above n 69, 22.
86 ‘Graduates of the Bachelor of Laws will be able to: (a) learn and work independently, and (b) reflect on and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development.’
the authors and peer reviewers. Whereas one editor may have an ‘easy run’ with prompt reviewers, a cooperative author and a compliant manuscript, others may be faced with difficulties and delays that require major time adjustments and diplomatic negotiations towards achieving deadlines. Under such pressure, student editors quite often manage to achieve things they had not previously known they were capable of.

This points to two important attributes emanating from TLO 6. The first is what ‘legal employers have identified [as] a need for graduates to have emotional intelligence – the ability to perceive, use, understand, and manage emotions.’87 Maturity of this kind ‘incorporates a capacity for resilience through personal awareness and coping skills that might include openness to assistance in times of personal and professional need.’88 The second is self-reflection with the benefit of feedback. Working in small teams towards a common set goal creates a dynamic of mutual feedback, but so does communication with reviewers and authors about amendments – from argument structure down to punctuation. Self-reflection can of course also be incorporated into the assessment regime. In view of the ‘growing awareness of the high levels of psychological distress being experienced by law students and the practising profession in Australia’,89 developing self-management skills and professional resilience is a major benefit of work of this kind. Enhancing self-management as envisaged by TLO 6 invites strategies that are

grounded in Biggs’ framework of engagement, which centres on motivating student learning, providing a learning climate that supports engagement and ensuring that learning is active … [and adopting] learning, teaching and assessment approaches that promote student autonomy … [and] reflective practice.90

Informal feedback received from students working on law journal publication indicates strongly that very high satisfaction and engagement levels are attained, with students enjoying the ‘fruits of their labour’ permanently recorded in print.

B The Capstone Experience

A capstone experience91 is one way in which a law school may prepare students for transition to the workplace. For the purposes of this article, it would suffice to avert to well-known work done by Kift and

87 ALTC, above n 69, 23.
88 Ibid.
90 Ibid 184.
91 A commonly used definition of a capstone is that of ‘a crowning (unit) or experience coming at the end of a sequence of (units) with the specific objective of integrating a body of relatively fragmented knowledge into a unified whole … through which undergraduate students both look back over their undergraduate curriculum in an effort to make sense of that experience, and look forward to a life by building on that experience’: Robert J Durel, ‘The Capstone Course: A Rite of Passage’ (1993) 21(3) Teaching Sociology 223.
others92 as a framework for considering the pedagogical benefits of participation by students in law journals work. Of course, a single unit of study that encompasses such work may not necessarily satisfy all of a capstone’s indicia, but there are various approaches to achieving capstone.93 Firstly it should be noted that the call for greater attention by law educators to capstone experiences formed part of the plea for final year curriculum renewal and promotion of the ‘final year experience’ for law students. Kift and others have noted that very few Australian law schools provide for capstone programs, and that this is a weakness in our legal education:

In our view, an important first step in achieving final year curriculum renewal that will better meet the educational needs of final year law students, involves moving towards inclusion in the final year curriculum of pedagogically grounded, specifically designed, capstone units … [which] can be used as a tool to effect closure on the students’ experience of higher education, and on their degree, as well as to ready them for the transition from university to the profession.94

The need to remedy this situation is evident in the pedagogical justifications for capstone, which have been described as comprising three valuable components or themes: reflection, closure and transition.95 The first theme of reflection corresponds to the experiential learning phase of reflective observation, in which the learner explains and interprets experienced events and draws conclusions about them and his or her participation. Reflecting on a course of law study as it draws to an end ‘concentrates the mind’ about its benefits and the participant’s growth.


94 Kift, Field and Wells, above n 92, 149-150.

Because a capstone unit should ‘be designed to provide space for meaningful reflection on the students’ overall tertiary experience, as well as reflection on the future potential and possibilities of life after university’, it is critical to closure and transition.

The second capstone theme of closure allows students to ‘pull together all the ideas presented in different (units) and construct some sort of integrated, meaningful whole.’ Anecdotally, it is not unusual for student editors to comment on how the experience ‘brings it all together’ as a crowning high order activity that integrates the knowledge and skills they have acquired at law school. This confirms the view that ‘capstones should concentrate on the integration of existing knowledge and skills rather than the acquisition of new content’. Working on law journal production also validates the law school program in the eyes of the student editors because it allows them to envisage themselves on the other side of the law school gates with their teachers’ imprimatur:

Capstone subjects are likely to be the only opportunities within the degree programme that traverse the breadth of the curriculum, adding depth and meaning to concepts and ideas previously introduced, and encouraging students to use this synthesised knowledge in authentic professional contexts.

The capstone component of transition is therefore directly facilitated by such closure. Transition to professional practice (or legal publishing, research or academic work) helps ‘students to develop transferable skills, to gain an awareness of the culture of their discipline and to provide career direction.’ Seeing themselves as practitioners working on the drafting, composition and editing of legal documents, as researchers arguing a policy position with verifiable authority, as academics preparing articles or books for publication – or even as legal editors in a publishing house – builds on their reflection upon the organic closure of their studies. All of these mentioned activities are vital to the integrity and development of the law. By looking forward, a capstone experience of this kind is a ‘more future focused objective that will achieve extension and exploration through facilitating each student’s metamorphosis from student to legal professional.’

C Experiential Learning and the Transition to Work

Much of the above demonstrates that units of study focused on law journal production belong to the few law undergraduate activities that address all the TLOs in such emphatic fashion. It also posits the possibilities for capstone study centred on law journal production. But it also points to a further important pedagogical benefit of law journals, and that is that the model outlined in Part Three facilitates the transition to professional legal work. The model offers the potential for meaningful

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96 Kift, Field and Wells, above n 92, 151.
97 Heinemann, above n 95, 5.
98 McNamara et al, above n 92, 3.
99 Ibid.
100 Ibid, 2.
101 Kift, Field and Wells, above n 92, 152.
experiential learning, in a qualified sense, since it is not full immersion in legal employment.

Experiential learning has a long and well known provenance and is as old as wisdom itself. In principle, experiential learning ‘involves direct encounter with the phenomenon being studied rather than merely thinking about the encounter or only considering the possibility of doing something with it’. David Kolb described learning as ‘the process whereby knowledge is created through the transformation of experience.’ There are various versions of experiential learning theory and its practical iterations, but here we can aver usefully to Kolb’s approach and then apply it to work that students do, by illustration, on the publication of law journals.

The work of Kolb and others in this area is founded on a constructivist perspective, which gives priority to the learner constructing his or her own meaning from personal experience. Kolb’s Experiential Learning Model (ELM) sets out a learning process in which ‘ideas are not fixed and immutable elements of thought but are formed and re-formed through experience’. It is based on propositions about learning and incorporates different modes of learning that may be adopted by individuals. The learner may experience different stages in the learning cycle. Typically, the stage of concrete experience, in which the learner is immersed in a real or simulated life experience, is followed by reflective

102 Confucius (Kong Qiu) is often reputed to have said ‘I hear and I forget, I see and I remember, I do and I understand’. Aristotle is reputed to have said ‘For the things we have to learn, before we can do them, we learn by doing them’. Experiential learning theory saw a revival in the twentieth century with earlier roots in American pragmatism and, later, the work of David A Kolb and others. Of course, there are behaviouralist and other views that disagree with such approaches, but that discourse is not within the ambit of this paper.


104 David A Kolb, Experiential Learning: Experience as the Source of Learning and Development (Prentice Hall, 1984) 41.


106 Kolb, above n 104, 26.

107 Learning is best conceived as a process, not in terms of outcomes; learning is a continuous process grounded in experience; learning requires the resolution of conflicts between dialectically opposed modes of adaptation to the world; learning is a holistic process of adaptation; learning results from synergistic transactions between the person and the environment; learning is the process of creating knowledge: Alice Y Kolb and David A Kolb, ‘Learning Styles and Learning Spaces: A Review of the Multidisciplinary Application of Experiential Learning Theory in Higher Education’ in Ronald R Sims and Serbrenia J Sims (eds), Learning Styles and Learning (Nova Science, 2006) 45.

observation, which may be facilitated by a supervisor. The thinking stage, or abstract conceptualisation, follows, during which the learner uses analytical skills to extract lessons from the experience that may be applied to further or other experiences. This is followed by active experimentation, which allows the learner to venture into further experiences with the acquired knowledge. However, social interactions are fundamental to experiential learning, because it is related to broader social learning theories, which focus on learning taking place in social milieus. Lave and Wenger, for example, see experiential learning as based on collaborative engagement within ‘communities of practice.’

Envisaging the stakeholders in law journal publication (editorial supervisors, authors, expert reviewers, student editors, printers) as a community within which all actors engage in the experience of acquiring knowledge from each other opens the door to further pedagogical benefits that need to be explored.

By participating in law journal production as a member of an editorial team, a student will be exposed to real, not simulated, experiences that could (summarised here for convenience) include the following: communicating with authors about received submissions; checking for plagiarism; locating appropriate reviewers in the field of specialisation and arriving at working arrangements and deadlines for peer review; de-identifying submissions for reviewers; managing time stipulations and deadlines; attending to any problems that arise in this process through negotiation and adroit time management; reading, comprehending and paraphrasing peer reviews; discussing the reviews at editorial meetings; setting out matters pertinent to the acceptance or rejection of submissions; drafting qualified acceptance letters and summarising editorial requests for amendments; creating, applying and amending precedent correspondence and document templates; liaising with authors about deadlines; checking for compliance with editorial requests; attending to the often exacting technical edits of articles; keeping careful track of all relevant documentation; creating and recording various iterations of submissions throughout the editing phase; and formatting articles to comply with AGLC, law journal, law school or university style, branding and image criteria. Here we see the very generic graduate skills, identified by the Vignaendra Report and referred to by Christensen and Kift, that legal employment requires: communication, time management, document management, and computer skills. Furthermore, such experiences are clearly not typical for undergraduate study, and correspond in considerable measure to the real work experiences undertaken in a legal publishing house or the publishing and marketing division of a large law firm or other legal institution.

109 Kolb, above n 104, 26.
112 Christensen and Kift, above n 57.
What is important in this context is reflection, which may be structured as a formal assessment task such as a reflective portfolio. There are numerous models of reflective writing, so that any of them may be expected to cover at least the following: recording and describing tasks undertaken during the experience; explaining and interpreting the experienced events and their significance, identifying what was learned, considering emotional and other responses, and drawing conclusions; evaluating and making judgments about the responses and conclusions; and commenting on the ways in which the experience is relevant to the overall task and how it may inform future steps and experiences. Students frequently focus also on their personal journeys through the experience, and what they learned about themselves as well as the process. Of course, reflection builds emotional intelligence and maturity and eases transition to legal work and professional service. Whereas reflection focuses on the self and on one’s emotional responses to experience, the stage of abstract conceptualisation focuses the mind on analysing the experience and extrapolating theories, ideas and lessons from what has been observed and felt. Students often express frustration at how they handled difficult reviewers or authors, or they anticipate ‘solutions’ to future experiences. This ushers in the active experimentation phase, in which lessons that have been learned affect active planning and conduct to influence and change further conduct in practical ways. Further research in this area could clarify the extent to which law journal work bears the hallmarks of experiential learning, and how student editors learn from (and contribute to learning by) supervisors, authors, reviewers and editor colleagues in the law journal production cycle. It could also explore the possibility of larger cohorts of students experiencing the journal production cycle.

V CONCLUSION

Although university law journals in the English-speaking common law jurisdictions have played an appreciable role in the development of the law and in legal research, most of the literature about them in the common law world has been dominated by those very themes. The educational benefits to students involved in their production have largely been assumed and attention to this area remains under-developed. In the US the literature has focused on the drawbacks of unsupervised student editorship and the need for more rigorous standards. In the UK and Australia, peer review and academic editorial control have avoided replication of the American dilemma. In both cases, a mature look at the learning and teaching aspects of law journal work has therefore been avoided. This article has attempted to redress the imbalance and provoke interest in how law schools may adopt models of student editorship that

113 Whereas Kolb’s model is concerned with direct experiential learning, there may be potential for group learning through vicarious experiential learning. See, for example, J Duane Hoover and Robert Giambatista, ‘Why Have We Neglected Vicarious Experiential Learning?’ (2009) 36 Developments in Business Simulation and Experiential Learning 33.
achieve desirable outcomes for educators, researchers and students alike. Lessons from the discourse now invite attention to the pedagogy.
INDIGENISATION OF CURRICULA:
CURRENT TEACHING PRACTICES IN LAW

AMY MAGUIRE* AND TAMARA YOUNG**

I INTRODUCTION

Indigenous collaboration initiatives aim, in part, to address the disadvantages experienced by Aboriginal and Torres Strait Islander peoples and to assist in the process of Aboriginal reconciliation.\(^1\)

Indigenous peoples\(^2\) in Australia are notably disadvantaged in the higher education context, with participation rates and successful outcomes significantly below the population as a whole.\(^3\) For example, in 2008, 45.4% of Aboriginal and Torres Strait Islander 20-24 year olds reported completing Year 12 or equivalent, compared to 88.1% of non-Indigenous 20-24 year olds, and only 40.8% of Aboriginal and Torres Strait Islander students who commenced a bachelor degree in 2005 had completed their degree by 2010, compared to 68.6% of non-Indigenous students.\(^4\)

The tertiary education sector in Australia is shifting in line with changes in global and national social, political and institutional developments. Over the past decade, Indigenous cultural competency and

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2 The authors note that the term ‘Indigenous’ does not have universal support. Some people prefer the use of specific identifiers of individual customary groups, while others prefer the use of ‘Aboriginal and Torres Strait Islander peoples’. We use the term ‘Indigenous’ and note its prevalence in our discipline communities, while acknowledging that it is not an ideal or entirely representative term.


4 Ibid 18, 61.
the Indigenisation of curricula have emerged as significant priorities for universities across Australia. This development reflects a commitment to social justice and an awareness that service delivery to Indigenous people is too often framed by a ‘neo-colonial’ framework.5

An awareness of the need for cultural competence is reflected in the strategic plans of various universities,6 including that of the University of Newcastle, the institution where the authors of this article are based. The University is committed to developing pathways for academic attainment for Indigenous students, embedding Indigenous knowledge systems into programs, fostering commitment to social justice in our students, and developing the cultural competence of staff and students.7 Indeed, the Indigenisation of curricula has been positioned as a ‘whole-of-university-responsibility’.8

This strategic direction was more broadly taken up by Universities Australia in its 2011 report, which defined cultural competence 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.9

On this basis, Universities Australia recommends that the guiding principle for teaching and learning be: ‘All graduates of Australian universities should be culturally competent.’10

In the context of legal education, the Indigenisation of the curriculum is essential in signalling to students that Indigenous-related content and perspectives are important in learning about the law. By integrating Indigenous material throughout the law curriculum, academics can shift the expectations of students and teachers regarding the intellectual boundaries of their fields of study, and challenge them to critique the

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9 Universities Australia, Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities (2011) 3.
10 Ibid 9.
relationship between the Australian legal system and Indigenous people. These actions can promote curricular justice for Indigenous students, and meet the wider responsibility of educating all students for equity, social justice and anti-racism.

In this article, literature pertaining to the Indigenisation of curricula is reviewed. We consider the need to take a whole-of-curriculum approach to the treatment of Indigenous issues, and we examine the value of introducing Indigenous perspectives to unsettle assumptions embedded in the teaching of Anglo-Australian law. The literature review documents current research on the Indigenisation of tertiary curricula, particularly in law. Our analysis focuses on four areas: Indigenous issues; Indigenous perspectives; Indigenous law; and Indigenous law students.

Following this review, we present the findings of our exploratory study, which investigated the extent to which Indigenous-related content and perspectives are currently incorporated into the Newcastle Law School curriculum. Our study involved interviews with teaching staff, who reflected on the degree to which they deal with Indigenous issues, and the teaching methods used to convey Indigenous-related content. The findings raise some qualitative questions regarding the Indigenisation of curricula. These questions allow us to reflect on our responsibilities as teachers of Indigenous-related material, including the scope we have to make distinctive contributions to the Indigenisation of curricula and the ways by which we can enhance our capacities. As gatekeepers for student learning, we represent the Indigenisation of curricula as a key means of broadening the scope of student enquiry, and reinforcing the centrality of justice in teaching and learning about the law.11

II INDIGENISING CURRICULA

The Indigenisation of curricula requires the sensitive and appropriate incorporation of Indigenous-related content and perspectives in university courses and programs. Butler and Young offer an open-ended definition of Indigenisation, finding that Indigenised curricula should encompass the following objectives:

(1) A curricular justice goal, aiming to provide educational opportunity and outcomes, and address the disadvantages faced by Indigenous students seeking tertiary education.

(2) A wider responsibility goal, focusing on educating all students for social justice through programs of anti-racism education.12

This definition has been adopted by the University of Newcastle.13 The broad nature of this definition supports our University’s commitment

11 An earlier version of this article was presented at the 2013 Australasian Law Teachers’ Association conference, relating to the theme of ‘Law Teachers as Gatekeepers’.
13 Butler and Young, above n 8, 1.
to a diverse and responsive approach to Indigenisation, rather than a homogenising and ultimately essentialist position.

Carey notes that the inclusion of Indigenous studies value-adds to other disciplines because it diversifies the knowledges and skills with which students will leave university. However, an Indigenised curriculum is not only concerned with educating students to understand historical and cultural Indigenous perspectives, it also involves the inclusion of Aboriginal and Torres Strait Islander students (in areas such as recruitment, retention and support), and the inclusion of non-Western knowledges in general. These central tenets of Indigenisation of curricula are explored, below, in the context of legal education in Australia.

A Indigenising the Law Curriculum

Three overarching types of Indigenous content can be incorporated into the law curriculum: Indigenous issues; Indigenous perspectives; and Indigenous law.15

1 Indigenous Issues

The key rationales for incorporating Indigenous legal issues into the law curriculum are that it represents essential training for students who will work in Indigenous communities, it enables Indigenous students to see the relevance of state law to their communities, and it contributes to an ongoing discussion of the social role of law by raising questions about the universality of law’s application and effects.16

Various concerns emerge in Australian legal education given the historical context of Indigenous issues and the methods by which Indigenous legal issues are introduced into the law curriculum. For instance, Watson draws on critical race theory to argue that racism is organic in Australian law schools and is propagated by the teaching of highly doctrinal or ‘black letter’ law.17 She argues that Indigenous people only appear in the law curriculum due to interest convergence, ‘when our meagre rights can be melded to the interests of the colonisers’.18 She urges change, so as to ensure a level playing field for Indigenous students, and enable the law profession to accommodate the needs of the whole of society.19

A means by which this critique may be addressed is through the incorporation of Indigenous legal issues throughout the law curriculum, where appropriate. Rodgers-Falk refers to this approach as ‘vertical

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16 Ibid 259-260.
18 Ibid 6.
19 Ibid.
integration’ and finds that it ‘produces a coordinated account of questions and issues of “Indigeneity” in Australian legal thought’.20 Meyers states that the introduction of Indigenous issues into foundation year courses is particularly important as it sets the tone for the rest of the degree and provides a knowledge platform that can be built on in later year courses.21 In this respect, he presents three aims for incorporating Indigenous issues: first, to introduce the idea that when Europeans first arrived in Australia Indigenous legal systems were already established; second, to consider how these systems are currently reflected in Australian law; and third, to explore whether Indigenous customary laws might be better recognised in Australian law.22 Furthermore, Indigenous issues and cases involving Indigenous litigants can be helpful in teaching legal processes, such as the role of the High Court, judicial techniques, common law, and legislative process.23

Certainly, there is a need for Indigenous issues to not merely be taught as an add-on.24 Indigenous materials should be integrated into a course rather than representing stand-alone topics.25 One way of introducing relevant material is to use the skills of professionals working in minority communities to provide information and resources for course-building. Meaningful assessment of Indigenous content is important as it emphasises the centrality of Indigenous issues to Australian law.26 Course materials must also be selected sensitively.27

On a practical level, Stephenson et al have described a method of teaching comparative Indigenous issues in the law across four different countries via videoconferencing.28 This broadens knowledge and avoids ethnocentrism, while allowing critical evaluation of different policies, institutions, reform measures and legal principles across jurisdictions and contexts.29 Within this space, there has been particular focus in the

22 Ibid 7.
27 Graham, above n 24, 296.
29 Ibid 247-248.
literature on teaching Indigenous issues in property, administrative, and constitutional law courses, and in criminal law and procedure.

(a) Property Law - In 1992, the High Court of Australia delivered a landmark judgment in a case of deep significance to Australia’s colonisation and settlement, the relationship between Indigenous and non-Indigenous peoples, competing conceptions of land and property, and Anglo-Australian common law principles. In *Mabo v Queensland [No 2]*, the High Court concluded that the doctrine of terra nullius, or ‘land belonging to no one’, had been improperly advanced as the justification for English settlement of Australia. It was not possible for the Australian Commonwealth to assert that settlement automatically transferred title to all lands to the Crown. As a consequence, Indigenous Australian peoples retained the capacity to claim rights over their traditional lands, as recognised by the common law through ‘native title’. Well before that decision was handed down, and particularly since, there has been significant interest and controversy regarding land rights in Australia, and specifically the legal recognition of Indigenous rights to land. Notwithstanding the co-existence of Crown, native and other titles within Australian property law, there is a tendency to marginalise Indigenous property concepts in the property law curriculum. When learning about native title, for instance, students should be presented with material written and created by Indigenous people. Castan and Schultz argue that this is particularly important when teaching Indigenous relationships to land and country. Bookending native title as a separate category of law obscures the complexity of competing proprietary interests. Instead, Indigenous property issues should be incorporated throughout property law courses.

Bond University (Queensland, Australia) has taken a novel approach to incorporating Indigenous legal issues into the law curriculum, by including a simulated exercise in its negotiation course. The negotiation involves four parties: Aboriginal traditional owners; the state government; pastoralists; and a mining company. Most students participating in this simulation felt that their understanding of native title law had been improved and that this activity provided context for the substantive law.

32 The Aboriginal Australians resisted the forces of colonisation from the outset and in the decades following settlement mounted a strong land rights movement: Justin Healey, *Aboriginal Land Rights* (Spinney Press, 2002) 9.
33 There have been many articles and works dedicated to the issue of native title and property law in Australia and indeed it has been the focus of significant public attention. For some insightful commentary see Peter Russel, *Recognising Aboriginal Title* (UNSW Press, 2005).
34 Castan and Schultz, above n 23, 80.
35 Ibid 84.
36 Graham, above n 24, 292.
37 Weir, above n 26, 253.
38 Ibid 260.
39 Ibid 262.
However, Australian property law ought also to be recognised as a contentious site in the law curriculum for Indigenous students. According to Wood,

to go to law school and learn about the rule of law and, at the same time, the continuing challenges of establishing native title, and the ongoing lack of recognition of Indigenous customary law, creates an inherent tension for Indigenous students.40

In courses such as property law, which go to the heart of Indigenous dispossession in Australia, lecturers should ideally be explicit in addressing the differential experiences of Indigenous and non-Indigenous peoples in relation to land.

(b) Administrative Law - Reilly finds that administrative law, while technical, can be used to present Indigenous perspectives, due to its political nature.41 There is currently an absence of direct engagement with Indigenous issues in administrative law, as legal challenges to government decision making focus on the legality of decisions, not on their merits.42 The political role of administrative law could be more effectively drawn on to highlight aspects of Indigenous law and policy.43 Furthermore, Indigenous issues could be incorporated into administrative law courses through sensitive interrogation of the significance of the applicants’ claims and the provision of historical and cultural context for case studies.44

(c) Constitutional Law - Castan has identified constitutional law, a fundamental course in the Australian law curriculum, as a site for significant development in terms of Indigenisation. She notes the opportunity to shift the traditional approach of commencing study with the idea of ‘reception’ of British law following colonisation, and instead begin by noting that Indigenous peoples in Australia have never ceded sovereignty.45 Throughout the constitutional law curriculum, opportunities present themselves to engage students in discussion of the marginalisation of Indigenous people at key moments in Australian history. Castan gives the examples of the process of Federation and the text of the Constitution, both of which deliberately denied the sovereignty and equality of Indigenous people.46

(d) Criminal Law and Procedure - Considering the severe over-representation of Indigenous people in the Australian criminal justice system, it is important for teachers of criminal law and procedure to

42 Ibid 277.
43 Ibid 279.
44 Ibid 273.
46 Ibid 4-5.
consider how to specifically address the experiences of Indigenous people in their courses. Anthony and Schwartz have set out a wide range of helpful proposals for teaching criminal law in a culturally competent way. They note particularly that criminal law should do more than acknowledge the impact of colonisation on Indigenous people; the course must also acknowledge the impact of British law on Indigenous laws. Then, to appreciate the connection between the colonisation of Indigenous peoples and criminal law, students can be encouraged to understand criminal law as a tool of subjugation. Students learning through this perspective may find their preconceived notions challenged in ways that encourage the development of cultural competence and a stronger sense of social justice.

2 Indigenous Perspectives

Beyond the inclusion of Indigenous issues in the law curriculum, Indigenisation requires the incorporation of Indigenous perspectives. Indigenous perspectives can assist in developing students’ understanding of the social role and effect of law, by reflecting on law in action and providing a critical framework for analysing laws and legal systems. Indigenous perspectives will sometimes (but not always) reflect whole communities; if possible, a range of Indigenous perspectives should be included in a course, to avoid essentialising Indigenous experience.

In a humanities context, Williamson and Dalal have argued that some pedagogical approaches can translate cultural interface complexities into curricular outcomes, which then link to graduate capabilities. These approaches require an unsettling of Western authority and hence critical self-reflection. This is done by engaging on levels other than the ‘intellectual’, using holistic teaching methods that connect with students on emotional, spiritual and intellectual levels, and acknowledging the limits of Western knowledge. Young et al discuss Indigenisation through the opening up of a ‘Third Space’. This is done through challenging students’ existing beliefs, and opening up a space for students to consider alternative views and interruptions to their common sense understandings. In this context, it may be useful to consider Martin and

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48 Ibid 40.
49 Ibid 43.
50 Jones, above n 15, 263.
52 Ibid.
53 Ibid 56.
Mirrabooka’s three main constructs of a theoretical framework for Indigenist research.55

In a legal context, Indigenous issues are often taught as a new doctrinal or substantive category of law.56 As noted above, in property law, native title is often taught as a separate category of law. This approach can inhibit lawyers by failing to acknowledge that Indigenous perspectives on Anglo-Australian law also exist.57 Embedding Indigenous perspectives on land and Anglo-Australian property law can promote intellectual integrity in a course and avoid the need to substantially extend already tightly designed course content.58 The incorporation of Indigenous perspectives can enhance student understanding of the dominant legal system.59 Indeed, Indigenous perspectives are useful in terms of evaluating the conflicts inherent in orthodox legal doctrines.60

The following are suggestions for incorporating Indigenous perspectives.

(1) Provide broader context to cases where the subject matter involves Indigenous people.61

(2) Draw on the political nature of course topics such as administrative law to assess Indigenous policy.62

(3) Include non-competitive moots that require students to engage with current Indigenous legal issues.63

(4) Invite Indigenous presenters into classrooms.64 Such presenters need not be academics, as many traditional owners and custodians of Indigenous knowledge are located outside the tertiary sector.65

(5) Show a provocative video to start discussion.66

(6) Present students with material written created by Indigenous people.67

(7) In smaller classes, divide students into groups or pairs to prepare a brief to advise on different positions or perspectives on Indigenous issues.68

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56 Graham, above n 24, 290.
57 Ibid.
58 Ibid 290-291.
59 See, eg, Graham, above n 24, 298-299.
60 Castan and Schultz, above n 23, 78.
61 Reilly, above n 41, 278.
62 Ibid 279.
64 Anna Cody and Sue Green, ‘Clinical Legal Education and Indigenous Legal Education: What’s the Connection?’ (2007) 11 International Journal of Clinical Legal Education 51, 58-60; Castan and Schultz, above n 17, 84.
66 Castan and Schultz, above n 23, 83.
67 Ibid 84.
(8) Take smaller groups of students on field trips to sites such as the Native Title Tribunal.69

Anker discusses how she invited a representative of a Canadian Indian tribe to tell students in her course, Aboriginal Peoples and the Law, about his tribe’s creation story.70 This formed part of her trans-systemic method of teaching that used both Indigenous and state law and perspectives to teach broader subject matter and themes.71

One innovative method of teaching Indigenous issues and perspectives has been developed through a comparative Indigenous rights course taught across universities in Australia, New Zealand, the United States and Canada via videoconferencing.72 The outcome of this form of teaching has been that students gain a broader understanding of society and are encouraged to become independent learners and think critically.73 The comparative method that is utilised broadens students’ perspectives on domestic law in the four jurisdictions as well as facilitating an understanding of international law in this field.74 This method of teaching avoids ethnocentrism and allows for an evaluation of different policies and institutions, as well as an identification of common themes and global context and background to domestic legal principles.75

3 Indigenous Law

Indigenous law is perhaps the most difficult aspect of Indigenous content to incorporate into the law curriculum as it derives from world-views, philosophies, and societies that are different to those from which common law legal systems have developed. However, the study of Indigenous law has similar benefits to learning a second language, and it enhances student understanding of the state’s system of law. Furthermore, it is directly relevant to Australian state formation and provides context for our constitutional background.76 Indeed, arguments persist in favour of offering greater recognition to a separate (and/or sovereign) Indigenous law within the Australian legal system. Watson notes, ‘there existed, and still exists today, Aboriginal legal systems and ... these were the first legal systems of Australia’.77 Watson argues that introducing Indigenous knowledge into legal education is a difficult task as there are few resources to work with. Further, an emphasis on Western knowledge works against the centring of Indigenous knowledges, as it ‘posits Aboriginal peoples as pre-historic, native, without any formal knowledge

68 Ibid 85.
69 Ibid 86.
70 Anker, above n 63, 134.
71 Ibid 133, 135.
72 Discussed in Stephenson et al, above n 28.
73 Ibid 244.
74 Ibid
75 Ibid 247.
76 Jones, above n 15, 266-267.
77 Watson, above n 65, 23.
Many traditional owners and custodians of Indigenous knowledge are also located outside the tertiary sector. In contrast:

Aboriginal knowledges are focused on ownership, control and protection of Aboriginal cultural and intellectual property. I see that Aboriginal academics can have a role in such dissemination, however that role needs to be delineated by those Aboriginal peoples who have a proper and rightful voice to speak for the country in which any particular university takes their occupation.79

In addition, Anker notes that current Indigenous law courses tend to focus on Australian state law, to the exclusion of Indigenous law.80 She argues that lawyers need to be able to understand something about Indigenous law, particularly if a case arises involving some sort of recognition of this law, and this suggests a need for trans-systemic legal education.81 The obstacles she identifies in this context are the dominance of European ontology in education, the challenge posed to Western rights discourse by the concept of collective human rights, and the fact that notions of Indigenous law may be abstract in relation to the typical forms of Western legal systems.82 However, these obstacles may be overcome, at least to some extent, by creative teaching methods such as an Aboriginal Law Moot and a ‘learning-by-doing’ approach.83

Edwards and Hewitson also promote the inclusion of Indigenous law in the law curriculum, arguing that the advancement of subjugated knowledges and Indigenous episteme can be emancipating for Indigenous peoples.84 They note that the academy is not power neutral and the low level of Indigenous control of formal education greatly curtails the freedom of epistemological thought.85 Current forms of Western education have covered over epistemological violence, and there is a need to explicitly challenge Eurocentric discourses and knowledge constructions.86

At least three main challenges present themselves in relation to the incorporation of Indigenous law into the law curriculum. First, there is no one body of Indigenous law in Australia; rather, bodies of Indigenous law vary considerably between the many Indigenous nations. Second, law teachers may have limited access to Indigenous people qualified and authorised to speak to the nature and content of Indigenous law. Third, there are very few Indigenous legal academics teaching in Australian universities. At a basic level, however, it should not be beyond the capacity of any law teacher to acknowledge the existence of Indigenous legal systems in Australia, and the ways in which these systems have been affected by the imposition of Anglo-Australian sovereignty.

78 Ibid 24.
79 Ibid.
80 Anker, above n 63,132.
81 Ibid.
82 Ibid 134-136.
83 Ibid 136.
85 Ibid 97.
86 Ibid 98.
The three modes of Indigenisation considered above – legal issues, Indigenous perspectives, and Indigenous law – can support one another and add greater complexity and richness to the law curriculum. Further, the attraction, retention and sensitive support of Indigenous law students are central to the effective Indigenisation of the law curriculum, and are discussed below.

B Indigenous Law Students

As noted earlier, supporting Aboriginal and Torres Strait Islander students in their pursuit of undergraduate and postgraduate qualifications is a fundamental principle of the Indigenisation of curricula. Encouraging and supporting Indigenous students to pursue tertiary education is particularly important from an equity and social justice perspective, given the history and contemporary experience of dispossession and disadvantage in Indigenous communities. Indeed, within Australian and Canadian law schools, significant numbers of Indigenous students surveyed have reported experiences of racial discrimination from staff and/or other students.87

Douglas identifies three theories to justify law schools making an effort to attract and retain Indigenous law students; reparation, social utility and distributive justice.88 This reasoning is not limited to the Australian context, but instead may apply in any jurisdiction with an Indigenous population. Douglas defines reparation as ‘the repairing of damage caused by historical discrimination’.89 Of course, one of the myriad outcomes of historical and contemporary disadvantage and discrimination against Indigenous people in Australia is their minimal representation in the legal profession and weakened capacity to gain legal representation. Douglas adds that a range of social utility arguments promote the inclusion of Indigenous law students, including the eventual provision of culturally competent legal advice to Indigenous communities and the benefits of promoting diversity among typically homogenous Law School student bodies.90 Finally, Douglas identifies fairness, justice and equality as the defining values encompassed by ‘distributive justice’, which seeks to promote the sharing of opportunity throughout society.91

Barriers to law school entry for Indigenous students are interlinked. Low socio-economic background, lack of formal education, language difficulties, a perception by Indigenous people that law schools are not places for them, and cultural differences, including ways of understanding what law means, may compound each other.92 Intersectional issues affect Indigenous students, particularly women.93 A major barrier to study and a reason for discontinuing can be the experience of alienation, isolation or

87 Rodgers-Falk, above n 20, 2-3.
89 Ibid.
90 Ibid 233-234.
91 Ibid 234.
92 Ibid 226.
racism at university. Closely related to this are issues such as previous negative experiences with the law, and cultural differences. Indigenous students are not usually from a family or community where many people have legal qualifications, and law school can feel like an extremely foreign environment. This sense may be heightened by the need to be individualistic in order to succeed at law studies. Attrition rates for Indigenous law students are typically high. This suggests that University access schemes alone are not sufficient to overcome differential outcomes between Indigenous and non-Indigenous students. Flexible entry schemes need to be accompanied by ongoing, institutionalised support.

Alternative entry schemes, and particularly pre-law programs, are important in this context. Between 1991 and 2001, 11 pre-law programs were established and two law schools began to refer students to the Indigenous pre-law program offered at the University of New South Wales. Evidence suggests that discretionary entrance schemes are enhanced by an intensive pre-law program for Indigenous students. Deakin University has taken a different approach and instead runs an alternative first year for Indigenous students where first year is extended, two academics are dedicated to teaching Indigenous students and classes are run off-campus.

Douglas argues that pre-law programs may attract more Indigenous students to law school, as they send a positive message to students that Indigenous students are valued, and create a snowball effect whereby more Indigenous students enrol and collectively reduce feelings of alienation and marginalisation. The University of New South Wales has also introduced two new law courses for Indigenous students. These courses are run in conjunction with clinical legal training at the Kingsford Legal Centre in Sydney and are aimed at improving academic skills, confronting the seeming irrelevancy of law courses to Indigenous students, and visiting courts, public defenders, the Legal Aid commission and the pro bono section of a large law firm.

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95 Douglas, above n 88, 299; Douglas, above n 93, 318.
96 Douglas, above n 88, 230.
97 Ibid 228.
98 Ibid 226.
99 Douglas, above n 93, 333.
100 Ibid 315; Douglas, above n 88, 225.
101 Douglas, above n 88, 225.
102 Douglas, above n 94, 511.
103 Ibid 498.
106 Ibid 504.
108 See Cody and Green, above n 64, 52-55.
Although the incorporation of Indigenous content into the law curriculum is seen as generally positive, it can be problematic for Indigenous students if it is not handled sensitively. For example, Indigenous students may be put under pressure to act as experts on Indigenous issues or to speak on behalf of Indigenous peoples. This is compounded if teachers deal with Indigenous issues superficially. Sometimes a lack of understanding among teachers and non-Indigenous classmates can cause Indigenous students to seek to correct misunderstandings, and in doing so, generate emotional entanglement that complicates both study and relationships. Further, as Wood has recognised, the under-representation of Indigenous students in higher education ‘significantly impacts on wellbeing among Indigenous law students’, particularly by reducing their capacity to form supportive peer groups at university.

Lecturers can also unconsciously exacerbate the isolation felt by Indigenous students, suggesting a need for cross-cultural training. Consultation with Indigenous staff and students about the impact of culturally confronting curricula, and staff training to ensure that academic content is inclusive in an appropriate way, are crucial. The University of Newcastle has recently established the Our Way Indigenous Cultural Competence Program for academic and general staff. This program includes an online pre-workshop module, ‘Interactive Ochre’, which develops knowledge and understanding of Indigenous history, cultures, languages, and contemporary experiences in Australian society. The program centres on a collaborative workshop, which trains staff in developing cultural competence and inclusivity in their professional practice. Participants develop Indigenous Collaborative Action Plans, to ensure critical reflexivity about Indigenous people and issues throughout their professional lives.

Indigenising tertiary education curricula has multiple motivations and benefits. Principally, it is aimed at broadening the knowledge base of Indigenous and non-Indigenous students alike and addressing educational disadvantages within the Indigenous population, with consequential positive effects from the benefit of a tertiary education. In this context, Penfold has identified factors that Indigenous students regard as contributors to success at university. These include personal motivation and determination, the opportunity to network with other Indigenous students, the availability of role models, the supportive atmosphere of the

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110 Penfold, above n 94, 174.
111 Ibid 175.
112 Ibid 159.
113 Ibid 175.
114 Douglas, above n 88, 326.
116 We acknowledge our colleagues in The Wollotuka Institute, University of Newcastle, Australia for developing this program. Information on the program is available at <http://www.newcastle.edu.au/community-and-alumni/community-engagement/indigenous-community-engagement/cultural-competency-workshops>.
law faculty and university, relevant and appropriate curricula, tutorial assistance,\textsuperscript{117} cadetships and professional support and the availability of exchange programs.\textsuperscript{118}

In the context of law schools, the research suggests that these ends can be achieved through the incorporation of Indigenous perspectives, Indigenous law and a focus on Indigenous issues within law school curricula, in conjunction with specific programs and sensitive support for Indigenous students. In the following section, we present the findings of the first empirical stage of our research, which considered developments in the Indigenisation of the curriculum at Newcastle Law School.

\textbf{C Indigenous-Related Content in Newcastle Law School Courses}

The graduate attributes for the Bachelor of Laws (Honours) program at the University of Newcastle do not include any specific statements about Indigenous peoples or their experience. Rather, there are less specific goals of attainment, including ‘apply critical and reflective analytical skills’ and ‘understand, evaluate and critically reflect upon the interaction of law and society, legal and policy issues and professional practice’. It is fair to say, however, that the goal of doing curricular justice to the experiences and knowledges of Indigenous peoples is implicit in the graduate attributes statement, particularly when read in the context of the University of Newcastle’s strategic plan.\textsuperscript{119}

In February 2012, we conducted interviews with 14 academics\textsuperscript{120} from Newcastle Law School (NLS) regarding the inclusion of Indigenous Related Content (IRC) in law courses. Respondents commented on 24 of the 33 courses offered during the study period.\textsuperscript{121} Eleven of the 24 courses were compulsory courses for all students, three were compulsory courses for students in the professional legal training module,\textsuperscript{122} and ten were elective courses. The only course that centralises Indigenous issues and perspectives at NLS (the elective course \textit{Indigenous Peoples, Issues and the Law}) was not offered during the study period.

The interviews form the key part of the first stage of research into Indigenisation of the NLS curriculum. The respondents were asked how many courses they taught and if any IRC was included in them. Those respondents using IRC were then asked about the teaching methods they used when incorporating IRC. Some respondents also volunteered to share relevant teaching materials.

\textsuperscript{117} For example, through the Indigenous Tutorial Assistance Scheme, a government-funded program that provides free tutoring to Indigenous students at university. This scheme is administered by The Wollotuka Institute at The University of Newcastle, Australia.
\textsuperscript{118} Penfold, above n 94,160.
\textsuperscript{119} University of Newcastle, above n 57.
\textsuperscript{120} Approximately 75\% of the staff of NLS during the study period. We note that, at this stage, no members of the NLS staff are Indigenous. This research was authorised by the University of Newcastle Human Research Ethics Committee (Protocol Number: H-2011-0346).
\textsuperscript{121} Approximately 72\% of the courses offered during the study period. This figure counts all the Legal Practice courses as a single course, as we found significant overlap in the comments offered by teachers of these courses.
\textsuperscript{122} Students in the professional legal training program are studying towards both the Bachelor of Laws degree and the Diploma of Legal Practice.
Our findings are reported quantitatively, below, under three themes. Part 1 summarises the frequency of the inclusion of IRC within current NLS courses. Part 2 explores how this content is included with reference to the three categories of IRC introduced in the literature review (Indigenous issues, Indigenous perspectives, and Indigenous law). Finally, Part 3 considers how IRC is taught by staff of NLS.

1 Frequency of Inclusion of Indigenous Content

We measured the frequency of IRC inclusion on a scale from substantial to none.

<table>
<thead>
<tr>
<th>Frequency of Inclusion</th>
<th>Definition</th>
<th>Number of Courses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantial Inclusion</td>
<td>IRC formed a major element or a significant component of the area of study. To fall under this category, a course had to include IRC as part of the assessment regime, as either a compulsory or optional question.</td>
<td>2</td>
</tr>
<tr>
<td>Major Theme</td>
<td>IRC formed a major element of the area of study, but was not so recurrent as to fall under the substantial category. IRC could be a major theme if only taught across one or two weeks. To fall under this category, a course had to include IRC as an optional assessment question.</td>
<td>3</td>
</tr>
<tr>
<td>Consistently</td>
<td>IRC was consciously and repeatedly incorporated into a course in a significant fashion, but did not form a whole topic.</td>
<td>5</td>
</tr>
<tr>
<td>Minor Theme</td>
<td>Context for IRC may not be provided, but the content forms a necessary and relevant element of a course or an area within a course.</td>
<td>5</td>
</tr>
<tr>
<td>Incidentally</td>
<td>IRC arises as incidental to the area of study, for example a key case where the factual scenario involves IRC. A course may also fall into this category where IRC or cases are used to illustrate a legal point or principle, but go no further.</td>
<td>4</td>
</tr>
<tr>
<td>None</td>
<td>No IRC is currently included in the course.</td>
<td>5</td>
</tr>
</tbody>
</table>

Our research shows that NLS staff have made significant progress towards the Indigenisation of the curriculum, in line with University policy, with 15 of 24 courses including IRC as at least a minor theme.

We note that some courses, particularly those regarded as highly doctrinal or ‘black-letter’, may be less likely to call for the inclusion of substantial amounts of IRC. Indeed, some teachers may not see IRC as appropriate or relevant for specific inclusion in certain courses. For example, compulsory ‘Priestly 11’ courses such as Torts and Equity and Trusts are typically taught without comprehensive inclusion of IRC. However, we believe that it is possible to at least include a case example involving Indigenous litigants in most, if not all, courses. Such an inclusion signals to students that the experiences of Indigenous litigants are often distinctive and are certainly of equal importance to the experiences of other litigants. It is also essential that IRC be incorporated
throughout the compulsory elements of the curriculum, in order that elements of this content reach all students in each cohort.

In contrast, only five of the 24 courses surveyed include IRC as an optional or compulsory assessment item. We note that many students tend to attach higher significance to an area of study if it is made assessable. On this basis, we question whether it might be possible for IRC to be more consciously incorporated into assessment regimes in other courses, as one means of emphasising the importance of this content.

Considering the number of staff currently teaching IRC in some form, NLS may draw on considerable practical experience in discussing and developing its collective approach to the Indigenisation of the curriculum. This will be discussed in more detail in Part 3 of this section, in which we set out the range of teaching methods currently used to deliver IRC.

2 How is IRC Included?

We measured the forms in which IRC was included in NLS courses by reference to the three categories of IRC discussed in our literature review: Indigenous issues; Indigenous perspectives; and Indigenous law. As shown in the table below, some courses incorporated IRC in more than one form. The table sets out data from the 15 courses that incorporated IRC as at least a minor theme.

<table>
<thead>
<tr>
<th>Form of IRC included in course</th>
<th>Number of courses using this form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous issues</td>
<td>15</td>
</tr>
<tr>
<td>Indigenous perspectives</td>
<td>10</td>
</tr>
<tr>
<td>Indigenous law</td>
<td>5</td>
</tr>
</tbody>
</table>

As stated in our literature review, the Indigenisation of a curriculum is enriched by the inclusion of Indigenous perspectives. It is encouraging that seven of the 24 NLS courses surveyed already include both Indigenous issues and Indigenous perspectives. In a further three courses, where Indigenous content was not regarded as relevant to the area of study, Indigenous perspectives were nevertheless introduced as a means of critiquing dominant perspectives on the state of the law.

Markedly fewer courses – only five of 24 – deal with Indigenous law. Anecdotal evidence from our research suggests that staff may not feel qualified to teach in the area of Indigenous law, and/or believe that they would need to be supported by Indigenous colleagues or guests in delivering this content. Four of the five courses which included the study of Indigenous law also included Indigenous perspectives, which supports the conclusion that teachers can most confidently consider Indigenous law when they have access to Indigenous perspectives (for example, from visiting lecturers, multimedia resources or Indigenous-authored sources).
3 Teaching Methods

We found that NLS teachers employ nine different teaching methods to include IRC in their courses:

<table>
<thead>
<tr>
<th>Method</th>
<th>Number of courses using this method to teach IRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lecture</td>
<td>12</td>
</tr>
<tr>
<td>Set readings</td>
<td>11</td>
</tr>
<tr>
<td>Class discussion</td>
<td>10</td>
</tr>
<tr>
<td>Student presentations</td>
<td>7</td>
</tr>
<tr>
<td>Case study</td>
<td>6</td>
</tr>
<tr>
<td>Assessment</td>
<td>5</td>
</tr>
<tr>
<td>Multimedia resources</td>
<td>5</td>
</tr>
<tr>
<td>In-class analysis of primary sources</td>
<td>3</td>
</tr>
<tr>
<td>Indigenous case examples given in place of ‘traditional’ black-letter examples</td>
<td>3</td>
</tr>
</tbody>
</table>

Lectures are the most commonly used teaching method for incorporating IRC. Five of the 12 courses delivering IRC through lectures involved guest lecturers (and, in this way, were able to incorporate an Indigenous perspective). We note that the frequent use of lectures may work to emphasise the importance of IRC in the curriculum, in that IRC is delivered directly by the teacher to the largest possible cohort of students.

On the other hand, we recognise the limitations of lectures in terms of the deep analysis of content, especially content that may challenge students’ preconceptions. It is encouraging, then, to find that seven of the 12 courses using lectures to deliver IRC also explored this content through class discussions. Discussion can provide helpful opportunities for students to explore alternative perspectives and debate points of view. Three courses that did not consider IRC in lectures did include this content in class discussions. As noted in our literature review, the effectiveness of class discussion as a teaching method is strongly influenced by the capacity of the teacher to moderate debate and ensure that any Indigenous students in the class are not placed under pressure in the discussion.

NLS teachers were also likely to support the lecture-based delivery of IRC with set readings, with 11 courses including required or recommended readings relating to IRC. Again, this is encouraging in the sense that content delivered in lectures is reinforced through the written material provided to students. However, as with class discussion, it is important for teachers to interrogate the effectiveness of setting IRC-related material for students to read independently. In three courses where teachers placed strong emphasis on IRC material, those teachers chose to conduct in-class analysis of Indigenous-related primary materials rather than (or in addition to) setting material for independent student reading. This in-class document analysis can develop student understandings and prompt fruitful class discussions.

The next most frequently used teaching method for incorporating IRC was student presentations, with seven courses including at least one IRC-related presentation topic. In five of those courses, the presentation was
part of the assessment schedule. As with class discussion, student presentations have the capacity to introduce alternative perspectives to students and encourage debate. Again, they should be carefully administered by teachers, with different issues arising depending on whether the presentations are delivered by Indigenous or non-Indigenous students, and the extent to which the whole class is then engaged in related discussion.

Six of the courses we surveyed incorporated IRC through what we term case studies. We define case studies to include decisions by courts, and close study of particular legal issues relevant to Indigenous peoples. When presenting these case studies in class, teachers offered context in terms of the relationship between Indigenous peoples and the Australian legal system.

Five of the 24 courses surveyed contained an IRC-related assessment item. Only one of these courses included IRC in a compulsory assessment item; in the other four courses, IRC appeared in optional presentation, research essay or problem questions. This is an important finding, as it shows how few current students of NLS are assessed on IRC, even where teachers have chosen to include IRC in significant proportions in their course.

In five of the courses we surveyed, teachers used multimedia resources to assist in the inclusion of IRC. These included YouTube and other online videos, simulation videos, interviews with Indigenous people and interactive websites.

In three of the four courses that we assessed as presenting IRC ‘incidentally’, a case example featuring Indigenous litigants was provided to students. These cases were used where a more ‘traditional’ case law example could also have been used to illustrate the same point. In that sense, teachers made the decision to include Indigenous-related cases to demonstrate an awareness of the marginalisation of Indigenous peoples from mainstream legal discourse. However, the cases were considered in class without added discussion or context being provided, beyond what would ordinarily be given for any case example used.

III REFLECTIONS

The first stage of our research demonstrates that NLS has set a strong foundation for the teaching of IRC. Several staff incorporate IRC in some way, using a wide range of teaching methods. We continue to engage with NLS teachers to encourage the development of a collective approach to the Indigenisation of the law curriculum.

One means of achieving that goal would be to develop a repository of IRC resources, accessible to all teaching staff. This could include multimedia resources, contact information and biographical details for potential guest lecturers, recordings of previous guest lectures, recommended readings and case studies, and teaching notes on successful teaching practices. We also note the enthusiasm of NLS clinical teachers for incorporating culturally sensitive learning experiences into Legal Practice courses, and suggest that NLS staff consider how to expose increasing numbers of students to experiential learning in relation to
Indigenous peoples and legal issues. Finally, we note that many NLS staff have undertaken the cultural competency training provided by the Wollotuka Institute – the Indigenous education institute of the University of Newcastle. This training has been well-received and has provided staff with tools to engage more deeply with the challenges and potential of an Indigenised curriculum.

A Qualitative Report

The first stage of this research sought quantitative data to determine the inclusion of IRC within NLS courses, however, most respondents also volunteered qualitative comments during their interviews. In this final section, we offer brief reflections on the themes emerging from the qualitative data gathered. We have grouped the qualitative comments into five categories: the importance of IRC, incorporating IRC, the courses, teaching and staffing.

We do not claim that this data provided a representative sample. However, it will help to guide the future development of our research project. The second stage of this project will ask qualitative questions such as ‘Why do University teachers include or exclude IRC?’ and ‘What benefits can the Indigenisation of curricula have for students, universities and the wider community?’ We have avoided imposing our own interpretations on this raw qualitative data and note that each statement was made by an individual respondent, unless otherwise indicated.

1 The Importance of IRC

Several respondents acknowledged the value of IRC in a law school curriculum. One considered IRC to be important as a means of addressing social justice issues and developing a critical framework for law in Australia, while other respondents regarded the teaching of IRC as important in producing graduates who are skilled in interacting sensitively with Indigenous people.

According to one respondent, IRC is important in its own right in addressing social justice issues, as well as in terms of creating a critical framework for law in Australia. Where content in the curriculum currently reflects Indigenous issues and perspectives, another respondent noted that IRC adds value to the course and is intellectually appropriate and fulfilling for teachers and students. This sense of value was confirmed by another respondent, who stated that: ‘Indigenous aspects should not be an obligatory footnote [to the law curriculum].’ Rather, IRC

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123 Newcastle Law School incorporates the University of Newcastle Legal Centre, a pro bono community legal centre, servicing the legal needs of clients who may not otherwise access representation. Students of Newcastle Law School have the opportunity to undertake Practical Legal Training alongside their study towards a Bachelor of Law or Juris Doctor degree, with much of this training taking place through interaction with live clients at the Legal Centre. As such, Newcastle Law School is a leader in experiential legal training in Australia. However, there is scope for the strengthening of ties between the academic and practical legal training arms of the School, and the consequential enhancement of practical learning opportunities for students at all stages of study.
is an important part of teaching within the Australian legal system and it
needs to be integrated throughout the curriculum.

According to one lecturer, the ability of students to listen for voices
other than the majority voice is important as it links to our graduate
attribute of producing lawyers who advocate for the rule of law and for
law reform. This is especially so considering our postcolonial
environment. It is fundamental to building a cohesive society that we
recognise that Indigenous people have been and continue to be influenced
by the colonial experience.

In practical terms, one respondent acknowledged the need to equip our
students with the skills to work in locations with high population
diversity. It is vitally important for students to recognise that law is not a
level playing field. IRC and contact with Indigenous people may more
frequently involve those staff members responsible for supervising
students in practical legal training, as they are more likely to have an
Indigenous client. This can be a very effective learning experience, but
the risk is that this does not occur across the whole cohort and can be
piecemeal and dependent on the client traffic in a given semester.

In teaching legal practice students, supervisors need to encourage
them to confront preconceptions and stereotypes: direct contact with
Indigenous clients can help students to engage on emotional and empathic
levels, rather than just on an intellectual level. In such cases, lawyers must
learn to be slower to judge a person or situation than they might otherwise
be. For students who may not meet Indigenous clients during their
studies, it is especially important that Indigenous issues are addressed in
their academic training. There needs to be an open awareness among
students of disadvantaged people and their needs.

According to one respondent, a lot more interest is generated among
students by including Indigenous perspectives, rather than just content.
Simply adding Indigenous content into courses does not equal
Indigenisation. Dissipation of apathy is achieved by giving students room
to explore a variety of perspectives on our legal system. Similarly,
aknowledgment of Indigenous people and heritage is important in
creating an atmosphere of respect and open mindedness. Lecturers might
consider commencing at least one lecture with an Acknowledgement of
Country, which can stimulate student engagement with Indigenous legal
issues, and show respect to Indigenous peoples and heritage. The Law
School should consider inviting an elder to perform a Welcome to
Country as a tangible reminder of our commitment to Indigenous social
justice and the education of Indigenous students.

2 Incorporating IRC

In this section, we present comments relating to how IRC can be
integrated into course design. We note that several staff agreed that IRC
ought to be integrated throughout the curriculum. According to one
lecturer, for the incorporation of IRC to be effective it needs to be a
recurrent theme across the curriculum. Students should have many
opportunities to reflect on IRC in class discussion. If we have a consistent
approach through the curriculum, we signal its importance to the students,
helping to avoid the objection from some students that IRC is ‘shoved down peoples’ throats’. However, we do also need stand alone topics within courses, and an Indigenous-specific course, to appropriately demonstrate the full impact of the law on Indigenous peoples and their alternative perspectives on the law.124

One responded found that student presentations and subsequent class discussions can be very effective means to educate students on IRC and Indigenous perspectives. However, if Indigenous students are involved in these presentations/discussions, they can be put under pressure to represent a viewpoint bigger than their own, or correct misconceptions among classmates. Therefore, academics need to be able to manage the way class debate and discussion flows from students when dealing with a difficult or sensitive area. This is particularly so where the academic may find some of the views expressed to be offensive. Perhaps academics should be encouraged to be more reflective about this question in advance of class. They need to be able to redirect debate to a more positive, constructive position, especially where there may be an Indigenous student in the class.

Another respondent argued that contextualisation of material is important in incorporating IRC as, at times, a bald reading of the facts of a case can lead to errors in understanding. There is also a need to take into account theoretical concerns, such as a postcolonial understanding of ‘race’, which is largely absent from the Australian legal system. In terms of teaching, if students are given a multiple-perspectives context, they are better able to understand the concept of race in a postcolonial environment.

Some courses with policy-focused content were identified as useful cases in the curriculum, because IRC can be introduced to explore whether the law currently deals with alternative Indigenous perspectives, and if so, whether the current approach is adequate or requiring reform. In these and other courses, staff might consider choosing Indigenous case examples where other cases could (and traditionally would) be used to convey the same message. One means of deeply engaging students in this process is to provide them first with a theoretical framework focusing on race. A familiar case study may then be used to examine a legal judgment involving Indigenous people from a racialised position. Through this process, students can engage with a familiar case in a new and enlightening way, because the alternative framework equips them with new tools of analysis. Finally, another respondent noted that some courses may be inappropriate for the conscious and sustained incorporation of IRC, but in most courses it would be easy to incorporate a case example involving Indigenous litigants, and give some context for this choice.

124 We note that an Indigenous-specific elective course is available at Newcastle Law School – *Indigenous Peoples, Issues and the Law* – and is typically offered every second year.
3 The Courses

In this section, we reflect on the qualitative matters respondents raised in relation to the courses constituting the law curriculum. In a process of Indigenisation, these courses need to be considered individually, and in terms of how they collectively reflect the Law School’s approach to teaching IRC.

Some staff commented that it was easier to incorporate Indigenous perspectives and integrate IRC throughout the whole course when teaching elective courses, as opposed to core courses. This is because electives involve smaller cohorts and less mandated content. Students may also be more open to how electives are taught. One respondent noted that it can take students longer to engage with alternative perspectives on the law, and this can cause a problem for staff trying to incorporate IRC while also covering other important content and perspectives. This is particularly true of courses that are compulsory, because significant content is mandated in order to meet accreditation requirements. An across-the-curriculum approach to Indigenisation could help in this regard, as students would get a consistent message from teachers regarding the importance of the content.

Another respondent acknowledged that in some courses, there may be no relevant case study or perspective from an Indigenous Australian point of view. However, such courses might usefully integrate content and/or perspectives from Indigenous peoples from other parts of the world. For example, the perspectives of Indigenous peoples are particularly topical and relevant when dealing with areas such as environmental law and human rights.

4 Teaching

NLS staff also raised some qualitative matters in relation to teaching methods. This is an area in which whole-of-institution approaches and leadership can guide future efforts in the Indigenisation of curricula. For example, in terms of teaching methods, it is preferable to have Indigenous people speak to Indigenous issues where possible, however this can raise time and resource constraints. Guest lecturers can be extremely helpful in this context, and if a guest lecturer is only available once, staff might consider recording their lecture or keeping notes which can be used in subsequent courses.

One lecturer suggested that the NLS could have a depository of common resources. For example, a wide-ranging interview could be recorded and split into short sections that can be played in lectures or placed on Blackboard. The online resource Interactive Ochre is available, offering staff and students at all law schools accessible Indigenous perspectives on a range of issues relevant to law teaching. Another respondent noted that lecturers teaching IRC may wish to use multiple methods in the same course, for example lectures, class debate and

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125 This valuable resource is available at <http://toolboxes.flexiblelearning.net.au/demosites/series9/907/swf/>.
assessment. Mixing teaching techniques signals the significance of the content to students.

Another respondent expressed the view that new teachers or staff teaching new courses face particular challenges in becoming familiar with all the required content to the necessary standard. In this case, teachers may find it hard to balance what they see as competing priorities of developing overall expertise, while meeting the goal of Indigenisation of the curriculum. A clear recurrent message from School and University leadership regarding the importance of IRC can give confidence to new teachers in this regard.

5 Staffing

Finally, in this section we set out qualitative comments relating to the staffing of our Law School, which we regard as applicable more generally. Some commented that having an Indigenous academic on staff benefited teaching practice, by giving access to an Indigenous voice on a particular legal issue, as well as mentoring and discussion of culturally sensitive and appropriate teaching methods. Further, some non-Indigenous staff expressed concern that they might be taken to speak for a position they are not entitled to represent, or create misunderstanding for students regarding Indigenous perspectives. Indeed, non-Indigenous staff can feel fraudulent when presenting IRC, if they have not had the opportunity to discuss their approach with an Indigenous colleague or other mentor. This concern can, at least in part, be overcome by staff who make students aware of the limitations of their perspective as a non-Indigenous teacher. Cultural competency training may be helpful for staff in seeking to meet these aims.

IV CONCLUSION

On an institutional level, universities in Australia and other countries with Indigenous populations can do much to improve educational outcomes for Indigenous students. However, this research demonstrates that individual university teachers can do much at the level of individual courses to enhance learning opportunities and outcomes for Indigenous and non-Indigenous students. Teachers in law schools should consider building their courses with a view to the sensitive and appropriate inclusion of Indigenous issues, perspectives and law. More broadly, law teachers are challenged to ‘examine how “law” as an academic discipline and professional practice has been central to the colonisation and dispossession of Indigenous Australians’.126

Law teachers should also be mindful of the particular needs and experiences of Indigenous students, and consider means by which they can encourage the admission, retention and successful tertiary education of Indigenous students. The twin goals of curricular justice and education for social justice should provide powerful motivation for law teachers seeking to engage with the goal of Indigenisation. Evidence from

126 Burns, above n 5, 238.
Newcastle Law School, as explored in this article, suggests a range of means by which this goal may be progressively realised, particularly if law teachers are supported at the institutional level. Our aim in the next, qualitative stage of this research is to explore the development and realisation of Indigenised curricula from the perspective of academics and Indigenous students.
TOWARDS A PEDAGOGY OF THE INTEGRATION OF CLINICAL LEGAL EDUCATION WITHIN THE LAW CURRICULUM: USING DE-IDENTIFIED CLINIC FILES WITHIN TUTORIAL PROGRAMS

RACHEL SPENCER* AND MATTHEW ATKINSON**

I INTRODUCTION – INTEGRATING CLINICAL PEDAGOGY WITH LEGAL DOCTRINE

The development of a law curriculum that integrates clinical pedagogy within the wider law curriculum has long been advocated as desirable, even essential, for legal education. This article examines the advantages of such integration and is divided into three parts. The first part reviews the literature relating to the integration of clinical pedagogy within the broader legal curriculum. The second part examines and explains how the University of South Australia Law School integrates its clinical legal education program into the wider curriculum through the use of de-identified Clinic files in two courses, specifically Professional Conduct and Civil Procedure. The third part discusses the secondary advantages of this initiative, including the access to real ‘case scenarios’ for problem-based learning.

The discourse about integrating clinical and legal doctrine pedagogies into a law school curriculum requires clarification. The writers refer to integration as combining two distinct elements – clinical teaching and teaching of legal doctrine – to make a whole, in the same way that Giddings examines the prospects of integrating clinical pedagogy across the law curriculum.¹ Clinical teaching and the teaching of legal doctrine are distinct because they have very different pedagogical underpinnings.

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** Managing Solicitor of the Legal Advice Clinic at the School of Law, University of South Australia. This paper was originally presented in the form of a workshop at the ‘Common Ground’ Eleventh International Journal of Clinical Legal Education Conference and Twelfth Australian Clinical Legal Education Conference, Griffith University, Brisbane, Australia, 16 – 18 July 2013. Thank you to Robyne Lyneham for her skilled research assistance and Joanne White for her helpful comments. Additional thanks to Peta Spyrou for sharing her love of the AGLC.

Clinical pedagogy entails students working solo or in small groups with a supervisor to help clients resolve legal problems. Students take on responsibility for the work, and their actions invariably have an impact on clients, their supervisor and colleagues. Students are then required to critically reflect on their experiences and performance in a structured manner, with a view to developing new insights and a greater appreciation of the law and legal practice.

Traditionally, teaching legal doctrine or *corpus juris* involved students learning from teachers, textbooks and printed judicial opinions. This approach resulted in knowledge about legal doctrine being derived primarily from cases, the reasoning for the decisions within cases, and the interpretation of legislation. Teaching of legal doctrine typically took place in a large lecture hall, and students were required to engage in Socratic dialogue and case analysis. Its aim was to have students learn legal principles and to think like a lawyer. Christopher Columbus Langdell of Harvard Law School in 1870 is credited as being the catalyst for this pedagogy, from which, as Cody describes, ‘the rich complexity of facts and people’s lives [is] largely extracted’.

Today, blended learning, on-line support, flipped classrooms and a variety of new pedagogical techniques have displaced the Socratic method of teaching law in many law schools. A law school curriculum that exclusively uses the Langdell – Harvard method has long been viewed as unsatisfactory. In 1933, Frank argued that law schools needed to rediscover clinical pedagogy. He thought the practice of exclusively teaching legal doctrine to law students was akin to ‘future horticulturalists confining their studies to cut flowers [or] … prospective dog breeders...

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2 Ibid.
3 While the writers acknowledge there are varying views on the goals of clinical legal education, it is widely accepted that an important aspect is reflective learning. See generally Rachel Spencer, ‘Holding Up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education’ (2012) 18 *International Journal of Clinic Legal Education* 181; Rachel Spencer, ‘“First They Tell Us to Ignore our Emotions, Then They Tell Us to Reflect”: The Development of a Reflective Writing Pedagogy in Clinical Legal Education Through an Analysis of Student Perceptions of Reflective Writing’ (2014) 21 *International Journal of Clinical Legal Education* <http://www.northumbriajournals.co.uk>; Rachel Spencer, ‘Private Lives: Confronting the Inherent Difficulties of Reflective Writing in Clinical Legal Education’ (2014) 21 *International Journal of Clinical Legal Education* <http://www.northumbriajournals.co.uk>.
9 Frank, above n 7, 907.
who never see anything but stuffed dogs’. 10 In 1984, Amsterdam claimed that legal education in the twentieth century failed to provide students with the necessary conceptual foundation to appreciate the role of lawyers and legal practice. 11 In 1995, Hyams argued that combining methodologies of law lecturing, tutorials and seminars together with practical, clinical components was necessary for effective teaching in law schools. 12 In 2002, the Law Commission of India handed down a report stating that clinical legal education should be compulsory. 13 In 2007, the Carnegie Report 14 recommended that law schools should offer an integrated curriculum that includes teaching of legal doctrine, an introduction to the many facets of practice as a lawyer, and an exploration and assumption of the values and identity of a practising lawyer. 15 Also in 2007, the Clinical Legal Education Association’s report Best Practices for Legal Education 16 provided a bleak view of legal education in the United States and recommended that experiential education play a much greater role.

In Australia, the Commonwealth Government has recognised the importance of universities producing employable, job-ready graduates. In the 2014-15 budget, the ‘Upholding Quality – Quality Indicators for Learning and Teaching’ initiative was introduced. 17 This resulted in the Government commissioning a purpose built website which brings together survey data from employers and Australian university graduates. 18 The website allows prospective students and their families to make informed decisions about undertaking higher education studies. As part of the Government’s new initiative, an ‘Employer Satisfaction Survey’ is being developed for the website. 19 It is intended that the survey provide ‘ongoing assurance from employers about the quality of the university experience.’ 20 The need to incorporate work-integrated learning into tertiary courses in order to improve the employability of graduates has also been documented and promoted in the 2015 National Work Integrated Learning Strategy. 21 The strategy aims to improve graduate

10 Ibid 912.
12 Hyams, above n 4, 63.
15 Ibid.
16 Roy Stuckey et al, Best Practices for Legal Education (Clinical Legal Education Association, 2007) ch 1, 2 and 5.
18 Ibid.
19 Ibid.
employability through provision of relevant practical experience that
connects with courses being studied at university.\textsuperscript{22}

Giddings provides a comprehensive historical perspective of clinical
legal education in Australia,\textsuperscript{23} setting out the origins of the country’s
clinical legal education movement, commencing with the first ‘live client’
clinical program at Monash University in 1975. Clinical pedagogy in
Australian law schools has developed exponentially over the last ten
years, with most Australian law schools now offering a clinical
program.\textsuperscript{24} While the value of clinical legal education has been generally
acknowledged in Australia for the past twenty five years,\textsuperscript{25} very few
universities do more than pay lip service to their clinics and the (lack of)
funding for clinical programs remains an omniscient dilemma. As a
result, most Australian clinical programs are supplementary in nature, and
not integral to the law school mission.\textsuperscript{26} Clinical programs are
characteristically found in later year elective courses with experiential
learning taking place in a practice setting.\textsuperscript{27} Typically, this is achieved by
placing students in a university legal clinic or an externship placement.

This characterisation of clinical pedagogy in part explains why it is
supplemental to the law school curriculum of most universities. Placing
large numbers of students into suitable practice settings is resource
intensive, and also a very costly proposition when it involves a university
legal clinic. Of course, being supplemental rather than integrated into the
law curriculum has drawbacks. Giddings points to there being ‘a lack of
what might be described as “clinical fluency” amongst Australian law
schools’.\textsuperscript{28} He also notes ‘[t]he sustainability of any clinical program will
depend on how effectively its advocates can anticipate and address
concerns, identify opportunities and emphasise natural strengths’\textsuperscript{29} and
that ‘[p]roviding an intense and productive clinical experience for

\begin{thebibliography}{999}
\bibitem{22} Ibid.
\bibitem{26} Giddings, above n 1, 270.
\bibitem{27} Kingsford Legal Centre, \textit{Clinical Legal Education Guide} (University of New South Wales, 11th ed, 2014).
\bibitem{29} Ibid.
\end{thebibliography}
INTEGRATION OF CLINICAL LEGAL EDUCATION

students needs to be balanced with making such experiences available to as many students as possible’. 30

Maranville et al suggest that experiential courses that involve a stand-alone placement are no longer adequate for the future curriculum reform era, and that legal educators must expand the curriculum for experiential learning. 31 Similarly, Giddings points out that effectively integrating clinical pedagogy into the law curriculum requires a sequenced program rather than a stand-alone placement. 32 Further to this, the tenor of the literature that advocates integration of clinical legal education pedagogy into the wider law curriculum has changed in recent years, and become far more exigent. Goldfarb argues that integration of clinical pedagogy is critical for the survival of law schools. 33 She reasons that the relationship between the workplace and law school has fundamentally changed, and that the legal profession is reliant on legal educators to prepare students to perform in a variety of professional environments. 34 Moliterno also argues that American law schools are in a crisis and that they need to adapt to a market that expects it to produce law students who are better equipped for legal practice. 35 Similar to Goldfarb, Moliterno claims that law schools must place a greater emphasis on clinical legal education. 36 Cody contends that the inclusion of a clinical component within a standard legal ethics course can be valuable for the development of ‘competent, self-directed and autonomous lawyering’. 37

It is axiomatic that for clinical legal education pedagogy to play a greater role in the wider law school curriculum an integrated rather than a supplementary approach is required. While the scope for integrating clinical and legal doctrine pedagogies is theoretically boundless, 38 there are practical considerations that can limit the endeavour. The primary limiter is resources. 39 Other factors include the organisational mission, faculty, students, and effectively linking clinical activities to the law school curriculum. 40 These practical considerations have given rise to varying views on how clinical educational pedagogy should be integrated into the wider law curriculum. Many legal educators argue that the

30 Ibid 5.
32 Giddings, above n 1, 261.
34 Ibid 292. The Langdell-Harvard method was also viewed as a necessary law school reform so that law educators could produce law graduates who could meet the changing needs of society at that time. See Barnhizer, above n 6, 68.
37 Cody, above n 8, 36.
40 Giddings, above n 1, 277-81.
curriculum should teach legal doctrine in the first year, introduce lawyering skills through simulations in the second year, and provide real client work in the third year. 41 Moliterno and Schehr advocate a complete overhaul of legal education in favour of a three year simulated practice model. 42 Most recently, Barry proposed a law curriculum that combines teaching of legal doctrine with legal practice in first year classes culminating in final year students spending time in a legal practice setting. 43

While there are varying views about when and how clinical experiences should be introduced into the law curriculum, the commonality in these views is the importance of a sequenced program. Giddings states, ‘[i]ntegrative approaches are likely to be most effective where they culminate in real client work, building on simulations and class-based discussions’. 44 Similarly, Coughlin, McElroy and Clark advocate the ‘see one, do one, teach one’ approach, which has been successfully used in medical education. 45 In their article, the authors suggest that legal educators should use samples and simulations – such as an actual contract or a video of excellent advocacy – to teach legal doctrine. 46 This should then lead to students applying legal doctrine and skill by performing an activity – drafting the contract, undertaking an advocacy exercise – to master the theory and link it with a legal practice skill. 47 Finally, after learning the doctrine and performing the legal practice skill, students should engage in peer teaching of the activity to further develop their understanding and also retain their newly acquired knowledge. 48

In view of the foregoing discussion, the writers’ instigation of a model that utilises the resources of the clinical program within courses offered to second and third year law students seems timely. The writers do not claim that this model is necessarily the best approach for introducing a sequenced clinical legal education program in the wider law school curriculum. Rather our intentions are far more modest: we hope this article will assist or encourage other legal educators to think of new ways to integrate clinical legal experiences into their law school.

The Carnegie Report suggested that the incorporation of lawyering, professionalism and legal analysis from the very beginning of a law degree is important. Although clinical programs are now being offered

44 Ibid 269.
45 Christine N Coughlin, Lisa T McElroy and Sandy C Patrick, ‘See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum’ (2009) 26(2) Georgia State University Law Review 361.
46 Ibid 380.
47 Ibid 396.
48 Ibid 405.
widely across many law schools, this is primarily to final or later year students, meaning that the integration of clinical pedagogy is not happening in the early years of a law degree. While some legal educators have advocated for a complete overhaul of legal education in favour of a three year simulated practice model, the writers have instigated an alternative model which utilises the resources of the clinical program within courses offered to second and third year students.

II THE DEVELOPMENT OF AN INTEGRATED CLINICAL LEGAL EDUCATION PROGRAM WITHIN THE WIDER LAW CURRICULUM THROUGH THE USE OF CLINIC FILES IN TUTORIALS IN TWO CORE COURSES

A Why Use Real Legal Problems?

The Legal Advice Clinic in the School of Law at the University of South Australia uses a real client model of clinical legal education. Students interview clients in pairs, in the absence of the supervisor, but confer with the supervisor before providing any advice. Like most clinical programs, the clinical program at the University of South Australia is founded upon two main pillars. The first is to provide law students with the opportunity to apply their knowledge of legal doctrine in a practical setting and to develop specific legal skills such as interviewing and drafting. The second is to provide access to justice to members of the community who might otherwise not have such access. Bloch notes that clinical legal education ‘presents the legal academy with a unique opportunity to cut across [the] traditional lines of conflict’ between academic inquiry and practical training and service delivery, but that it still occupies ‘an uncertain place in the legal academy’. It is not the intention of this article to explore the already vast literature on clinical scholarship, but as mentioned above the debate about the role of clinical legal education within law schools continues, most notably around the question of funding. One of the writers of this paper teaches both a Clinical Legal Education elective course and a compulsory Professional Conduct course. In 2012 an experiment was carried out using real Clinic files to provide the case scenarios for tutorial discussions for Professional Conduct. Following a successful initial trial in Term 1 2012, the use of real files in Professional Conduct tutorials is now a fixture of the Professional Conduct program. A similar trial took place for Civil

49 Schehr, above n 42, 31.
52 Bloch, above n 51, 8.
53 Ibid.
54 From 2015, this course will be called Lawyers, Ethics and Society (LAWS 4006).
Procedure, and Clinic files are now also used in selected tutorials for that course.

The Legal Advice Clinic opens approximately thirty new files per month. This provides a rich variety of case studies that can be used beyond the Clinic in other aspects of the curriculum. The Clinic advises clients in a number of areas of law, but predominately criminal law, minor civil claims, tenancy matters and family law. The minor civil claims files provide excellent examples for students in the Civil Procedure course to develop an understanding of litigation theory. All files potentially offer ethical issues. This pedagogy aims to take up the challenge set by the Carnegie Report to link ‘the interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve’.  

The use of real cases as the basis for discussion requires minimal resources and appears to have been particularly successful in the writers’ law school. Students regularly tell the writers that they prefer the use of real legal case studies as tutorial problems rather than fictitious dilemmas. As Schehr says,

[m]ost of my learning experiences as a student were frustrating because there was no involvement beyond class work. It was dissatisfying because it was too abstract. Alienation from the process is what made the experience a failure.

Schehr advocates the stimulation of ‘alternate pedagogical methods that draw upon student development theory to enhance what education scholars know about cognition’,  Schehr describes the ‘absence of a coherent integrated curriculum’ as a burden on second and third year curricula. Similarly, Stuckey et al lament that faculty do not integrate upper-division course themes, concepts, and ideas nor do they ‘help students progressively acquire the knowledge, skills and values needed for law practice’.  

The use of real legal problems is designed to eliminate the ‘abstract’ feeling described by Schehr. Even though the Professional Conduct and Civil Procedure students are not directly involved with the clients, there is a direct connection between the application of knowledge and a problem that a real person has actually experienced. Unlike with fictitious scenarios, students will often ask questions about the client, and how the matter was resolved in the end. The concept of empathy for clients is a fundamental aspect of the pedagogical basis for the clinical legal program.  

55 Sullivan et al, quoted in Schehr, above n 42, 14.
56 Schehr, above, n 42, 15.
57 Ibid 10.
58 Ibid 11.
59 Ibid 12.
60 The importance of empathy as part of client-centred practice is a subject that goes beyond the scope of this article. The subject of empathic understanding is a core element of the clinical legal education course. See e.g. Marjorie Silver, ‘The Professional Responsibility of Lawyers: Emotional Competence, Multi-Culturalism and Ethics’ (2006) 13 Journal of Law and Medicine 431; Jane Harris Aiken, ‘Striving to Teach Justice, Fairness and Morality’ (1997) 4 Clinical Law Review 1; Beverly Balos,
examined when there is a real person to whom emotions can be attributed. Schehr argues that the pedagogy for teaching sports is applicable to education: the formula of (1) introduce; (2) demonstrate and (3) execute can be applied to law. 61 Moliterno also advocates that experiential education should be a ‘process of synthesis’ involving exposure to, then experience of, an activity, followed by reflection on the relationship between the theory and the experience. 62 Stuckey is of the view that ‘in order for students to fully engage in experiential education they must continuously be exposed to a four stage process that includes experience, reflection, theory, and application’. 63 The Clinic file tutorial program represents the Stage 2 Demonstration stage of Schehr’s formula. The de-identified Clinic files are used to demonstrate how the relevant principles actually apply ‘in real life.’

In Professional Conduct tutorials, use of Clinic files ‘constantly gives rise to spontaneous and various ethical questions which challenge and test students’ 64 even though these students do not meet the actual clients.

For many students, this is their first experience reading and analysing a real, de-identified legal file. The files provide an opportunity for students to learn about the basic mechanics of file keeping. In addition, seeing real letters of advice going out to real people can be enlightening for students whose only connection with law has been through academic essays and exams.

Student learning in these tutorials goes beyond simply parroting what the ‘Rules’ might say in response to ethical dilemmas. Students have an opportunity to recognise the complexity in the concept of ethical decision-making. The concept of confidentiality, for example, is brought to light by the fact that students must sign an undertaking that they will not discuss the contents of the file beyond the classroom (see below).

The use of de-identified Clinic files can assist students to reflect on ‘how a lawyer contributes to the legal system and its ability to deliver justice’, which Cody articulates is a necessary component of professionalism. 65 Students can see first-hand how the particular subject matter actually applies to real-world situations. The fact that the files depict scenarios that are happening in their home city also adds to their

61 Ibid 15.
65 Cody, above n 8, 6.
recognition that they are learning about the legal system as it affects their fellow citizens. Students in the tutorials also show a genuine interest in the Legal Advice Clinic and the tutorials provide a forum for discussion about how the Clinic works and how students can become involved if they want to participate.

B How to Use Real Legal Problems: The Use of Clinic Files in Tutorials

Ethics and professional responsibility are taught through clinical legal education in many law schools and the inclusion of a ‘clinical component’ in an ethics course has also been noted to be ‘equally effective’.

At the University of South Australia, these subjects are taught in Professional Conduct. It is a course generally taken by students in the last year of their Bachelor of Laws degree. It is designed to inform them of the ethical and professional responsibilities of those engaged in the practice of law. Completion of this course (or a comparable course) is a requirement for admission to practice. Tutorials in this course now involve students working with client files from the UniSA Legal Advice Clinic as a vehicle for the discussion of ethical and professional conduct issues.

Likewise, Civil Procedure is a later year course, although as there are a number of part-time students and double-degree students with complex timetable arrangements, both this course and Professional Conduct could potentially be taken in any year after first year. Completion of Civil Procedure is also a requirement for admission to practice. Some of the tutorials in this course now involve students working with client files from the UniSA Legal Advice Clinic to provide real examples of civil litigation issues.

Using Clinic files in the absence of actual client contact appears to be pedagogically effective at the University of South Australia law school. Students get a sense of how a legal office operates, the issues and challenges that arise when dealing with actual clients, and real-life legal problems and the challenges of having to deal with a number of tasks within a limited time frame. Cody has identified that clinical placement of students does not automatically teach them ethics or how to engage in ethical reasoning: ‘It has to be consciously planned and incorporated.’

This use of Clinic files is part of that conscious planning, providing the base of a scaffolded introduction to the Clinic.

Another apparent benefit is that students also are provided with a unique opportunity to understand the relationship between academic study and the practical application of those principles. Finally, using the Clinic files highlights the legal profession’s service ideal and promotes a pro bono culture. An aim of the program is also to enable students to

66 Ibid 14.
67 Ibid.
68 Ibid.
acquire high-order professional skills and a deep appreciation of ethical standards and professional responsibility.

Clinic files to be used in tutorials are chosen for their subject matter, relevant legal issues, ethical issues and other general points of interest. The files are copied and de-identified (names and other identifying information are removed) for tutorial use. They are then placed in coloured folders (yellow for Professional Conduct, pink for Civil Procedure) so as not to confuse them with actual Clinic files, which are kept in plain manila folders. Enough copies are made of each file so that students in tutorials can read them in pairs. The files are kept in separate filing cabinets in the Managing Solicitor’s office. From time to time, the Managing Solicitor will identify new files that would be suitable for use in the tutorial program and these are added to the ‘bank’ of tutorial files.

C The Professional Conduct Tutorial Program

1 Week 1 of the Professional Conduct program

Like many tutorial programs, the first week of the Professional Conduct tutorial cycle is devoted to ‘getting to know you’. Students not only get to know each other, they are also introduced to the function and operation of the Clinic and to the Clinic’s Managing Solicitor. This is done through a series of facilitated questions. Students are asked to discuss (first in pairs, then in a larger group) their responses to questions that encourage them to consider the concepts and philosophy of clinical legal education and some basic practical ethics issues. In particular, week 1 focusses on confidentiality, conflicts of interest and the importance of keeping accurate client records. The discussion questions are:

- Why does the Law School have a legal advice clinic?
- Who can give legal advice?
- What are the restrictions/ethical obligations on lawyers in relation to the advice that they give?
- What is meant by a conflict of interest?
- Why do we keep records of clients?
- What is meant by legal professional privilege?
- What does that mean in practical terms?

Following this general introductory discussion, the Managing Solicitor talks to the students about the operation of the Clinic, including how clients make appointments, the structure of the interview process and its practical day-to-day operation. This discussion also includes a detailed briefing about the importance of maintaining the confidentiality of clients, and the necessity to inform the tutor (one of the writers) immediately if, during the course of tutorials, a student thinks that a conflict, a potential conflict or the perception of a conflict may exist in relation to a client whose file is being discussed. Even though files are de-identified for tutorial purposes, it is possible that a student may think he or she knows
the identity of a party from the circumstances.\textsuperscript{69} Of course, given that the file is de-identified, the identity of any party involved in the file will never be revealed in a tutorial. Therefore, client confidentiality is always maintained in all tutorials.

2 Confidentiality and Conflicts

The fact that access to these files is a privilege is stressed to students. Students are taught in \textit{Professional Conduct} that to hold the position of officer of the court is a privileged role in society, not least because they become privy to the private and confidential information that is told to them by their clients. This provides a tangible basis for discussions about ‘the privilege which is granted to them by the community (via legislation)’ and the fact that ‘the public must be satisfied that the privilege is being exercised in the public interest’.\textsuperscript{70} Having access to ‘real’ facts is instrumental in re-enforcing this message. It also assists with ‘negotiating the connection between individual values and professionalism’.\textsuperscript{71}

Clients give their informed consent to the use of their files for educational purposes. The retainer agreement signed by all Clinic clients contains a section which acknowledges that the provision of legal advice is part of an educational program and therefore their file will be used for educational purposes. The retainer agreement provides as follows:

Your file will be used for educational purposes. Your legal matter will be discussed within the clinic office by one or more students and one or more supervisors; it may also be the subject of a de-briefing session within the classroom. The classroom component of clinical legal education is an important part of the clinical experience for students. However, the Clinic will treat your information with strict confidence. All persons involved in the Clinic have had extensive training about client confidentiality. The information you provide will only be seen and discussed by persons involved in the Clinic for educational purposes and to ensure our work meets the highest standards. Your confidential information will only be released to persons not involved in the Clinic when you authorise such disclosure or when the Clinic is permitted or compelled by law.

For teaching and learning purposes, de-identified excerpts from your file (with all of the parties’ names, addresses and identifying details deleted) may be discussed in a supervised classroom for other teaching and learning purposes. Your case example may be used to provide an example about a particular type of law, a legal concept or legal procedure. For example, if your matter is about a car accident, the fact scenario (with all names and other identifying features removed) might be provided as a

\textsuperscript{69} This has happened once. The student notified the tutor (who is one of the authors) immediately and the student was given a different file to examine. In that particular tutorial, which was a file costing exercise, there was no class discussion about the actual facts or legal issues of the file.

\textsuperscript{70} Judith Dickson, ‘Clinical Legal Education in the 21\textsuperscript{st} Century: Still Educating for Service?’ (2000) 1 \textit{International Journal of Clinical Legal Education} 33, 41-42.

\textsuperscript{71} Cody, above n 8, 7.
case example to assist law students with learning about the law of negligence.\textsuperscript{72}

If the client agrees to this, the client is asked to sign the retainer agreement. Law students who have contact with Clinic clients receive intensive training. Further to this, students are trained in summarising and explicitly reading through the dot-points in the retainer agreement – this is done at the commencement of every client interview. After the students read through the retainer agreement with the client, the document is signed and dated.

The very nature of clinical legal education necessitates that all client files are used for educational purposes. Clients’ legal matters are discussed within the clinic office by one or more students and one or more supervisors; they may also be the subject of a de-briefing session within the classroom. The classroom component of clinical legal education is an important part of the clinical experience for students. It is here that they deconstruct their experiences, analyse their disorienting moments\textsuperscript{73} and reflect on what they have learnt. This is explained to all clients. It is not possible to operate a clinical legal education program without the files being used for educational purposes. Accordingly, the Clinic is unable to provide any advice if the client declines to sign the retainer agreement, and instead will attempt to provide a referral to other free legal services. (This has only happened twice out of over a thousand files.)

The obtaining of the client’s consent to use their de-identified file ensures compliance with the Australian Solicitors’ Conduct Rules concerning confidentiality.\textsuperscript{74} If the client has any questions about the retainer agreement – such as the use of their file for educational purposes – students record the client’s questions, excuse themselves from the interview room, and then discuss the possible answers with a clinic supervisor. Students are constantly reminded that no advice can be given to a client without it first being approved by a clinic supervisor.

Additionally, all students who have access to de-identified client files are required to sign a Confidentiality Undertaking\textsuperscript{75} that is discussed at length in the first tutorial (see above). For the rest of the term, at the beginning of each tutorial, the tutor asks the class if there is anyone present who has not signed a Confidentiality Undertaking, and reminds everyone of their confidentiality obligations. Students are reminded at the beginning of every tutorial that they are not permitted to discuss the files outside of the classroom.

During the tutorial program, a different file is used every week. Below are some examples.

\textsuperscript{72} See Appendix 1.

\textsuperscript{73} Jane Harris Aiken ‘Striving to Teach Justice, Fairness and Morality’ (1997) 4 Clinical Law Review 1.

\textsuperscript{74} Law Society of South Australia, Australian Solicitors’ Conduct Rules (at June 2011) r 9.

\textsuperscript{75} See Appendix 2.
3 *Professional Conduct Example File 1*

The client had previously been convicted of child sex offences. The client did not seek advice about the criminal charge, but about another matter. The previous conviction was relevant to the matter for which the client sought advice. This file provides the basis for a discussion about providing advice to a morally repugnant or unlikeable client and whether or not a lawyer has a choice in acting for such a client. This file usually provokes strong reactions in a number of students, and generates animated discussion.

4 *Professional Conduct Example File 2*

This file involves a settlement negotiation. Students are first asked to consider and discuss the limits placed on lawyers in representing their clients. For example, they are asked to consider whether a lawyer may use trickery or deception or make unsupported allegations in representing a client; and whether a lawyer may try to intimidate the opposing party or file a frivolous action on behalf of a client. Students must also consider whether a lawyer may knowingly make false and/or misleading statements or conceal or fail to disclose information required to be disclosed by law. They are asked to discuss whether a lawyer may assist his or her client in conduct that the lawyer knows to be illegal or fraudulent.

Students are then given a file and asked to read it. They are then asked to consider the ethical duties inherent in assisting the client to negotiate a settlement. They are asked to discuss the following questions:

- Is it appropriate to demand an excessive sum on behalf of the client at the start of a negotiation? Why or why not?
- May a lawyer make a false statement to the other side in an effort to settle the matter?
- What duty does a lawyer have to encourage settlement of a litigious matter?
- Is there a need for a code of ethics in negotiation?

5 *Professional Conduct Example File 3*

During this tutorial confidentiality and privilege are discussed in the context of a case file. Students are given a de-identified file about a 17 year old male who was charged with driving a 50CC scooter without a licence. His father had made enquiries about whether the son was allowed to drive the scooter on a (car) learner’s permit. The father’s instructions were that he made enquiries and had been told by a police officer that this was permitted provided that the scooter was no greater than 50CC. This advice was wrong. The boy drove the scooter and had a minor accident. He was charged with driving a motor vehicle of a particular class when not authorised to drive such a vehicle. The father and the son came in to the Clinic together. Discussion in this tutorial revolves around the lawyer-
client relationship. Students are asked to consider if the client is the father or the son, or both. The following issues are discussed in the tutorial:

- Who is the client?
- To whom did the Clinic provide advice?
- When does the lawyer-client relationship commence?
- Imagine that the Clinic is a law firm. What advice is the firm obliged to provide about legal aid? Which Conduct Rule covers this?
- Imagine that you are a student advisor. What do you do if you suspect that the son is not being entirely truthful with you with his father in the room?
- What rights does the father have in relation to the legal advice relating to his son? Does he have a right to know what the advice is? If he had to pay for the legal advice, does the fact that he is paying for the advice make any difference?
- What are the relevant rules from the Australian Solicitors’ Conduct Rules?
- Imagine that the son made a further appointment with the Clinic after the initial interview. Imagine that he instructed the advisors that he had actually done some research himself before the incident, and he knew that he should not be driving the scooter on a Learner’s permit, but he did not tell his father. Would this change the advice that you might give?
- Imagine, then, that the father finds out that the son has been into the Clinic by himself. He asks to know what the son told you and what advice was given. What is your response?

6 Professional Conduct Example File 4

This matter involves a client who wishes to make a ‘convenience plea’ of guilty in relation to a shoplifting charge. Students are guided through the file and asked to identify the elements of the offence charged. This is followed by a discussion identifying elements of this offence that the defendant admits, and the elements that are not admitted. The class discussion then revolves around these questions:

- In this matter, why did the magistrate not accept a plea of guilty?
- If a solicitor advises this defendant to plead guilty, or pressures the defendant into pleading guilty, what rights does the defendant have? What might be the consequences for the solicitor?

7 Professional Conduct Example File 5

In one of the tutorials, usually the penultimate tutorial for the term, students work with a file in order to calculate the appropriate fee for work done. The Clinic does not charge clients any fees; this exercise is completed in the context of quantifying the value of ‘pro-bono’ work. Students work in pairs to calculate the costs of a file on the Supreme Court scale.
The general question of whether lawyers should be involved in providing their services for free is also considered, as is the question of whether it should be compulsory for lawyers to complete a certain number of pro-bono hours each year.

D The Civil Procedure Tutorial Program

1 Civil Procedure Example File 1

The client is a taxi driver who was involved in a motor vehicle collision. Judgment was entered against the client for the value of the damage caused to the other driver’s car. The client did not own the taxi and had paid an insurance levy to the owner. The file involves the question of joinder of parties to a proceeding. Students are also required to identify an issue concerning jurisdiction and possible alternative means of resolving the dispute.

2 Civil Procedure Example File 2

The focus of this seminar is on the drafting of court documents including pleadings and affidavits.

The file involves a client who had been working as a nightclub security worker. During his workshift, the client did not complete the nightclub’s security logbook correctly, and, as a result, the police issued the nightclub with an expiation notice (failure to keep an accurate logbook is an expiable offence). The nightclub contacted the client’s employer about the expiation notice, and the employer paid the fine of approximately $500.00. The employer then deducted this amount from the client’s wages. The client made a successful complaint to the FairWork Ombudsman about the deduction. It was found that the employer was not entitled to take this action, and the client was paid all of his wages.

However, the employer did not appreciate the FairWork Ombudsman’s decision, and commenced proceedings in the Magistrates Court against the client for his losses in making payment of the expiation notice. The court proceedings had come as a surprise to the client who thought the matter was resolved. The client had also recently resigned from his position as a nightclub security worker and was focussed on his studies.

The Clinic provided the client with assistance in drafting a defence to the former employer’s claim. Subsequent to this, the client missed his first court hearing and the court entered a default judgment in favour of the former employer. The client received additional help from the Clinic with drafting an application and an affidavit to set aside the default judgment. In the seminar, the students are asked to examine and critique all of the court documents.
3 Civil Procedure Example File 3

At this seminar students are required to draft a Short Form Bill of Costs. The client purchased a bike rack from a retail shop. The client was not aware that the bike rack was missing a safety pin. The client drove his car to the coast for a weekend getaway with all of the family’s bicycles loaded on the bike rack. The bicycles dislodged and were strewn across the road. The Clinic helped the client to write to the retailer seeking a refund for the purchase price of the bike rack together with compensation to replace the damaged bicycles. In the course of corresponding with the retailer, the client initially received no response, then a denial of responsibility, and then ultimately a proposed settlement. To receive payment, the client was required to sign a poorly drafted and unfavourably worded deed of settlement. The Clinic helped the client to negotiate more acceptable terms of settlement and ensure that his legal position was protected.

This exercise demonstrates the potential amount of money that a client might have to pay for legal advice, compared to a relatively small amount of money in dispute. It provides an example of the difficulties faced by many people in relation to the cost of access to justice.

III THE SECONDARY ADVANTAGES OF AN INTEGRATED PEDAGOGY

A Storytelling

Legal education regularly requires the invention of fictitious factual scenarios to which students can apply legal doctrine. To devise a fictitious tutorial problem to which students must apply their knowledge can be interesting and even engaging for students. However, the love of storytelling is an essential quality of being human and beneficial for adult learning.76 One of the secondary advantages of integrating clinical legal education with the wider law curriculum is to tap into the value of narrative. In examining the pedagogical benefits of storytelling in clinical legal education, Tyler and Mullen observe that ‘making [a] storytelling process transparent and systematic helps to increase student understanding of its relevance to the practice of law’.77 Using real stories about real people has been found to be more engaging for students than fictitious narratives because they appreciate and enjoy the fact that the stories are ‘real’. In the writers’ experience, to tell students that ‘this really happened’ always garners extra interest.

It is critically important to constantly infuse pedagogy with the recognition that even the driest of High Court judgments originated with an agitated, worried, perhaps angry or tearful client sitting in a lawyer’s waiting room. The student experience must be perpetually linked to this

77 Ibid 329.
human dimension, which has been argued to be ‘sorely lacking in law school pedagogy’. Barry puts it simply and succinctly: ‘[c]linics expose students to the impact that the practice of law has on people’. So even if the students are not directly dealing with the clients themselves, but only reading and working from the file, the fact that the students have contact with a ‘real problem’ that ‘actually happened’ has a far greater impact than discussing the hypothetical impact of the law on a fictitious character in a fictitious tutorial question.

In addition, some students have had limited life experiences and may not be familiar with concepts such as mortgages, council rates, how the Medicare system works, cash flow for small businesses – the list is endless. Providing authentic scenarios can be eye opening for students, not just in relation to the law, but in relation to the realities of life. Using Clinic files can help students to recognise that legal problems are multi-faceted and often overlap with other aspects of life. Legal dilemmas are rarely discrete and separate. Clinic files can assist students to become aware of the complexity of how the law and the legal system affect different individuals.

B Inclusiveness

Many Clinic files involve marginalised people: those people whom the text books ignore. It is quite likely that students from culturally devalued backgrounds may recognise and empathise with the situations and issues presented by these clients. This not only provides a more inclusive educational experience for those students, but it can also be empowering for them to be able to participate in, or lead discussions that perhaps their fellow students from more privileged backgrounds may not be able to understand so readily. This is critical in the context of what Schehr defines as ‘the success narrative’ of law school where performance and competition are ritualised and become normative. Schehr argues that law school education renders law students docile and disinterested in learning ‘because it fails to engage students in a dialogical process that leads them to real understanding of the world around them, their substantive interest, and themselves’. In discussing their own knowledge in the context of a real person, who has literally walked the same path as them through the corridors of the Law Building, students cannot avoid the reality of law as it connects with the wider world.

Schehr argues that:

Students emanating from culturally devalued class backgrounds experience education as a form of symbolic violence. Unlike the more privileged students, working class and poor students, female students, gay and lesbian students, and ethnic minority students tend not to learn much about their experiences, or people who are like them, from their textbooks.

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78 Schehr, above n 42, 41.
79 Barry, above n 13, 30.
80 Ibid 27.
81 Ibid 28.
82 The authors would also include students with disability.
or classroom lectures. Rather, by way of omission, their experiences are marginalised and thereby devalued ... textbooks ... simply ignore them, their parents, their grandparents, their contributions to history, and so on, They are not present for students to recognize, take pride in, or even to criticize. They simply vanish from history. 83

Schehr also argues that modern law school curricula should be developed by way of a ‘non-linear, dialogical pedagogy that privileges experiential education where the dominant philosophical and pedagogical emphasis is to expose students to their responsibility for improving the quality of life of those around them.’ 84 Schehr agrees with Moliterno’s emphasis on the need for experiential education which must consist of ‘a designed, managed and guided experience’. 85

C Sustainability

Giddings has highlighted the difficulties relating to the sustainability of clinical programs, 86 not least because of the funding model under which Australian law schools operate. As law is placed in the lowest federal government funding bracket, clinics must constantly justify their existence, especially given that the staff/student ratio is disproportionate to other methods of teaching. While some classes might be able to operate with one staff member to 300 students (in a lecture for example), the accepted workable ratio in the Clinic environment is usually no more than 1:8 87

At the writers’ law school, the integration of Clinic resources with the wider curriculum has enabled financial resources from the Law School budget to be channelled directly into the Clinic to assist with Clinic staffing costs. A percentage of the EFTSL from each student enrolled in Professional Conduct and Civil Procedure is allocated towards the Clinic. This provides a source of funding for the Clinic, which in turn provides an engaging and stimulating experience for all students through the tutorial program of two core courses. In this way, the Clinic is effectively integrated within the School, both pedagogically and financially.

D Pro Bono Culture

The tutorial program serves as an introduction to the Legal Advice Clinic and as a basis for the development of a pro bono culture and a consciousness of access to justice issues at a local level, not just for students in the clinical program, but for all law students. Pro bono legal services are garnering greater attention in Australia, with many major law firms setting up pro bono departments.

In a sign of differentiation from one of the characteristics of Australian clinical legal education, 88 the Legal Advice Clinic at UniSA is

83 Schehr, above n 42, 25.
84 Schehr, above n 42, 30.
85 Schehr, above n 42, 31.
86 Giddings, above n 28, 5.
87 Evans et al, above n 24.
88 Dickson, above n 71, 39.
not linked to a community legal centre, but it does still fit into the ‘poverty law practice’ model.\textsuperscript{89} While clients are not means-tested, and all members of the community may attend an appointment and obtain assistance,\textsuperscript{90} most clients of the Clinic are in some way disadvantaged or marginalised members of society. Because of this, both students who are engaged in the clinical program (those who actually interview clients and work on the files) and those students who have access to Clinic files through the tutorial program become aware of access to justice issues. In this way, the tutorial program is linked to the service ideal of the clinical program and enforces the notion that ‘lawyers have an obligation...to involve themselves in the equal distribution of legal services’.\textsuperscript{91}

In 2001, the national Pro Bono Task Force emphasised the importance of clinical experiences and suggested that all law students should be able to access Clinical Legal Education to enhance their appreciation of ethical standards and professional responsibility.\textsuperscript{92}

In 2009, the Attorney General’s department report on access to justice recommended that undergraduate law degrees should include access to clinical legal education opportunities.\textsuperscript{93} This recommendation came about through recognition of the fact that the legal profession is an important mechanism in promoting access to justice. The report observes that the legal profession is often the first point of contact for individuals who are experiencing legal problems. Students who graduate from law school with a well-rounded understanding of the legal system and the skills needed to begin their professional careers will be better equipped to assist such individuals in resolving their legal problems in a timely and cost effective manner. McCrimmon argues that clinical pedagogy, with its emphasis on critique and reflection can instil in students ‘a desire to promote justice, fairness and morality for the poor, disadvantaged and marginalised members of society’.\textsuperscript{94} Using Clinic files in the way described in this article exposes students to the sometimes harsh realities of access to justice for people from low socio-economic or other marginalised backgrounds. It helps them to recognise the bigger picture of justice.

**IV CONCLUSION**

In a climate of increasing demands to enhance student engagement concurrently with shrinking budgets, clinical legal education faces ever increasing challenges. However, extending clinical legal education into

\textsuperscript{89} Ibid.

\textsuperscript{90} Subject to the discretion of the supervisor, and any conflict issues; there are also some areas of law for which the Clinic does not provide advice.

\textsuperscript{91} Dickson, above n 71, 39.


\textsuperscript{94} McCrimmon, above n 92, 73.
the broader curriculum can be achieved through the relatively simple mechanism of using files as case scenarios in core courses. This initiative has proved to be successful for the writers, especially for student engagement. Student engagement in the classroom indicates that students enjoy being able to apply their legal knowledge to real-life scenarios. Classroom engagement also indicates that student understanding of legal doctrine develop to a deeper level. An additional advantage has been the recognition that using Clinic resources is beneficial to the wider student cohort. The resultant win-win situation ensures that more students have access to clinical legal education principles, lecturers have access to useful and believable tutorial scenarios and the potential exists for clinical programs to receive a portion of law school funds. While student learning and student engagement are the main aims, the other advantages of this initiative make the use of Clinic files in tutorials in the broader law curriculum an attractive pedagogical consideration.
APPENDIX 1

University of South Australia (UniSA) Legal Advice Clinic

Client Agreement

About the Clinic: The Clinic is staffed by law students and provides confidential, free legal advice and assistance. It gives law students the opportunity to use their legal knowledge and further develop their professional skills. Law students are not qualified legal practitioners. All advice and assistance is provided under the supervision of a supervising solicitor who is a qualified legal practitioner.

Legal advice and assistance: A supervising solicitor must approve any advice and assistance that a law student will give to you. This means that law students will confer with the supervising solicitor during all of your interviews. Sometimes, advice and assistance will not be provided on the day, as the law student will need time to do research about your legal problem.

Obtaining legal advice and assistance is not automatic: Sometimes, the Clinic cannot provide any advice or assistance. The decision not to provide assistance (or to stop helping you) may occur because your dispute is too complex, a conflict of interest arises, or for other operational reasons. When such a decision is made it will be communicated in writing to you and we will provide you with the contact details of alternative legal services.

What we agree to do for you: If you require more than basic initial advice, we will write to you advising whether or not we can help. If we can help, we will outline exactly what we have agreed to help you with. Please be aware that even if we agree to help you, our assistance can end at any time. As outlined above, when the supervising solicitor makes a decision to stop assisting you, we will communicate this in writing and provide you with the contact details of alternative legal services.

Representation: Law students and the supervising solicitor do not represent clients. You will need to represent yourself. This means that all correspondence we have agreed to assist you with (including letters and court documents) is done in your name. It also means that we cannot speak with others on your behalf, nor can we represent you in court. If you want to be legally represented, please let the Clinic know and we will provide you with the contact details of alternative services.

You may need to pay ‘disbursements’: The Clinic does not charge for any work done. However, you are responsible for paying all your own expenses for your legal problem. Sometimes, you will need to pay money to others in order for us to help you – these are ‘disbursements.’ ‘Disbursements’ could include fees to lodge court documents, and to obtain expert reports. The Clinic will not make any contribution to your ‘disbursements.’

Legal Costs: If your dispute is in (or goes to) Court, there is a risk you will have to make payment of the other parties’ costs or counter
claim. The Clinic **will not** make any contribution to any costs or sum that the court orders you to pay.

**Confidentiality:** Your file will be used for educational purposes. Your legal matter will be discussed within the clinic office by one or more students and one or more supervisors; it may also be the subject of a de-briefing session within the classroom. The classroom component of clinical legal education is an important part of the clinical experience for students. However, the Clinic will treat your information with strict confidence. All persons involved in the Clinic have had extensive training about client confidentiality. The information you provide will only be seen and discussed by persons involved in the Clinic for educational purposes and to ensure our work meets the highest standards. Your confidential information will only be released to persons not involved in the Clinic when you authorise such disclosure or when the Clinic is permitted or compelled by law.

For teaching and learning purposes, de-identified excerpts from your file (with all of the parties’ names, addresses and identifying details deleted) may be discussed in a supervised classroom for other teaching and learning purposes. Your case example may be used to provide an example about a particular type of law, a legal concept or legal procedure. For example, if your matter is about a car accident, the fact scenario (with all names and other identifying features removed) might be provided as a case example to assist law students with learning about the law of negligence.

**Third party involvement:** In order to provide you with legal assistance, we may need to consult with third party legal practitioners who are not involved in the Legal Advice Clinic. We will first advise you in writing should this situation arise. By signing this retainer, you agree that we may, if needed, release personal details relating to your matter to a third party legal practitioner. Your details will remain confidential when in the possession of a third party legal practitioner. We will only release your details for the purpose of determining whether the Legal Advice Clinic can provide you with assistance. You will not need to pay for this service.

**What we ask of you:** We ask that you keep all appointments but if you cannot, please contact the Law School receptionist on 8302 7436 to cancel or reschedule the appointment. We ask that you provide us with all information that we have requested promptly. We ask that you provide us with frank and proper instructions and maintain respectful and cordial relations with the law students and all other staff at the Clinic.

I acknowledge that:
- A Student Advisor has explained this agreement to me;
- A Student Advisor has explained ‘disbursements’ and legal costs;
- The Clinic cannot represent me and only provides advice and assistance;
- The Clinic can cease the provision of advice and assistance at any time; and
- My file will be used by the University of South Australia Law School for teaching and research purposes.

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APPENDIX 2

CONFIDENTIALITY UNDERTAKING

I………………………………………………………………………………
(‘Student Advisor’) in relation to any client and confidential information of the Legal Advice Clinic (‘Clinic’), undertake as follows:

RECITALS

The Student Advisor may obtain client and confidential information through direct or indirect involvement with the Clinic.

The Student Advisor undertakes to keep secret the Clinic’s client and confidential information.

DEFINITIONS

‘client’ of the Clinic means a person who has provided any details to the Clinic or has left a message to make an appointment with the Clinic.

‘confidential information’ of the Clinic means regardless of the form of the disclosure or the medium used to store it, all confidential information of the Clinic, or information treated by the Clinic as confidential and of which the Student Advisor becomes aware, either before or after the date of this agreement, through the Student Advisor’s direct or indirect involvement with the Clinic.

DUTY OF CONFIDENCE

The Student Advisor undertakes that all client and confidential information:

• will be kept strictly confidential;
• will remain absolute property and exclusive property of the Clinic or the client, as applicable;
• will not be disclosed or divulged to any third party;
• will not be used for any other purpose other than set out above.

Signed by the Student Advisor

………………………………………………………………………………
Date
I INTRODUCTION

Law students entering the competitive work environment can benefit significantly from practical work experience during the course of their law degree. Whether gained through clinical education, external work experience or pro bono programs, the effect is to increase self-confidence, practical experience and, consequently, employability in students. It has been widely recognised that extra-curricular community engagement enhances graduate employability by combining experiential learning, course work and community service.¹ This article contends that, not only is clinical experience an invaluable asset to students to enhance learning and to prepare them for practice, but a pro bono teaching clinic has the added benefit of developing a sense of social responsibility in students. It further considers the advantages of incorporating service learning — which falls under the category of experiential education² — into a commercial law pro bono clinic, by reference to a case study of a successful clinic established within a university law faculty. The article further examines the challenges and considerations inherent in establishing such a clinic within a law school, and suggests solutions for implementing an effective faculty-run pro bono teaching clinic.

The traditional differences between clinical legal experience (‘CLE’) and pro bono programs are acknowledged and discussed below. This article advocates for a stronger focus on pro bono programs, and indeed, pro bono clinics in law schools, as distinct from externship programs for academic credit. As discussed below, the advantages of such faculty-run clinics are numerous — not only do they provide the faculty with experiential learning opportunities for students at a low cost, but they also

offer pro bono work opportunities for local legal practitioners, as well as render a valuable community service. Other benefits to students include interaction with ‘real’ clients and cases; development of social responsibility, empathy and interpersonal skills; networking and integrating with legal professionals; and promotion of ethical behaviour in students.

II CLINICAL LEGAL EDUCATION VERSUS PRO BONO PROGRAMS

Although there is some overlap between clinical legal education (CLE) and pro bono programs, they have generally been regarded as ‘separate and distinct entities’.

The main distinguishing factors between the two models appear to be as follows:

- Academic credit is usually awarded for CLE programs, as opposed to purely voluntary non-reward arrangements for pro bono students.
- The term ‘pro bono’ refers to voluntary work done out of a sense of professional responsibility, where the primary motivation for the work is a concern for justice or for reasons of kinship or friendship, as opposed to securing gain.
- CLE programs typically have a teaching focus whereas pro bono programs typically have a community service focus.
- Usually pro bono programs are at no financial cost to students whereas academic fees are usually payable for CLE programs.
- CLE programs are usually required to have formal assessment procedures to produce specific learning and teaching outcomes whereas pro bono programs generally implement informal feedback and reflective practices.

This distinction is evident in US law schools, where some universities mandate a certain number of pro bono hours for law students as a prerequisite to graduation. The pro bono requirement is a separate component of the law degree, and can be undertaken in a number of ways and at different institutions, one option being clinical work. The

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6 Ibid 6.
8 Generally work undertaken as part of a clinical subject may count towards the US pro bono requirement; see, eg, New York University, New Pro Bono Info <http://www.law.nyu.edu/sites/default/files/upload_documents/NewProBonoInfo.pdf>, which explains that pro bono work in law clinics may be counted at NYU. See also Harvard Law School, Pro Bono Graduation Requirement (2015)
Association of American Law Schools has made the following distinction between CLE and pro bono projects:

[The principle goal of most clinics is to teach students lawyering skills and sensitivity to ethical issues through structured practice experiences and opportunities to think about and analyze those experiences. By contrast, the most important single function of pro bono projects is to open students’ eyes to the ethical responsibility of lawyers to contribute their services.]

This article proposes that pro bono projects need not exclude a strong learning and teaching focus, and that practical legal skills and ethics, as well as social responsibility, can be effectively taught within a pro bono teaching clinic with a commercial law focus. Seen from a community perspective, a primary function of a pro bono clinic is of course to provide consumers with access to legal services, but it also offers students a unique learning opportunity.

A Clinical Legal Education (CLE)

To contextualise this pro bono teaching proposition, it is necessary to consider more closely what is meant by CLE, and the desirable outcomes of CLE programs. CLE is generally defined as a student’s involvement with ‘real clients’ in a legal centre or in-house campus clinic; or through a placement program or internship. In this context the term refers to ‘any law school course or program in which law students participate in the representation of actual clients under the supervision of a lawyer/teacher’. In his paper, Corker provides the definition of CLE used by Griffith University in their Strategic Plan:

“[Clinical legal education] involves an intensive small group learning experience in which each student takes responsibility for legal and related work for a client (whether real or simulated) in collaboration with a supervisor. The student takes the opportunity to reflect on matters including their interactions with the client, their colleagues and their...”

<http://law.harvard.edu/academics/clinical/pro-bono/index.html> which explains clinical courses automatically qualify for inclusion in the pro bono requirement.


12 Bloch, above n 10, 326.

13 Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 5.
 supervisor as well as the ethical aspects and impact of the law and legal processes.\textsuperscript{14}

CLE has been incorporated in most law schools in Australia. A recent comprehensive review of law school clinics in Australia by Evans et al revealed that most Australian law schools had implemented CLE programs. \textsuperscript{15} The report distinguished between the following models: wholly law school funded in-house live-client clinics, in-house live-client clinics (with some external funding), external live-client clinics (‘agency clinics’), externships (including internships and placements) and clinical components in other courses (including simulations of legal practice activities and encounters).\textsuperscript{16}

The report also aligned ‘service learning’ with CLE:

\textit{Service learning} is a teaching and learning strategy that integrates meaningful community service with instruction and reflection to enrich learning experiences, teach civic responsibility and strengthen communities. CLE shares these objectives and might be considered a specific example of service learning.\textsuperscript{17}

Clinical pedagogy generally involves formal assessments during and at the end of semesters. The benefits of clinical training are well-recognised,\textsuperscript{18} and it has been found to be consistent with Dewey’s curriculum theory and the power of experiential learning, thereby producing ‘graduates who can deal effectively with the modern world.’\textsuperscript{19} Goldfarb proposes that clinical legal education is interconnected with the notion of ‘personal and social responsibility’ within the profession, as well as focusing on the transferrable skills pedagogy of clinical education, for example, effective collaboration and communication with other lawyers and clients.\textsuperscript{20} Clinical pedagogy also accords with a number of

\textsuperscript{14} Griffith Law School, ‘Clinical Legal Education Programs Strategic Plan’ (Strategic Plan, Griffith Law School, 2003–2007) 1.


\textsuperscript{17} Ibid 4.

\textsuperscript{18} See generally ibid.

\textsuperscript{19} Ibid 5. Experiential learning has attracted the attention of academics in several professional fields, for example, teaching, engineering and pharmacy. Numerous studies have investigated the purpose and value of this learning model, its structure, and its relationship to units or courses as a whole and it is now widely accepted that students need exposure to professional practice to develop critical decision-making skills and to place classroom learning in an authentic context. See, eg, Kevin Taylor and Ian Bates, ‘Pharmacy Student Numbers are Bound to Affect Educational Standards’ (2003) 271(7271) \textit{Pharmaceutical Journal} 546.

the threshold learning outcomes (TLOs) for LLB and JD degrees, such as ethics and professional responsibility,\(^{21}\) thinking skills,\(^{22}\) research skills,\(^{23}\) and communication and collaboration.\(^{24}\)

Castles and Hewitt propose that legal graduates must be equipped with a broader practical skills base: ‘first-tier skills’ which they describe as ‘intellectual and social aptitude including critical thinking and problem solving, oral and written communication, and the capacity to work both independently and cooperatively.’\(^{25}\) CLE allows students to engage in and develop several of these skills in the context of providing oral and written client advice. Additionally, Curran points to other advantages of clinics for law students: the broader experience base they take into employment and the ability to make a positive impact on policy-making and law reform.\(^{26}\)

Clinical legal education has been distinguished from pro bono law clinics.\(^{27}\) Giddings argues that despite the similarities between ‘clinical’ and ‘pro bono’ programs, a definite difference in objectives exists between the two.\(^{28}\) He suggests that while the ‘practice based context of clinical legal education has the potential to offer a very rich learning environment’,\(^{29}\) these benefits can be lost in an environment without the necessary supervision or control over casework.\(^{30}\) In his article on pro bono work in law schools, Grimes also argues that ‘professionally supervised’ (by legal practitioners) student involvement in practical legal work at university will have a multitude of benefits.\(^{31}\) Thus, in both CLE and pro bono programs there should be a requirement for professional supervision to maximise the benefits and increase the learning outcomes for student participants.

Evans et al also distinguish CLE from ‘pro bono publico and student-run volunteer programs’:


\(^{22}\) Ibid 17.

\(^{23}\) Ibid 19.

\(^{24}\) Ibid 20.


\(^{29}\) Ibid 17.

\(^{30}\) Ibid.

Such placements have limited educational objectives compared to CLE, do not generally seek to develop students’ normative awareness and do not set out to strengthen wider legal education and law reform curricula, although both can awaken and sustain graduates’ civic consciousness once they are in practice.\textsuperscript{32}

Whilst the reservations expressed by Evans et al may hold true for student-run programs – such as the Pro Bono Students Australia program discussed below – there may be multiple social and pedagogical benefits attached to a pro bono faculty-run clinic, with professional supervision, which has a focus on both community service objectives and learning and teaching outcomes.

\textbf{B Pro Bono Programs}

\textit{1 Programs in Australia}

This article focuses upon the pro bono clinic operated by the Bond University Faculty of Law. There are however other successful university-run law clinics. The Kingsford Legal Centre at the University of New South Wales (‘UNSW’)\textsuperscript{33} incorporates a number of different clinical subjects and is run by a staff solicitor. The South Australian law schools – Flinders University, University of South Australia and University of Adelaide\textsuperscript{34} – also adopt a similar model involving legal academics who also have legal practice experience and current unrestricted practising certificates to provide legal advice to clients. Similarly, the Pro Bono Centre at the University of Queensland (UQ)\textsuperscript{35} incorporates a number of different clinics in which students can enrol for academic credit (although the UQ clinic differs from the UNSW and South Australian models in that is no dedicated staff solicitor).

\textsuperscript{32} Evans et al, ‘Best Practices Australian Clinical Legal Education’, above n 4, 5.

\textsuperscript{33} See University of New South Wales, Kingsford Legal Centre <http://www.klc.unsw.edu.au>, which states that ‘Kingsford Legal Centre’s clinical legal education courses provide opportunities for law students to engage directly with disadvantaged communities about pressing legal matters. Students work to empower not just the individual client, but the community or group’s interests as a whole.’ At Kingsford Legal Centre, clinics are offered in Community Law, Employment Law and Family Law.


\textsuperscript{35} See The University of Queensland – TC Beirne School of Law, UQ Pro Bono Centre (2010) <http://www.law.uq.edu.au/uq-pro-bono-centre>, which states that ‘[t]he UQ clinics aim to provide students with work experience in a legal setting for academic credit. Clinics are currently run out of the Queensland Public Interest Law Clearing House, Caxton Legal Centre, the Prisoners’ Legal Service, the Refugee and Immigration Legal Service, Queensland Advocacy Inc., the Environmental Defenders Office and Tenancy Law Clinic. In their clinical placement, law students spend one day per week during semester undertaking legal work supervised by lawyers.’
All of these models can be distinguished from the Bond University program, which seeks to engage local law firms (often alumni of the institution) in a pro bono partnership with the university, and where student involvement is not for formal academic credit.

Cognisance is also taken of the Pro Bono Students Australia (‘PBSA’) program mentioned above. The PBSA program was developed by the National Pro Bono Centre in conjunction with the University of Western Sydney Law School (‘UWS’), and is based on the Pro Bono Students Canada (‘PBSC’) model.36 The initiative combines education and public service, ‘enabling law students to develop their legal skills and broaden their education while providing critical legal services to a broad range of community organisations that are involved in delivering services to disadvantaged people.’37 The PBSA program aims to involve law students in setting up pro bono programs at universities, which provides a low cost option for student participation in various projects identified by UWS. Since its inception in 2004, the National Pro Bono Centre has provided PBSA materials to students at at least 8 universities.38

The pro bono teaching clinic at Bond University differs from the PBSA model in that the program is run by members of the law faculty (not by students) in conjunction with local law firms.

2 Definition of ‘Pro Bono’

The Australian Law Reform Commission (‘ALRC’) defines pro bono work as ‘legal services provided in the public interest by lawyers for free or for a substantially reduced fee’.39 As for what constitutes ‘legal services provided in the public interest’, the UCLA Program in Public Interest Law and Policy defines them as:40

all interests under-represented by the private market, including the poor, ethnic minorities, unpopular causes ‘across the political spectrum’ and diffuse interests (such as environment and peace).41

37 See National Pro Bono Resource Centre, Setting Up a Pro Bono Program at Your University (2015) <http://www.nationalprobono.org.au/page.asp? from=9 &id=94>. The page also describes the Pro Bono Students Australia program: ‘The program assists organisations that are involved in the delivery of services to the disadvantaged in the community of Western Sydney by matching law students with law-related projects that seek to enhance access to justice for disadvantaged individuals or groups.’
38 Email from John Corker (Director of National Pro Bono Resource Centre) to Franci Canatore, 25 May 2015: ‘There are no records available of the number of students who have been engaged in this program, but there are currently 34 students are placed on 17 projects through UWS’; see also National Pro Bono Resource Centre, Setting Up a Pro Bono Program, above n 37.
40 McCrimmon, above n 3, 55.
The National Pro Bono Resource Centre relies on the following definition of pro bono:

Giving legal assistance for free or at a substantially reduced fee to:

(a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or

(b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or

(c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;

(d) conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;

(e) participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or

(f) providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.42

Related to that, the National Pro Bono Resource Centre adopts the following definition of ‘student pro bono’, in the context of discussing the PBSA initiative:

‘[S]tudent pro bono’ is where students, without fee, reward or academic credit provide or assist in the provision of services that will provide or enhance access to justice for low income and disadvantaged people or for non-profit organisations that work on behalf of members of the community who are disadvantaged or marginalised, or that work for the public good.43

The definition of pro bono often excludes university courses for credit, and Corker observes that pro bono and CLE programs ‘occupy different roles in the context of a law school education.’44 However, there sometimes exists an overlap in instances such as the Flinders Legal Advice Clinic at Flinders University, where both enrolled students and student volunteers are accommodated as interns. In such cases enrolled students will generally be required to meet course requirements for academic credit. Corker regards ‘the primary focus of the clinical program [as] the development of practical lawyering skills in a closely supervised environment’, whereas the ‘primary focus [of pro bono work] is community service.’45

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43 National Pro Bono Resource Centre, Information Paper, above n 15, 8.
44 Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 6.
45 Ibid.
It is proposed that free legal services to qualifying small businesses and entrepreneurs, and non-profit organisations, meet the definition of being ‘in the public interest’, and thus fall within the definition of ‘pro bono services.’ In the context of the commercial law clinic model described below, these services are rendered by students and lawyers without charge and are not for students’ academic credit.

Booth points out that pro bono work does not necessarily form part of the academic curriculum and is instead focused on instilling future graduates with a community and public service rooted mentality. She argues that an increased focus on pro bono work is consistent with the need for modern legal education to ‘instill certain fundamental professional values’, as opposed to merely focusing on the acquisition of legal knowledge.

Corker identifies the following key objectives in promoting pro bono engagement by law students:

- To develop and nurture a commitment in law students to practice law in a way that promotes justice and fairness for all, particularly the poor and disadvantaged members of society.
- To provide legal services that benefit poor and disadvantaged members of society.
- To introduce law students to the workings of the legal profession and to meet, observe and work with practising lawyers involved in public interest work.
- To assist students to develop interpersonal skills in a professional environment.
- To provide students with practical experience in research, writing and advocacy in a legal environment.

In this sense the pro bono clinic enhances student skills that might otherwise be embedded in the curriculum. Other advantages for students are the ability to engage with and interview ‘real clients’ and deal with ‘real cases’, thereby developing their self-confidence and general communication skills in preparation for legal practice. Additionally, it is hoped that active participation in pro bono work will cultivate a sense of altruism in law graduates, which would ideally be carried over into their work ethic as lawyers. As noted above, McCrimmon cautions against the expectation that empathy will necessarily follow through into the work environment.

An Information Paper of the National Pro Bono Resource Centre found that, in 2004, pro bono or other volunteering activities for students

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46 The Bond Law Clinic provides free legal services to small businesses, entrepreneurs and non-profit organisations that cannot pay market rates. They are required to demonstrate why they are unable to pay market rates by disclosing their income and expenditure.

47 Booth, above n 27, 280.

48 Ibid 281.

49 Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 7.

50 These advantages are common to both CLE and pro bono work.

51 McCrimmon, above n 3, 68.
‘were organised or facilitated either through the law school faculty or law student society/association’ in 16 of the 29 law schools (55%) surveyed.\textsuperscript{52} There has been little organised research into the types of activities in which these students engage; however, it is apparent that pro bono activities usually involve free legal advice on a number of topics to individuals who cannot afford legal assistance, or pro bono activities where students work on projects for community organisations.\textsuperscript{53}

3 A Voluntary Initiative

While this article contends that the pro bono clinic offers students an opportunity for skills development and inculcation of professional values, it does not contend \textit{per se} that pro bono service should be a compulsory requirement for either graduation or admission to practice as a solicitor. At present there is no requirement in Australia for law graduates to complete pro bono work as a requirement for admission, although some have suggested that it should be the case.\textsuperscript{54} In the USA, some States have imposed compulsory pro bono requirements for law graduates. For example, the New York State Bar requires that law graduates complete at least 50 hours of voluntary legal work before being admitted to the legal profession.\textsuperscript{55} In the USA, at least 39 law schools require students to engage in pro bono or public service as a condition of graduation. These schools may require a specific number of hours of pro bono legal service as a condition of graduation (e.g. 20-75 hours) or they may require a combination of pro bono legal service, clinical work and community-based volunteer work.\textsuperscript{56}

\textsuperscript{52} National Pro Bono Resource Centre, \textit{Information Paper}, above n 15, 8.
\textsuperscript{53} See, eg, National Pro Bono Resource Centre, \textit{Setting Up a Pro Bono Program}, above n 36, which states that students in the University of Western Sydney Pro Bono Students program have worked in ‘law-related projects that seek to enhance access to justice for disadvantaged individuals or groups’.
\textsuperscript{55} See the New York State Board of Law Examiners, \textit{Mandatory 50-Hour Pro Bono Requirement} <http://www.nybarexam.org/MPB.html>, which explains that since 1 January 2015 candidates seeking admission to the New York Bar have to provide evidence showing that they have completed 50 hours of qualifying pro bono work, as required by Rule 520.16 of the Rules of the Court of Appeals. The approaches differ from State to State, see, eg, Florida International University, \textit{Pro Bono Brochure} (August 2014) <https://law.fiu.edu/wp-content/uploads/sites/21/2014/09/2014-2015ProBono_BrochurerevisedAug2014.pdf>, which states that law students in Florida are required to complete 30 pro bono hours.
\textsuperscript{56} See American Bar Association, \textit{Pro Bono Publico}, above n 7; See also Harvard Law School, \textit{Pro Bono Graduation Requirement} (2015) <http://law.harvard.edu/academics/clinical/pro-bono/index.html>, which states that Harvard Law School Juris Doctor students are required to complete 50 hours of pro bono work (which may include clinical subjects) before graduating.
Corker and Legg caution against the imposition of mandatory pro bono requirements in law schools:

To make it compulsory for an aspiring lawyer may dilute the honourable aspect of the pro bono ethos. Pro bono may become more about counting hours and minimum compliance than a genuine commitment to helping others in need.\(^{57}\)

There appears to be an inherent conflict in mandating pro bono work, which is generally regarded as voluntary work, although the US position reflects the view that the public good should prevail:

If pro bono is a core value of our profession, and it is, and if we aspire for all practising attorneys to devote a meaningful portion of their time to public service, and they should, these ideals ought to be instilled from the start, when one first aspires to be a member of the profession.\(^{58}\)

The US view was shared by the Commonwealth Attorney-General in 2013, when he stated that he felt:

very strongly that innovations such as compulsory pro bono requirements for students to be admitted as lawyers would enhance the sense of social justice in aspiring lawyers in universities around Australia, and help foster a pro bono culture, whilst also providing very valuable and practical legal experience.\(^{59}\)

It is not inconceivable that a greater emphasis on student pro bono engagement will foster a culture of social responsibility in law graduates.\(^{60}\) Comprehensive arguments have been made for and against imposing mandatory pro bono requirements in law schools, although this article does not specifically call for a mandatory approach.\(^{61}\) In order to justify a mandatory pro bono requirement in Australian law schools, further research would be required to establish the projected value and impact of such pro bono services, the cost of pro bono initiatives to government, students and law schools, and the underlying concerns of equity and diverse student cohorts.

McCrnimmon argues that ‘[e]ven if a clinical program is beyond the financial capacity of a law school, an obligation exists to perform some form of “institutional pro bono”.’\(^{62}\) Interestingly, McCrimmon further notes that the research suggests ‘[t]here is evidence, although not entirely uncontroverted, that law students’ altruism and interest in public service decrease more than do other professionals’ as a result of professional


\(^{58}\) Ibid, quoting New York Court of Appeals Chief Judge Jonathan Lippman.

\(^{59}\) See Corker, ‘Pro Bono Partnerships’, above n 54, 8, quoting The Honourable Mark Dreyfus QC.


\(^{61}\) McCrimmon, above n 3, 61.

\(^{62}\) Ibid 62.
school and practice.’\footnote{63} Specifically, in the Australian context, research has shown that ‘there is significant hesitation, possibly even a lack of sufficient interest, in working for the public good’\footnote{64} and that

\[\text{[s]imply participating in a pro bono program while at law school will not necessarily manifest in a willingness to engage in pro bono work following graduation. The experience must be monitored closely to ensure that the educational objective – that is, to foster or, in some cases, to inculcate, an ethic of volunteer service – is achieved.}\footnote{65}

This article acknowledges the concerns raised by McCrimmon concerning mandatory imposition of pro bono service, including the issues about funding of such programs. However, \textit{voluntary} pro bono service during students’ law degrees undeniably, at the very least, acquaints and familiarises them with the concept of community service, and with the benefits resulting from such experience. It may also be argued that changes in the employment landscape since McCrimmon’s observations some 14 years ago may have resulted in changes in students’ willingness to engage in pro bono work following graduation in order to boost their employability. Overall, the benefits of pro bono work may include a sense of personal satisfaction, due to the voluntary nature of their involvement, a practice-based learning experience and sense of achievement through real client contact, but also an opportunity to improve their resume, benefit from mentoring by experienced practitioners and build valuable networks. Provided the experience is a positive one – a voluntary decision and not a mandatory requirement – it is likely to result in a sense of heightened social responsibility in participants and to foster a culture of community service engagement once graduates enter into practice.

In Australia, the National Pro Bono Aspirational Target provides an incentive for law firms to engage their staff members in pro bono work.\footnote{66} This may be an advantage for work seeking graduates with past pro bono experience, should a firm have a strong pro bono focus and value a pro bono ethos in potential employees. It has been shown that engaging with volunteering opportunities can be a personally transformative

\footnote{63}{Ibid 63–64. See also Susan Daicoff, ‘Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism’ (1997) 46 \textit{American University Law Review} 1337, 1406; and Jane Aiken, ‘Striving to Teach “Justice, Fairness, and Morality”’ (1997) 4 \textit{Clinical Law Review} 1, 8, who asserts that legal educators ‘are actively training students to divorce themselves from issues relating to justice, fairness and morality.’}


\footnote{65}{McCrimmon, above n 3, 68.}

\footnote{66}{See National Pro Bono Resource Centre, \textit{National Pro Bono Aspirational Target} <http://www.nationalprobono.org.au/page.asp?from=&id=169> which explains that the National Pro Bono Aspirational Target is a voluntary target that law firms, individual solicitors and barristers can sign up to and strive to achieve the target of at least 35 hours of pro bono legal services per lawyer per year.}
experience,\textsuperscript{67} and it has also been suggested that volunteering is strongly linked to ‘a values based approach and enhances an individual’s leadership and teamwork skills, including resilience, courage and recognising one’s impact on others (which) augment the suite of employability skills that may have been more explicitly honed through other activities.’\textsuperscript{68} All of these attributes contribute to a strong and diverse employment profile in a law graduate. They also align with a number of the TLOs for LLB and JD degrees,\textsuperscript{69} as mentioned above.

It has also been recognised that some of the benefits offered by pro bono involvement may distinguish graduates in employment, such as increased skills, real-world experience and community engagement.\textsuperscript{70} A university run pro bono teaching clinic is the ideal venue in which to develop these attributes.

\textbf{C Overlapping Objectives}

Despite the distinctions between pro bono and CLE programs, it is clear that there is an inevitable overlap between the two models. Corker acknowledges that

\begin{quote}
[j]n many Australian law schools CLE programs take place in a community service setting and are deliberately established with a view to engendering a pro bono ethos in the participating students.\textsuperscript{71}
\end{quote}

Additionally, both models generally rely on placements or partnerships with community organisations or law firms\textsuperscript{72} (sometimes referred to as ‘externships’), and both facilitate dealings with ‘real’ clients and cases.\textsuperscript{73}

Styles and Zariski argue that CLE can instill law graduates with a ‘public interest’ oriented-focus, and define ‘clinical legal education’ to include participation in pro bono work and law reform activity.\textsuperscript{74} Similarly, as noted above, many US universities with pro bono stipulations accept completion of clinical subjects as satisfaction of their pro bono requirements.\textsuperscript{75}

There is merit in both models – the CLE model which is for academic credit, and the more informal pro bono program without formal academic credit – but a ‘hybrid’ model incorporating both pro bono work and specific learning and teaching outcomes provides students with an

\textsuperscript{67}Kinash et al, above n 1, 12.
\textsuperscript{68}Ibid.
\textsuperscript{69}Kift, Israel and Field, above n 21, 14.
\textsuperscript{71}Ibid 5.
\textsuperscript{72}See generally Evans et al, ‘Best Practices Australian Clinical Legal Education’, above n 4, for a discussion on CLE; see also National Pro Bono Resource Centre, Information Paper, above n 15, for a discussion on pro bono resources.
\textsuperscript{73}Ibid.
\textsuperscript{74}Irene Styles and Archie Zariski, ‘Law Clinics and the Promotion of Public Interest Lawyering’ (2001) 19 Law in Context 65, 66.
\textsuperscript{75}See, eg, American Bar Association, above n 7.
optimum practice-based learning experience. If such a program is conducted at the university premises, rather than externally, the benefits become even more pronounced due to the interaction of students, lawyers and academic staff in the faculty environment.

III CASE STUDY: A PRO BONO COMMERCIAL LAW CLINIC

A Nature and Scope of the Clinic

The Commercial Law Clinic (‘the Clinic’) run by the Bond Law Clinic at Bond University serves as an example of a pro bono teaching clinic that incorporates an effective service learning model. At Bond University, clinical subjects have been offered consistently as part of the LLB and JD curricula, 76 endorsing the practical benefits offered to students by the clinical experience. The Bond Law Clinic was established to complement the existing clinical training programs offered by the Bond University Law Faculty. Further, the Clinic sought to offer students the opportunity to undertake pro bono legal work within the sheltered environment of the law school, under the supervision of experienced legal practitioners. The Clinic is held at the Faculty premises and students are supervised by both academics (who attend to the administration and running of clinic sessions) and volunteer legal practitioners (who supervise students in client interviews and settle draft advices). 77

The Clinic was an initiative that challenged existing models of CLE programs and pro bono services, by merging pro bono service and experiential learning in a commercial law context. The Clinic was launched subsequent to the final Evans report, 78 but the report nevertheless provided evidence that the Clinic would be unique and distinctive. Specifically, the Clinic is the only purely commercial law pro bono teaching clinic in Australia, where students deal with real cases involving small business, entrepreneurship and not-for-profit organisations. In a recent report by the National Pro Bono Resource Centre, 79 where different models of delivering pro bono legal assistance were traversed, no other dedicated commercial law clinics were identified.

The Clinic was designed with this distinctive difference after auditing and reviewing Bond graduate outcomes, which revealed that applied experience with commercial law is a necessary employability attribute for students entering commercial law practice. 80 Practical commercial

76 Bond University currently offers the following clinical elective subjects: Clinical Legal Placement, Family Law Practice Clinic and Administrative Law Clinic.
77 The author is the Director of the Bond Law Clinic, see Franci Cantatore, About The Bond Law Clinic (2015) Bond Law Clinic Program <http://bond.edu.au/current-students/opportunities/bond-law-clinic-program>.
80 Kinash et al, above n 1, 6.
experience is often under-represented in Australian law curricula and is thus frequently missing from learning activities and resources. The Clinic, with its associated resources and learning activities, has remedied this absence for students at Bond University through the participation of experienced legal practitioners. In addition, it provides a valuable service to qualifying small business, non-profits and entrepreneurs throughout Queensland, entities and persons who would typically not be accommodated by Legal Aid or most other community legal centres. Currently 95 per cent of the two million actively trading businesses in Australia are regarded as small businesses under the Corporations Act 2001 (Cth) (‘the Act’). This is a large sector of the Australian economy, one that does not traditionally have access to free legal advice. The Clinic adheres to the Act’s definition of a small business, which defines it as a business having ‘less than 100 employees if a manufacturing business, and otherwise less than 20 employees; or no employees’. It provides free basic legal advice to these entities in relation to issues such as business structures, leases, debt recovery, intellectual property, sale and purchase of business advice, franchising and general commercial law matters.

The need for such a Clinic is borne out by the increasing number of referrals of clients by Legal Aid and other community legal centres to the Clinic, and the inability of the Clinic to keep up with a demand for its services. The value of the Clinic to small businesses seeking legal advice has also been recognised by the Queensland Government Business and Industry portal by the provision of a web link to the Clinic’s website.

Further research into the lack of government funding for pro bono clinics is desirable to explore the benefits of university run pro bono clinics in providing access to justice for disadvantaged parties. More recognition of the value of such university run clinics would also support the findings and recommendations of the 2014 Productivity Commission Enquiry Report about promotion and implementation of volunteer legal work.

81 Students are supervised by lawyers during client interviews, and academic staff offer additional assistance in guiding students in advice preparation. Although only some academic staff members in the Clinic have current practising certificates, all of them teach in areas of commercial law.
83 Corporations Act 2001 (Cth) s 761G.
84 Since its inception in 2013, all Clinic appointment times have been fully booked and the demand for appointments has outstripped the available appointment times. Client surveys conducted since the beginning of 2014 show that 75 per cent of all clients have been referred to the Clinic by the Legal Aid Board.
86 Such further research is currently being undertaken by the author.
Thus, the Clinic is a joint effort by the Faculty of Law and local legal practitioners to provide students with a practical learning opportunity in commercial law matters and to provide assistance to the community at the same time. The objectives of the Clinic are four-fold: first, to provide students with an opportunity to engage in pro bono legal work and promote a sense of community service; second, to provide students with practice-based learning to prepare them for legal practice; third, to provide small businesses, non-profits and entrepreneurs with much-needed legal advice and service; and fourth, to enable lawyers to engage in pro bono activities and provide community services and student mentoring. Although the Clinic was established as part of the student learning experience in the Faculty of Law, none of these objectives takes precedence over the other: the structure and operation of the clinic reflects a commitment to meeting each of these objectives in a consistent and meaningful way.\footnote{Also see Evans et al, ‘Best Practices Australian Clinical Legal Education’, above n 4, 5.}

B Structure of the Clinic

Integral to the successful operation of the Clinic is the involvement of its four foundational components, namely law students, legal practitioners, academic staff and clients. The relationship between these parties is reciprocal in respect of learning opportunities and provision and receipt of legal services, which creates a mutually beneficial and supportive framework for a successful pro bono enterprise. In the Bond Law Clinic the involvement of the Law Students Association has greatly assisted with the running of the Clinic in respect of marketing and student applications; however, the administration of the Clinic rests with an appointed academic who is responsible for the running of the Clinic, together with a part-time administrative assistant and other academics who volunteer as scheduled. In the Bond Law Clinic the appointed academic is an experienced lawyer who holds a practising certificate,\footnote{The academic in this instance is the author, who also practices as a consultant with a local law firm.} which ensures that the management of the Clinic is undertaken by someone with knowledge of the practicalities of legal practice. At no time do the students provide ‘legal advice’; the legal advice provided during interviews is given by the supervising lawyers (although students observe, and may participate in the interviewing process), and any written advices prepared by students are signed off by the lawyer before being provided to clients. Academics involved in Clinic sessions supervise the running of the Clinic and provide students with research and administrative assistance; however, they are not involved with the client interviews and thus do not require practising certificates.

As participation in the Clinic is entirely voluntary for the students, academics and lawyers, it provides students with the opportunity to provide a community service and engage in meaningful volunteer work while gaining practical work experience. The Clinic effectively integrates
key elements of CLE\textsuperscript{90} and pro bono programs.\textsuperscript{91} It has a pronounced focus on community service and volunteering, yet it also provides strong support for the development of legal skills (e.g. client interviewing, drafting, professional and ethical training, and the giving of high quality practical advice to clients). Students who volunteer commit a few hours on a fortnightly basis for the duration of a semester and are supervised by legal practitioners and academics during the operating hours of the Clinic. By the end of the semester, students have had the opportunity to interview real clients under professional supervision, conduct legal research and draft legal advice, interact with professionals from local law firms, be trained in ‘client know-how’ techniques and office processes, and receive professional and ethical guidance from experienced lawyers. It also provides them with opportunities for networking and building relationships with their peers and law firms, which is an important employability asset.\textsuperscript{92} Both volunteer lawyer and student volunteer groups receive training at the beginning of the semester in separate sessions, to acquaint them with the practice and procedures followed in the Clinic. To this end the Bond Law Clinic Volunteer Handbook sets out the duties and responsibilities of all participants in the Clinic. As part of their supervising responsibilities, volunteer lawyers provide students with timely and detailed feedback about client advices, and informal and immediate feedback about interviewing skills.

Although commercial clinics are not evident at other Australian universities, examples of specifically commercial law focussed clinics at universities in the USA include the Community Enterprise Clinic at Columbia University,\textsuperscript{93} and the Business Law Transaction Clinic at New York University (‘NYU’).\textsuperscript{94} Similar to the Bond Law Clinic, the Community Enterprise Clinic at Columbia University provides legal assistance to non-profit organizations and small businesses that cannot pay market rates for legal services.\textsuperscript{95} The Business Law Transaction Clinic at NYU also provides legal services to:

non-profit organizations, as well as to small businesses, entrepreneurs and social enterprises that may not have access to the traditional legal market and that operate in areas of concern to the public.\textsuperscript{96}

These clinics, however, differ from the Bond Law Clinic in that they are examples of CLE in a commercial law context, rather than pro bono

\textsuperscript{90} See generally Goldfarb, above n 20; Castles and Hewitt, above n 25; Curran, above n 26.
\textsuperscript{91} Kinash and Crane, above n 69, 28–29.
\textsuperscript{92} Ibid.
\textsuperscript{95} See Columbia Law School, above n 92.
\textsuperscript{96} See New York University Law, above n 93.
clinics. Students obtain academic credit for their involvement in those clinics, and they are subject to formal assessment requirements.  

C Developing a Pro Bono Culture in a Commercial Law Context

The importance of promoting a pro bono culture in Australian law students has been recognised, as well as the general obligation of legal practitioners to provide pro bono legal services. 

There are societal perceptions of lawyers as ‘sharks’, jokes which centre on lawyers’ avarice, and an erroneous idea that commercial lawyers are necessarily self-serving and intent on financial reward to the exclusion of worthier causes. This is not the reality, and many law students with an interest in commercial law have a strong sense of social justice and public interest issues. However, historically (and as reflected in the scope of different types of law clinics at Australian Universities), small businesses have rarely been recognised as deserving recipients of pro bono legal advice. Non-profits are in some instances benefited by student involvement in pro bono projects, but again many small non-profits and social enterprises are unable to access free legal advice about commercial law matters. Considering the high cost of legal services it can be onerous – and in some instances, unaffordable - for small home-run businesses or non-profit organisations to have adequate access to legal services when needed. This need has, for example, been recognised by the ACT government, which as established a free legal service for small businesses.

Students with a keen interest in commercial and corporate law are often unable to obtain any practical exposure to real clients and cases in a commercial context, other than during internships. Even in that context, they may be relegated to a specific department drafting contracts or researching specific areas of the law, without the opportunity for personal client contact. The Bond Law Clinic provides students with a unique

97 Ibid. See also Columbia Law School, above n 92. In both these clinics, students are required to attend weekly seminars and students generally participate in projects (subject to assessment), rather than engage with individual clients.
98 See Corker, ‘Pro Bono Partnerships’, above n 5, 8, quoting The Honourable Mark Dreyfus QC.
100 Raymond Wacks, Law: A Very Short Introduction (Oxford University Press, 2008) 108, quoting Mark Twain: ‘It is interesting to note that criminals have multiplied of late, and lawyers have also; but I repeat myself.’
102 See generally Ho, above n 78.
103 See, eg, University of New South Wales, above n 33; National Pro Bono Resource Centre, Setting Up a Pro Bono Program, above n 36, for a discussion of the University of Western Sydney Law School’s program.
opportunity to gain both pro bono and service learning experience in a commercial law context. It is envisaged that students exposed to this type of community service will be inclined to implement and continue this public service ethic once they enter practice, whether through a scheme such as National Pro Bono Aspirational Target, or as a local community service initiative to engage their firms in pro bono work.

D Challenges and Considerations

Relying on US pro bono research, Corker identifies the following issues that law schools should consider in establishing pro bono programs:

1. Finding the necessary funds.
2. Securing adequate staffing and space.
3. Location and structure of projects.
4. Should student participation be required or voluntary?
5. Relationship between clinical courses and pro bono projects.
6. Adequacy of supervision for students.
7. The importance of enthusiasm of law deans and faculties and rewarding the efforts of student leaders.

Mc Crimmon discusses the issue of funding in relation to mandatory pro bono programs in law schools, and notes that ‘[t]he cost to the faculty of maintaining a clinical program can be substantial.’ The proposed clinic structure can reduce the need for funding by the faculty, as it utilises existing resources (local lawyers, academics and students) on a pro bono basis. Currently no specific provision for external funding for pro bono university law clinics exists for Australian universities.

The requirements of staffing and space can be alleviated by using university law faculty staff and premises for the conduct of clinic training and appointments. For example, if the clinic is conducted in the evenings, tutorial rooms and offices can be used to conduct interviews. Supervision can be conducted by lawyers and academics as a pro bono activity.

A key issue is balancing the four clinic ‘ingredients’, namely lawyers, students, clients and academic staff. Enough volunteer lawyers are needed to ensure sufficient supervision, enough students are needed to volunteer to justify the running of the clinic and enough clients are needed to require the services offered to make the clinic viable. Academic staff involvement is also necessary in administering and running the clinic, preferably with the assistance of a professional staff member. The clinic

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105 See National Pro Bono Resource Centre, National Pro Bono Aspirational Target, above n 65.
106 Association of American Law Schools Commission on Pro Bono And Public Service Opportunities, above n 9.
107 Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 8.
108 McCrimmon, above n 3, 71.
109 The author proposes to undertake further research into the viability and benefit of allocating government funding to support pro bono university law clinics.
administration team is responsible for coordinating and administering the client appointments, rostering of lawyers and academics and appointment and training of students. This can be a significant burden for academic staff. The ability to apply their volunteer hours to their firms’ National Pro Bono Aspirational Target\textsuperscript{110} may be an incentive for lawyers to partner with law faculties in building a pro bono teaching clinic, and, indeed, a strong industry partner can alleviate the burden of the administration team by coordinating a team of volunteer lawyers. In the same way, allocating certain clinic responsibilities to law student associations can ease the administrative burden on academic staff. The enthusiasm of the Law Dean is an essential requirement for the successful execution of such an enterprise, both in building industry relationships and making students and staff aware of the individual and community benefits of service learning.\textsuperscript{111} It is also important that the structures for informal and formal student feedback are implemented in a structured manner as discussed above to maximise service-learning outcomes for students.

\textbf{IV \textit{Promoting Employability Through A Pro Bono Law Clinic}}

It has been well established that the habits of mind, work ethic, behaviours and professional identity learners develop through experiential opportunities in higher education are critical to their graduate employability.\textsuperscript{112} CLE has been lauded as providing opportunities for growth in these areas,\textsuperscript{113} but pro bono programs with their community service focus are also ideal vehicles to advance these attributes in law students. Although there may be a perceived tension between the idea of altruistic behaviour and promotion of graduate employability, these two propositions are not mutually exclusive, and can in fact go hand-in-hand. It is thus proposed that the Bond Law Clinic improves student employability by developing important aspects of their learning, but also serves to support a community purpose. As explained above, students volunteering in the Clinic undergo induction training about how to interview clients, conduct research in practice, draft legal advice and interact responsibly with clients, and are supported by Volunteer Practice Manuals setting out student conduct and ethical guidelines. Students are also provided with access to a secure database for the Clinic where client advice is stored, and are taught the importance of ensuring client confidentiality and ethical practice habits.

\textsuperscript{110} See National Pro Bono Resource Centre, \textit{National Pro Bono Aspirational Target}, above n 65.
\textsuperscript{111} Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 8.
\textsuperscript{112} Mantz Yorke and Peter Knight, ‘Embedding Employability into the Curriculum’ (Learning and Employability Series 1 and 2, Higher Education Academy, 2006) <http://www.employability.ed.ac.uk/documents/Staff/HEABriefings/ESECT-3-Embedding_employability_into_curriculum.pdf>.
\textsuperscript{113} Evans et al, ‘Best Practices Australian Clinical Legal Education’, above n 4, 5.
A Assessment

Assessment mechanisms can be indicative of the success of the learning process in a clinic. Although there is no summative assessment of student pro bono work in the Clinic, students are engaged in the following learning activities in the Clinic, under supervision of legal practitioners and academics, during the course of the semester:

- Receiving induction training in professional communication with clients, interviewing skills, ethics, client file management and confidentiality.
- Interviewing commercial law clients;
- Conducting legal research in relation to a specific commercial law issue/problem.
- Drafting advice and receiving feedback from supervising solicitors on their draft advice.
- Drafting fact sheets for use in the clinic under supervision of academics and receiving feedback on drafting skills.

Significantly, students benefit from the following formative assessment processes:

- Students receive personalised feedback from supervising solicitors about each piece of interviewing, research and advice that they attempt, as well as copies of the model advice issued to the client after finalisation by the solicitor.
- At the beginning of each Clinic session the problems and issues of the previous week are discussed so that all student volunteers can learn from the experience.
- Students receive feedback about and assistance with drafting of fact sheets from academic staff during the semester.
- Students are asked to complete a survey reflecting and commenting on their experience at the end of each semester.

More formal in nature is the ability of law students to claim ‘work experience points’ for their ‘Beyond Bond’ core degree requirement.114 ‘Beyond Bond’ is a Bond University initiative that requires completion of a ‘work experience’ component by all undergraduate Bond students prior to graduation. This connection between the Bond Law Clinic and Beyond Bond demonstrates how the Clinic assists students to be work-ready. Students can claim 20 points per semester for volunteering in the Clinic. As students may volunteer in the Clinic for up to 2 semesters, they can earn 40 (out of 100 required credit points to satisfy the core requirement) for volunteering in the Clinic. Beyond Bond also mandates a non-graded 1,000 word essay by the student reflecting on the value of their experience and indicating how their experience enhanced their

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employability skills.\textsuperscript{115} Reflection has been recognised as an important part of the learning experience.\textsuperscript{116}

In addition to the practical skills developed within the ambits of the Clinic, students also undergo a formal application process\textsuperscript{117} for volunteering positions, similar to a job application. The application process and interviewing of shortlisted applicants acquaint students with the rigours involved in applying for work in practice. This approach equips participants with a further employability skill, namely how to effectively secure employment, thus preparing them for the ‘real world’.

The cumulative effect of these activities serves not only to create experiential learning opportunities and increase student confidence and communication skills, but also to promote students’ employability.

B Evidence of Success

Although the Bond Law Clinic has only been operational for two years, there is some qualitative evidence from both students and the profession to support the contention that student employability is improved through participation in the Clinic.

1 Student Feedback

Students are surveyed at the end of each semester by way of a short electronic survey on SurveyMonkey to obtain their feedback about their Clinic experience. The survey feedback from volunteer students over the past two years has been positive, without exception, and most students have indicated in their comments that the Clinic assisted them with employment skills and work readiness. Although the evidence to date is largely anecdotal, the positive student comments reflect the value of the experience for participants.

Students described how the Clinic increased their work skills. For example:

The BLC helped me able to engage with a range of people, and my client interview skills developed very quickly because of the volunteer position. I have a current volunteer internship with The Tax Institute and they were particularly interested in the BLC program because a lot of the responsibilities in this role are similar to those in the BLC. I am able to use those skills: administration, time management, report-writing and response to solutions and client-interviewing in this role, and didn’t

\footnotesize{\textsuperscript{115} Ibid.}
\footnotesize{\textsuperscript{116} David Boud, Rosemary Keogh and David Walker, ‘Promoting Reflection in Learning: A Model’ in Richard Edwards, Ann Hanson and Peter Raggatt (eds), Boundaries of Adult Learning (Routledge Publishing, 2013) 32.}
\footnotesize{\textsuperscript{117} The application is based on a cover letter, academic transcript and the student’s resume, weighted equally.}
require additional training because they felt my skills had developed to the appropriate level.\textsuperscript{118}

BLC was a perfect way to start developing my professionalism. My readiness to work in a fast paced legal environment has exceptionally excelled. I learnt invaluable skills by drafting legal advice, participating in interviews and even just talking amongst the lawyers themselves. It was a time I will never forget because work keeps bringing my mind back to the practical skills I learnt!\textsuperscript{119}

Other students commented on their increased confidence and improved communication skills, as well as the Clinic’s role in helping them to obtain employment:

The Bond Law Clinic was crucial to giving me the confidence in interviews to demonstrate I have had practical experience outside the classroom. It provided a level of comfort for me to attack and approach a client's case because of the different challenges I faced with the clinic. Interviewing clients, writing letters of advice and doing legal research, were all key components which I felt were beneficial for my current position.\textsuperscript{120}

I am currently undertaking an internship as a paralegal and also secured three clerkships with three different top tier law firms. The Bond Law Clinic a significant role in enabling me to obtain all of these things - it was brought up by my interviewer in every single interview I attended and I was able to speak about my experience working in the pilot program as an administrator, seeing the range of problems that the clinic dealt with, the way the other law students researched and delivered information to the clients, and the extreme levels of professionalism required by a law firm in all correspondence and interactions.\textsuperscript{121}

Another student described how the Clinic helped to prepare her for her current legal position:

BLC helped to develop my personal interaction skills. I was a Business Development Manager at the BLC, and so I was required to greet and assist all clients that came in for consultations from the moment that they arrived. This forced me to be calm and confident in communicating with strangers, and developed my initiative in understanding and responding to a variance of different requests and enquiries. At work I am constantly required to communicate to senior level lawyers and partners and respond

\textsuperscript{118} Email communication to author from Bond University Law Graduate (Semester 153, December 2015), who has been accepted into a Professional Legal Training Program since volunteering in the Bond Law Clinic in 2015.

\textsuperscript{119} Email communication to author from Bond University Law Graduate (Semester 152, May 2015), who secured an internship and placement since volunteering in the Bond Law Clinic in 2015.

\textsuperscript{120} Email communication to author from Bond University Law Graduate (Semester 152, May 2015), who secured a legal placement since volunteering in the Bond Law Clinic in 2015.

\textsuperscript{121} Email communication to author from Bond University Law Graduate (Semester 153, September 2015), who secured an internship and three clerkships since volunteering in the Bond Law Clinic in 2015.
to their instructions and questions. I feel that I can hold myself more comfortably in both professional and social situations.  

2 Legal Practitioner Feedback

The feedback from the lawyers volunteering at the Bond Law Clinic has also been positive without exception.  

The feedback from the lawyers volunteering at the Bond Law Clinic has also been positive without exception.  

It may be said that their support of the Clinic is in itself a validation of its perceived value in the profession.  

When asked whether the Bond Law Clinic experience would be viewed as an advantage or positive benefit for graduates if they were applying to their firms for work, the lawyers participating in the Clinic all answered in the affirmative.  

Additionally, they were all of the view that the Clinic experience contributed to students’ employability skills and made them more practice-ready. Some lawyers commented as follows:

The more experience a student has with real life cases and client interaction the better. Further, to be accepted into the program is also evidence of the student’s excellence in their studies, initiative to apply, ambition to further their education by volunteering their time and willingness to learn from and make connections with legal professionals in practice.

Employability often goes hand in hand with confidence and personality. The more experience the student has the more practice ready they will be, because their confidence in different legal situations with actual clients is increased by their experiences at the Bond Law Clinic.

Although academic grades only count for one third of the application process, as explained above, the first lawyer’s comment indicates that lawyers may regard students’ participation in the Clinic as evidence of academic achievement. This is not strictly true as social justice motivation reflected in a compelling cover letter would be a strong consideration when shortlisting applicants. The legal practitioner feedback, although anecdotal, is however particularly significant, in light of the fact that the number of law students in Australia has doubled between 2004 and 2014, with more than 12,000 graduates entering a job market which has only approximately 66,000 practising solicitors.  

In a broader context, recent

122 Email communication to author from Bond University Law Graduate (Semester 152, May 2015), who secured a part-time clerkship with a top-tier law firm whilst completing his studies, since volunteering in the Bond Law Clinic in 2015.
123 Currently five law firms send volunteers to the Bond Law Clinic, namely Minter Ellison Lawyers, Cronin Litigation Lawyers, MBA Lawyers, The Stone Group and Ivan Poole Lawyers.
124 Ibid.
125 Email communication from Bond Law Clinic lawyer to author, 3 August 2015.
126 Email communication from Bond Law Clinic lawyer to author, 3 August 2015.
figures released by Graduate Careers Australia (‘GCA’) indicate that only 68% of bachelor graduates from the class of 2014 had a full-time job 4 months after graduating, the lowest rate since 1982, when GCA began measuring employment statistics.\(^{128}\) These figures support the contention that law graduates today need to distinguish themselves from their peers to be assured of strong employment prospects.

V CONCLUSION

With increasing competition for law graduate positions,\(^{129}\) it has become paramount that law students enhance their employability as much as possible during their law degree. This article has suggested that students develop a higher level of work-related skills and thus increase their employability through engaging in voluntary work in a pro bono teaching clinic. It has been shown that CLE opportunities currently exist in most Australian universities, but pro bono clinics run by university faculties are a relative rarity, a phenomenon that needs to be further explored as a teaching opportunity.

As early as 2001 the ALRC stated that:

Australian law schools should be encouraged to support programs that (a) highlight the legal profession’s service ideal and promote a pro bono legal culture, and (b) enable students to acquire ‘high order professional skills and a deep appreciation of ethical standards and professional responsibility.’\(^{130}\)

It appears that Australian law schools have not yet adequately explored the benefits to be gained from engaging students in pro bono service, compared to other jurisdictions such as the USA.

Furthermore, the National Pro Bono Centre also advocates the introduction of pro bono education in law schools:

This Centre would argue that CLE and student pro bono activity are vital components of a comprehensive social justice education at law school. They should both exist in all law schools in Australia so as to provide a proper legal education for students. It is important that they be managed as complementary activities, occurring in close cooperation with each other.\(^{131}\)


\(^{129}\) Tadros, above n 125.


\(^{131}\) Corker, ‘PBSA Fit with Clinical Legal Education in Australia?’, above n 5, 6.
Again, this has not occurred. Despite student-based programs such as PBSA, there has been no concerted effort to promote the introduction of pro bono activities in Australian law schools. There may be a case for government funding to be provided in respect of such pro bono initiatives in law schools and for a more cohesive approach, which could be aptly administered by the National Pro Bono Scheme. This article has laid the foundation for further research in this area, which will be required to establish the viability of implementing pro bono law clinics in universities nationally, as little empirical research currently exits regarding the effective learning outcomes of pro bono student activities. Clearly, to maximise the impact and learning outcomes of pro bono clinics, a cohesive and structured approach will be required across higher education institutions, together with targeted qualitative research to implement an effective strategy.
‘FAVOURABLE VARIATIONS’: TOWARDS A REFRESHED APPROACH FOR THE INTERVIEWING CLASSROOM

JANE CHING*

I INTRODUCTION

This article is derived from a panel presentation that was developed for the ninth Global Legal Skills conference held in Verona in May 2014.¹ Our law school has a broad range of students: undergraduate, vocational, postgraduate, and research students. This includes both students who are new to the law and students who are already experienced practitioners. The law school also teaches students who wish to qualify into three of the eight legal professions regulated under the Legal Services Act 2007 in England and Wales.² Members of most of these groups, however, are expected to ask questions and to provide advice to clients, which may be called ‘interviewing’, ‘interviewing and advising’, ‘client counselling’ or ‘conferencing’. Consequently we chose interviewing as the theme for the panel and, in this article, ‘interviewing’ will be used as a generic term. Within this umbrella topic, however, we also began to notice differences between the student groups in the way they approached this activity. The aspiring solicitors were students on a broad-based Legal Practice Course as a precursor to a training contract in the workplace, in most cases studying full-time. They were likely to have limited, if any, prior experience in legal practice. Typically, they focussed heavily on the questioning stage of the interview and expressed concern about the stage

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² In alphabetical order: barristers, chartered legal executives, costs lawyers, licensed conveyancers, notaries, patent attorneys, registered trade mark attorneys and solicitors. In addition, some accountancy professions are regulated for the purposes of providing legal advice under the Act.
where they were expected to advise on the law. By contrast, the aspiring trade mark attorneys were taking the specialist Professional Certificate in Trade Mark Law and Practice course in parallel with employment in the intellectual property sector. Typically they moved very quickly into advising on their client’s specialised problem, without giving the client a great deal of time to explain concerns and objectives.

Much academic work in interviewing is, however, focussed not on the difference between students, professions, career stage, problems or clients, but on standardisation and consistency. For example, the British Columbia protocol,3 similar to the Calgary/Cambridge model used in medicine,4 has been developed as a core tool for teaching and assessment. The standardised clients’ initiative, drawing from work in medicine, is designed to achieve greater consistency in assessment.5 In this article, however, the author wishes to explore the concept of variation, rather than consistency, as a means of reinvigorating the teaching of interviewing. The activity is, therefore, first viewed through the lens of threshold concepts as a way of establishing its disciplinary significance and ‘troublesomeness’. The idea of variation theory is then proposed as a way of helping students to transcend this threshold in the classroom. It is argued that a variation theory approach can help students develop confidence in dealing with the interplay of variables within a client’s problem and facilitate development by them of an ethical and professional theory of practice. In order to do so, a starting point is to examine what exactly it is that one is teaching.

II What Is ‘Interviewing’?

In England and Wales, ‘interviewing and advising’ or ‘conferencing’ is a required component of the vocational stage of professional education for barristers, solicitors and trade mark attorneys. In the USA, the activity is known as ‘client counseling’. ‘Client consultation’ has been adopted as a global term by the Louis M Brown and Forrest S Mosten International Client Consultation Competition.

In Australia, interviewing and advising is covered in simulation in practical legal training (PLT) courses linked to the APLEC competencies, Graduate Certificates and Diplomas in (Professional) Legal Practice, the Tasmanian Legal Practice Course, and with real clients in work placements and clinics connected with such courses. Where periods of articles, traineeship or other supervised legal training are required, or are an alternative to PLT, entrants will, of course, be exposed to the activity in the workplace as they are in the post-Legal Practice Course training contract in England and Wales. Where PLT is incorporated into the LLB or JD, it may appear in distinct units (as in the University of Newcastle’s JD/GDLP). Alternatively, as in the second year Torts module offered by Flinders University in its Bachelor of Laws and Legal Practice course, the skill may be integrated with another topic. This uses the legal topic as a context for development of the skill, which is introduced in a first year unit. In New Zealand, interviewing and advising occupies at least 23 hours of the required Professional Legal Studies course and 10% of its assessment.

Prior to the vocational stage, the picture is more diverse. Clearly where an Australasian LLB/JD program mandates or offers work-integrated learning, a placement or a clinic, students will inevitably be

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6 This term is used by the Bar in England and Wales in recognition that interaction has, historically at least, been with another professional, usually a solicitor, rather than with a lay client.

7 It is sometimes available at undergraduate level: see for example: Mary Holmes and Judith Maxwell, ‘The Use of Role Play and Video in Teaching Communication Skills to Law Students’ (1987) 5 Journal of Professional Legal Education 151. In my own institution, it is included in the third year Preparation for Professional Practice module.


exposed to client interviewing in a real world context. In the classroom, mediation, negotiation and advocacy are more likely to appear as distinct units in LLB/JD programs than interviewing, although, as at Flinders, the skill may be used as a teaching vehicle for other material. That said, Bond University includes client interviewing in a compulsory legal skills module; Victoria University has a mandatory third year course combining interviewing and negotiation skills and the University of Wollongong offers a compulsory communication skills course which includes some aspects of interviewing. Outside the formal curriculum, competitions may be organised by student societies: this is the case at La Trobe, Melbourne, Otago and the University of New South Wales. These may feed into the national competitions held by the Australian Law Students’ Association and New Zealand Law Students’ Association, and thereafter into international competitions.

Clearly, after qualification, employers and individual solicitors may undertake continuing professional development which includes a focus on interviewing skills as well as informal learning in practice. This article, however, is principally concerned with the treatment of the skill at an introductory stage and with the classroom teaching of interviewing.

Where interviewing is carried out in a classroom simulation or in competition at this introductory stage, a conventional approach is to require students to both ask questions and provide initial advice on the same occasion during a thirty-minute appointment. The client may be played by a student, staff member or trained standardised client, working from a brief. The student may have been given very limited, if any, prior information about the client’s problem. He or she is expected to introduce the appointment effectively; question the client about the problem, their concerns and goals; provide initial advice on the relevant law; work with the client to explore a range of possible solutions and conclude with a

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23 See, for example, Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 reg 6.1.3. Skills are not referred to specifically in the New Zealand equivalent, but are by no means excluded: Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013.
clear list of next steps. The student may be encouraged to use a protocol setting out the structure and components of a ‘good’ interview.²⁴ Such a protocol may also be used as the assessment criteria and will, by definition, represent a particular concept of a ‘good interview’ normally one that is ‘client-centred’.

This model is, however, not necessarily consistent with modern practice. In many areas of practice, it is increasingly rare for the lawyer to have such limited prior knowledge about the problem, or for a lawyer to provide extempore advice. It is also increasingly rare that lawyer-client interaction is face to face. The classroom activity may be isolated in some courses from follow up activities such as retainer letters and attendance notes or taking the steps (such as writing a letter to an opponent) that have been agreed in the interview. There is a risk, in addition, that over-reliance on interviewing protocols could become a highly formalised end in itself, divorced from legal practice.

While the protocol has a useful role in signalling what is important and as a starting benchmark,²⁵ such over-reliance can produce simplistic rote responses;²⁶ lead to unthinking recourse to a pre-determined list of do nothing / negotiate / litigate as solutions;²⁷ and override a student’s


²⁵ For example, the authors of the Carnegie Report, taking a largely cognitive approach to the development of expertise, comment: ‘Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use … But the opposite is not possible: the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis’. William M Sullivan et al, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass, 2007) [electronic edition] location 1675.

²⁶ For example: ‘My name is Alex and I’m a trainee solicitor at [name of firm]. Can I just reassure you that everything you tell me today will be confidential? Have you ever been to see a solicitor before?’ In fact, the relevant rule of conduct provides for exceptions to the duty of confidentiality ‘when required … by law’: Solicitors Regulation Authority, SRA Handbook - Code of Conduct - Confidentiality and Disclosure <http://www.sra.org.uk/solicitors/handbook/code/part2/rule4/content.page>.

²⁷ Body language, in the author’s experience, may give away the novice student’s preferences, even if she or he is nobly attempting to set out the advantages and disadvantages of each solution to enable the client to make an autonomous decision. ‘Do nothing’ and ‘litigate’ seemed frequently to be accompanied by a minuscule shake of the head, but ‘Or I could write a letter …’ with a vestigial nod.
normal empathy. It may therefore, it is argued, detract from development of an informed personal approach to practice.

The craft of interviewing, as taught in law schools, often seems to be home-grown. There exists useful work in other disciplines; for example, therapeutic counselling, and social work, psychology and cognitive science, linguistics and conversation analysis; probability and risk analysis; and, from medicine, substantial activity in the creation.

28 Julian S Webb and Caroline Maughan, Teaching Lawyers’ Skills (Butterworths Law, 1996) 93 provides the following example: ‘Client (clearly distressed): “My mother died two weeks ago.” Lawyer: “Right. Have you brought the death certificate?”’.

29 Contrast in this some of the medical equivalents, which make explicit reference to the personality and norms of the advice-giver as a component of the interview. For example, Royal College of General Practitioners, The GP Consultation in Practice (May 2014) <http://www.gmc-uk.org/2_01_The_GP_consultation_in_practice_May_2014.pdf_56884483.pdf> 12; Hanneke CJM De Haes, Frans J Oort and Robert L Hulsman, ‘Summative Assessment of Medical Students’ Communication Skills and Professional Attitudes through Observation in Clinical Practice’ (2005) 27 Medical Teacher 583.


34 Smith, above n 33.


evaluation and meta-analysis\textsuperscript{37} of protocols. However, this work appears, in the author’s experience, to be unfamiliar to lawyers in practice and comparatively rare in the classroom.\textsuperscript{38} The contribution of personality type,\textsuperscript{39} learning style\textsuperscript{40} and possibly gender,\textsuperscript{41} the implications of affect,\textsuperscript{42} empathy\textsuperscript{43} as distinguished from sympathy\textsuperscript{44} and emotional labour,\textsuperscript{45} and
the demands of intercultural communication are all topics that could be drawn upon to enhance teaching of the activity.

Increased attention to the teaching and assessment of interviewing is strongly justified. The activity requires a student to combine skills, knowledge and (professional and ethical) attitudes in establishing rapport with a (possibly difficult) stranger; listening and questioning; knowledge of the law; ability to ‘teach’ the law to the client; knowledge of the real world; evaluating advantages and disadvantages of possible solutions; and management of clients’ expectations. The student is also expected to behave professionally and ethically while doing so. Interviewing is, therefore, both an intense microcosm of legal practice and an opportunity to experience the impact of substantive law on individuals. It represents a very clear example of integration of the three ‘apprenticeships’ identified in the Carnegie review of North American legal education: the intellectual and knowledge-based; the practice-based; and the ‘apprenticeship of identity and purpose’.

Its significance is reinforced when it appears in the competence frameworks of employers and professional bodies. A good interview

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47 It may have been more explicit in some of the earlier approaches, as here, where the course was originally taught by counsellors and included an explicit reference to dealing with difficult people: Gary Tamsitt, ‘Methods of Instruction in Interviewing and Counselling and Negotiation’ (1986) 4 Journal of Professional Legal Education 33.


51 Sullivan et al, above n 25, locations 427, 429 and 432.

by a novice could, indeed, be treated as a kind of professional apprentice piece. The protocols are extremely useful, and even necessary for novices, but they are not sufficient. If they allow students and teachers to reduce interviewing to a sequence of rehearsed calls and responses, they may be dangerous. Interviewing is more complex, more difficult and more nuanced than this: it is a ‘threelfold movement between law as doctrine and precedent … to attention to performance skills … and then to responsible engagement with solving clients’ legal problems …’54 A way of recognising this, and re-envisioning and refreshing the interviewing construct, is to relate it to ideas about threshold concepts.

III IS IT USEFUL TO THINK OF INTERVIEWING AS A ‘THRESHOLD CONCEPT’?

A threshold concept, as identified by Meyer and Land55 in work from 2003 onwards, is one which is specific to a discipline and at least likely to be:56


54 Sullivan et al, above n 26, location 1766.

a) transformative (occasioning a significant shift in the perception of the subject);
b) irreversible (unlikely to be forgotten, or unlearned only through considerable effort);
c) integrative (exposing the previously hidden interrelatedness of something); and
d) troublesome.57

Proposals for threshold concepts in law58 have included the rule of law and precedent, 59 uncertainty, 60 ‘analogy, materiality, responsibility, allocation of risk’,61 ‘contingency’,62 research63 and ‘malleability’.64


57 Slightly simplified from Meyer Land, ‘Threshold Concepts and Troublesome Knowledge (2)’ above n 55, 373-4. Other factors which have been used in delineating threshold concepts are liminality (see Ray Land, Julie Rattray and Peter Vivian, ‘Learning in the Liminal Space: A Semiotic Approach to Threshold Concepts’ (2014) 67 Higher Education 199, reconstitution (ie, a change in identity or ontology); boundedness (confined to only a single aspect of the discipline); and the idea that mastery of a threshold concept ‘will incorporate an enhanced and extended use of natural, symbolic or artificial language in a manner that characterises particular disciplinary discourses’: Caroline Baillie, John A Bowden and Jan HF Meyer, ‘Threshold Capabilities: Threshold Concepts and Knowledge Capability Linked through Variation Theory’ (2013) 65 Higher Education 227, 229.

A Can a Skill be a Concept?

Of the list above, only one item, ‘research’ is clearly a skill. There is, however, necessarily skill involved in recognising a concept, and concepts are necessary underpinnings to the exercise of skills. Indeed, it has been argued that ‘practical elaboration into the domains of applied strategies and mental models’ – that is, application – should be an additional characteristic of a threshold concept in any event. Weresh argues, however, that ‘legal reasoning’ is too extensive to be treated as a single concept. She provides a list of components of ‘thinking like a lawyer’ based on the understanding and analysis of legal arguments and their application to facts, but also referring to alternative courses of action and taking a ‘client-centred approach’ which are relevant in interviewing. The skills of legal reasoning and ‘thinking like a lawyer’ might, consequently, be described not as single concepts but as bundles that represent a ‘way of thinking and practising’ in the discipline. ‘Legal reasoning’, has, however, been selected as a threshold concept for

(eds), Information Experience: Approaches to Theory and Practice (Emerald Group Publishing Limited, 2014) vol 9, 239 - could also be applied to some aspects of legal activity.


60 ‘[T]he key threshold objective in the learning of law was identified as being able “to think like a lawyer” – this includes an understanding of uncertainty, that there is not necessarily a quick or simple or one right answer, but extends more broadly to accepting different ways of arguing and different possibilities for analysis of the facts and problem at hand’: Åkerlind et al, above n 58, 2.

61 Webb, above n 58.


63 Weresh, above n 58, 713.

64 ‘[T]he latitude a lawyer has in articulating legal principles’: ibid 710.


67 Weresh, above n 58, 709.

68 Ibid 707.

69 O’Donnell, above n 56, 9 (an economist) criticises threshold concepts envisaged in this way as inappropriately normative: “‘Thinking like an x’ means thinking in the conceptual categories foundational to the currently dominant discourse in x, and also practising x in the standard ways. It then becomes contrary to one’s training to view the world through other lenses, or even to do x in ways which depart from professionally sanctioned frameworks.”

substantial work in Australia, and giving advice to a client used as a vehicle to explore it. Ricketts identifies use of threshold concepts as fostering ‘[a] sceptical approach to legal knowledge (and to the assumptions that traditionally accompany it)…’ Recognition of uncertainty and malleability of law have already been suggested as threshold concepts. Indeed, the authors of the Carnegie report suggest that ‘[t]he mark of professional expertise is the ability to both think and act well in uncertain situations’. Interviewing involves dealing with uncertainty and malleability, and demands a degree of scepticism. By definition, acting as a lawyer in an interviewing situation engages ‘way[s] of thinking and practising’ in the discipline.

Baillie et al take the relationship between threshold concepts and skills further by blending threshold concept theory with capability theory to provide a proposal for ‘threshold capability’. This incorporates the underpinning threshold concepts (the ‘what’) with development of professional skills-oriented capabilities (the ‘how’), and acknowledges the need for a trajectory of learning within that skill. They argue that it leads to ‘knowledge capability’ (‘a personal sense of oneself as a professional’) that is consistent with the disciplinary-specific nature of threshold concepts as well as with the third cognitive apprenticeship suggested in the Carnegie Report.

There is nothing in principle, therefore, to prevent a skill such as interviewing being treated as a threshold concept or as a bundle of threshold concepts. As a demonstration not simply of thinking like a lawyer but acting like a lawyer, interviewing also engages capability.

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71 Åkerlind et al, above n 58; Australian National University, Queensland University of Technology and University of Technology Sydney, ‘Law Case Study’ on Threshold Concepts and Variation Theory (2011) <http://thresholdvariation.edu.au/content/law-case-study>.
73 Ricketts, above n 58, 9.
74 Given the reliance earlier in this paper on medical examples, and the similarity between some of the legal protocols and the medical consultation protocols, this factor has been identified as a critical difference between medical reasoning in diagnosis and treatment, and legal reasoning: ‘Both professionals advise their clients and both make professional decisions; and, of course, both may turn out to be wrong. Yet “wrongness” here is not the same. …the doctor’s wrongness will be determined by the facts themselves and this falsification will, if definitively established according to scientific method, be accepted (finally) by everyone in the community of medical science. A lawyer’s wrong prediction is not a wrongness that attaches just to the facts of the litigation problem; it attaches as much to how the judges have manipulated the (virtual) facts distilled from the litigation facts.’ Geoffrey Samuel, ‘Is Legal Reasoning like Medical Reasoning?’ (2015) 35 Legal Studies 323, 347.
75 Sullivan et al, above n 25, location 184. Consequently they identify ‘enabling students to learn to make judgments under conditions of uncertainty’ as one of the six core tasks of professional education: Ibid location 347.
76 Baillie, Bowden and Meyer, above n 57.
77 Ibid 239.
B Thresholds and Portals

A threshold concept can be considered as akin to a portal, opening up a new and previously inaccessible way of thinking about something. It represents a transformed way of understanding, or interpreting, or viewing something without which the learner cannot progress.\(^{78}\)

It is suggested that interviewing is such a portal for two reasons. First, as a microcosm of practice, it requires the student to deal with law, facts, client objectives and the interplay between them in a way that is uncommon in academic legal education. Secondly, because the outcome relies on evidence presented by the client and extracted by the student, it exposes students to ambiguity and to their own role as lawyer in determining an appropriate solution for the client. The fact that a client might not provide reliable information, or that the most obvious legal solution may not be appropriate because the client cannot afford it, are examples of transformed ways of understanding which are necessary for effective practice. The link to effective practice is significant, as the threshold here is not, as it is for some of the other candidates for threshold concepts in law, at the beginning of legal study.\(^{79}\) If a threshold concept can be a bundle of skills and abilities, or a ‘threshold capability’ in its own right, then it follows that there must be an initial realisation – here, of the implications of the interplay and ambiguity – which supports a trajectory in developing increased skill thereafter.\(^{80}\)

Proponents of threshold concepts acknowledge that there is variation in what students bring to their learning (‘pre-liminality’)\(^{81}\) and this, it is suggested, affects the nature of the threshold. The specialist trade mark attorney students, for example, are already secure in their technical knowledge and professional demeanour because they are already in the workplace. However, the idea that it could be useful to allow the client space to explain, and investigating by asking more than a perfunctory number of questions, was often highly problematic for them. On the other hand, the aspiring solicitors were anxious to ask, and reluctant to provide initial advice on areas of law that they, possibly, felt they had forgotten. Understanding the students’ initial position supports an understanding of the transformative nature of the activity.


\(^{79}\) Weresh, above n 58, 708.

\(^{80}\) O’Donnell and Rowbottom both have difficulties with the idea of the ‘threshold’ not as a limit to be breached but as a stage of progression, particularly where failing to make the breakthrough, or to make it in a particular way, does not prevent passage to the next stage: O’Donnell, above n 56, 7.

\(^{81}\) Meyer and Land, ‘Threshold Concepts and Troublesome Knowledge (2)’ above n 55, 384; Land, Rattray and Vivian, above n 58.
C Transformative

Weresh\(^{82}\) and Barradell\(^{83}\) agree that transformativity (strongly related to troublesomeness) is, of all the suggested characteristics, the most prominently identified in discussions of the threshold concept paradigm. Over-reliance on a protocol, if it results in routinised and over-rehearsed performance, produces convergence, as if adherence to the structure and use of a small repertoire of pre-determined solutions was in fact sufficient for practice. Reconceptualising the activity in terms of threshold concepts allows us to aim higher: to a personalised,\(^{84}\) ethical and creative professional practice as an inherent part of the Carnegie Report’s second and third cognitive apprenticeships. This is, of necessity, transformative.

D Irreversible and Integrative

The requirement of irreversibility demands that, once the threshold has been passed, there is no going back. It is suggested that, provided there is no over-reliance on a protocol, once a student has experienced the implications of the interplay of law, facts and client as a precursor to real legal practice, this cannot be undone. Where Baillie et al’s blended capability approach provides a useful supplement to build on the epiphany involved in transcending the threshold is in making a clear linkage with skills and activities and in seeking to provide students with the capability for what has been referred to as ‘post liminal variation’.\(^{85}\) This involves a rather more positively framed capability to deal with new problems and new people as part of a trajectory of learning extending past the vocational classroom into practice. As the preceding discussion has indicated, interviewing necessarily involves integration of legal knowledge with skills in investigation and in advising, and also in orality, empathy,\(^{86}\) ethics and personal relationships. As the authors of the Carnegie Report put it, ‘knowledge, skill and judgment become literally interdependent: one cannot employ one without the others, while each influences the others in ways that vary from case to case.’\(^{87}\) The need to integrate is why interviewing is troublesome.

E Troublesome

Interviewing deserves attention because it is troublesome. This troublesomeness is blurred by over-reliance on protocols which suggest that all that need be mastered is a suitable performance, in the correct

\(^{82}\) Weresh, above n 58, 695.
\(^{83}\) Barradell, above n 71, 267.
\(^{84}\) The authors of the Carnegie Report see discussion of the differing roles of the lawyer, conflict between them and student awareness of ‘not only the various sorts of lawyer they might become but also of the various kinds of approaches they can take toward lawyering itself’ as key components of the second cognitive apprenticeship. Sullivan et al, above n 25, location 1868.
\(^{85}\) Land et al, ‘Threshold Concepts and Troublesome Knowledge (3)’, above n 55, 60.
\(^{86}\) Lynn Clouder, ‘Caring as a “Threshold Concept”: Transforming Students in Higher Education into Health(care) Professionals’ (2005) 10 Teaching in Higher Education 505.
\(^{87}\) Sullivan et al, above n 25, location 1171.
order, of the components of the protocol. A number of aspects of interviewing may be highly problematic for novice students in ways that their teachers may not appreciate, or have forgotten.

A student without extra-curricular experience of acting, debating/mooting or playing a musical instrument may not have been assessed in anything performance-based before. The very orality of the activity may consequently be difficult, even before one has attempted to tackle the implications of affect (or ‘professional non-affect’88), or individual theory of practice.

Still more troubling are ideas related to uncertainty, malleability, fallibility in the information provided by the client and how it is provided, and the idea that there may be multiple solutions to similar problems, any of which might be ‘right’ for a particular client, of a particular culture, in particular circumstances. In this respect, interviewing constitutes a substantial barrier for at least some students, despite - or possibly because of - its explicit links with legal practice. This troublesomeness may manifest differently for different kinds of legal advisors, as in the example in this paper, for the trade mark attorneys and the solicitors.

F Why Treat Interviewing as a Threshold Capability?

Webb suggests that the value, for teachers, in identifying threshold concepts lies in what we then do about them.

The explicit use of threshold concepts may ... help us achieve three things. First, it may provide a counter-balance to the tendency to overload the curriculum with substantive legal rules. This has often served to restrict students’ learning to a ritualised use of formal knowledge, at the expense of a deeper, more personalised, understanding of the law. Secondly, it may also help us provide students with greater opportunities to acquire independence in using legal concepts, since abstract knowledge is more likely to become personalised and transformative through use. Thirdly, it follows that a focus on threshold concepts also holds out perhaps greater potential for moving students beyond their established ways of thinking and problem solving.89

The question is whether the protocols used in interviewing teaching help students to avoid ritualisation, develop a personal style and theory of practice and move beyond the ways of thinking and problem-solving used in academic study when there is no client present. The alternative is that, in an attempt to support novices with integration and with troublesomeness, they inadvertently promote the ‘mimicry’ perceived by the proponents of threshold concepts as a marker for failure to transcend the threshold. Protocols are useful, but they do not ‘solve’ interviewing

88 A perception that it is part of the role of the lawyer actively not to demonstrate affect was found in a study of barristers: Harris, above n 45.
89 Webb, above n 59.
teaching. Viewing interviewing in the light of threshold concepts/capabilities highlights the complexity and disciplinary significance of the activity not only for students, but also for teachers. It allows us to rethink and to refresh what we do.

Because it pays attention to the ways in which students understand and experience concepts strongly connected with their discipline, and, in this extension, apply skills and develop capacities, the threshold concepts movement is strongly linked to phenomenographic enquiry and to use of variation theory as a teaching approach. If threshold concept theory identifies the significance of the issue, then variation theory, it is suggested, helps us determine what to do about it.

IV CAN WE TRANSCEND THE PROTOCOL BY FOCUSING ON VARIATION?

A Phenomenography and Variation Theory

Phenomenography developed in the 1970s as a method of enquiry seeking to generate ‘experiential descriptions’ of individuals’ experiences of a phenomenon. It is particularly suited to educational research.

In a sense phenomenographic research mirrors what good teachers do. It tries to understand what the students are doing in their learning. It attempts to discover what different approaches students are taking and to understand these in terms of outcomes of their learning activities. Good teachers do that as a preliminary to

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90 The authors of the Carnegie Report, while recognising the utility of such approaches as articulating and distilling expert performance so that it can be practised and discussed by novices, nevertheless describe them as ‘training wheels’: Sullivan et al, above n 25, location 2447.


further action to help their students come to understand the concept concerned and, of course, many do it instinctively.\textsuperscript{95}

A phenomenographic researcher uses interviews or scenarios to extract individuals’ understandings of, or responses to, a phenomenon. The responses are then categorised into groups, and the groups sorted into a scale (the ‘outcome space’).\textsuperscript{96} Because threshold concepts/capabilities are inherently troublesome, and areas where variations in student understanding and experience may contribute to the difficulty, a phenomenographic approach to investigation of the problem is a natural progression.\textsuperscript{97} An example is provided by an Australian study of the threshold concept ‘legal reasoning’. This categorised students’ understandings of what the concept/skill entails into the following set of categories:

1. A formulaic process for predicting a legal outcome.
2. An interpretive process of arguing for an outcome that serves your client.
3. A dynamic, responsive and innovative process for developing the law to reflect changing society.


\textsuperscript{97} ‘Starting from the idea that using the findings from phenomenographic studies in teaching by introducing the students to the variation of conceptions found, it seems natural that the notion of variation as ‘the mother of all learning’ arose as the central idea …’: Bo Dahlin, ‘Enriching the Theoretical Horizons of Phenomenography, Variation Theory and Learning Studies’ (2007) 51 Scandinavian Journal of Educational Research 327, 328.
4. Law as a tool for change.\textsuperscript{98}

Phenomenographic research, therefore, \textit{describes} variations in experience. The account, earlier in this paper, of the different ways in which aspiring solicitors and aspiring trade mark attorneys understand and approach interviewing is phenomenographic in nature. Variation theory, which developed in the 1990s, ‘can be seen as a more theoretical extension of phenomenography, in that it attempts to explain \textit{how} people – particularly students – can experience the same phenomenon differently and how that knowledge can be used to improve classroom teaching and learning’ (emphasis added).\textsuperscript{99}

Bussey et al, however, identify that variation theory of itself does not necessarily take into account students’ prior knowledge of the phenomenon (in threshold concepts terms, their pre-liminality)\textsuperscript{100} or the influence on teachers of teaching materials (such as interviewing protocols).\textsuperscript{101} In the context of interviewing, these may be highly significant, as students will bring with them prior experience of being interviewed (perhaps for a job); social skills; understanding of their own culture (if not necessarily the culture of others); and assumptions about the role of the lawyer.\textsuperscript{102} Students such as the aspiring trade mark attorneys, already in the workplace, also bring with them experiences of what lawyers do in practice. This prior experience and current context is critical to the nature of the threshold presented by the interviewing activity. For both groups, however, an important element of the troublesome nature of the threshold is provided by the interplay between, and impact of, variables involved in the legal and factual scenario; the needs and objectives of the client; and the theory of practice of the individual lawyer. It is therefore argued that a way of helping students to transcend the threshold and avoid reductive use of protocols – as well as to acknowledge their own emerging theories of practice – is to employ the techniques of variation theory in classroom interviewing teaching.

\textsuperscript{98} Australian National University, Queensland University of Technology and University of Technology, Sydney, above n 71.

\textsuperscript{99} Tan puts it even more simply: ‘Phenomenography and variation theory offer an alternative, by examining the \textit{variation within}, rather than the \textit{differences between}, experiences …’: Kelvin Tan, ‘Variation Theory and the Different Ways of Experiencing Educational Policy’ (2009) 8 Educational Research for Policy and Practice 95. See also on this topic, Thomas J Bussey, Mary Kay Orgill and Kent J Crippen, ‘Variation Theory: A Theory of Learning and a Useful Theoretical Framework for Chemical Education Research’ (2013) 14 Chemistry Education Research and Practice 9, 11.

\textsuperscript{100} Pang and Marton, however, designed different teaching approaches to suit students with or without a strong initial grasp of the subject matter: Ming Fai Pang and Ference Marton, ‘Interaction between the Learners: Initial Grasp of the Object of Learning and the Learning Resource Afforded’ (2013) 41 Instructional Science: An International Journal of the Learning Sciences 1065.

\textsuperscript{101} Bussey, Orgill and Crippen, above n 99, 26.

\textsuperscript{102} The latter, as Smith points out, may of course be drawn from inappropriate sources, such as film or television: Smith, above n 33, 595.
Those techniques are, in the literature, conventionally divided into the following stages.103

1 Contrast/Discernment

Variation theory, more so than threshold concept theory, is distinctly based on activity, learning by doing and ‘the capability’104 to do something with something’.105 Consequently, the first stage in a variation theory approach involves highlighting what is to be learned (‘the object of learning’), bringing it to attention by contrasting it with what it is not, and doing so through experience rather than didactic instruction.106 In the interviewing context, therefore, a teacher might begin by encouraging students to explore the differences between a lawyer-client interview in which advice is given and similar activities: job interviews, journalism, therapeutic sessions, careers advice, cross-examination, taking a witness statement. In later interviewing activities, this technique might be extended to assist students in distinguishing the significance of the parts of an interview set out in the protocol from the whole, and the relationship between those parts.107

2 Generalisation

In the generalisation phase, the ‘intended learning object’, now distinguished from what it is not, is emphasised by exposing students to multiple examples to enable them to develop a meaning for it. This approach is also intended to allow students to begin to work out what is essential (for example, that it is always necessary to establish the terms of the retainer with the client) and what is irrelevant. Students might conduct, and watch, a range of interviews with different kinds of clients, about

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103 They are sometimes seen in a different order. So Lam, for example, takes separation before generalisation: Ho Cheong Lam, ‘On Generalization and Variation Theory’ (2013) 57 Scandinavian Journal of Educational Research 343, 345.

104 See, for example, Ference Marton and Amy B M Tsui, Classroom Discourse and the Space of Learning (Lawrence Erlbaum, 2004) 4: ‘[T]he object of learning is a capability, and any capability has a general and specific aspect. The general aspect has to do with the nature of the capability, such as remembering, discerning, interpreting, grasping, or viewing, that is, the acts of learning carried out. The specific aspect has to do with the thing or subject on which these acts are carried out, such as formulas, engineering problem, simultaneous equations, World War II or Franz Kafka’s literary heritage.’


106 ‘We cannot discern a particular quality based on the sameness of this quality among different instances (e.g. all the males in this world would not help us to discern maleness), we can only discover it by juxtaposing it with another quality (i.e. femaleness)’: Lo Mun Ling and Ference Marton, ‘Towards a Science of the Art of Teaching: Using Variation Theory as a Guiding Principle of Pedagogical Design’ (2012) 1 International Journal for Lesson and Learning Studies 7, 10.

different kinds of problems, leading to different kinds of solutions.\textsuperscript{108} If a variety of interviewers, using a variety of styles, is included in the sample, this would provide a foundation for discussion of the influence of different styles and theories of practice later on.

3 \textit{Separation}

By contrast with generalisation, the separation stage works in reverse. Here individual components of the learning object are varied, whilst other aspects are deliberately kept constant. It is the dimension or value that is varied that becomes the object of learning.\textsuperscript{109} It is at this point that the variation theory approach is able, it is suggested, to address the heart of the troublesomeness of the threshold. In the real world of legal practice, different solutions are suitable for different problems and different clients (and, arguably, for different lawyers). As suggested above, grasping this is irreversible and may also be transformative. To address this, a group of students might, for example, conduct a short interview using a scenario in which two family members are in dispute about an item of property. In some copies of the scenario, however, the item is worth $500, in others $5,000 and in others $50,000. The range of proposed solutions and their relationship to the value of the item – the cost/benefit analysis – could then be the focus of discussion with the teacher. This exercise can be repeated with other factors which experience suggests novices fail to address effectively: the client’s level of risk-tolerance; the credibility of the available evidence; limitation; the ability of the client to fund litigation; the client’s negotiation position and attitude towards their opponent;\textsuperscript{110} and, sometimes critically, what, if any steps the client has already taken him- or herself to attempt to remedy the situation.\textsuperscript{111}


\textsuperscript{109} ‘[C]ritical features can be discerned if they vary while non critical features are invariant. If two aspects vary together they will fuse, and the two features cannot then be easily differentiated.’ Ling and Marton, above n 107, 11.

\textsuperscript{110} This may be subject to cultural difference: in a scenario involving an unpaid loan made to a family member, we encountered not only personal but also cultural reluctance to sue a relation.

\textsuperscript{111} This is from perhaps bitter experience in practice of clients who had already exhausted options, or managed to make their position worse, before consulting a lawyer. An example of patterns of variation used in teaching legal reasoning in this way is provided in Lupton, Åkerlind and McKenzie, above n 93.
4 Fusion

In the final stage, many factors are varied, and the student is invited to work with this simultaneous variation of features in relation to each other. This is, of course, the situation in the workplace where there is no control over the problem or the client. It also represents the integrative aspect of the threshold, blending all three of the Carnegie cognitive apprenticeships.

For more expert practitioners, and for practitioner students reflecting on their own practice, however, this more sophisticated stage could also be replicated in the classroom by increasing the number and complexity of the variables in the situation: overlapping areas of law; interviews by videolink; interviewing through an advocate or interpreter and cross-cultural interviewing generally. In some of the interviewing student competitions, after the event reflection on action is also required. Such a debrief might also, it is suggested, provide permission for students to develop - or at a more senior level, interrogate - their own theories of practice, as well as to explore the identification of variables in the situation and their impact on the solutions proposed.

V What Shall We Vary?

A defining characteristic of the threshold concept is as a portal to a discipline and, in particular to the practices of that discipline. Phenomenography exposes variations in understanding (and misunderstanding) of such concepts and practices. Variation theory deliberately explores the implications of what is constant or varied in experience of a concept or practice to enhance learning. Each treats the individual learner as significant in the process, and the threshold concept, in particular, highlights transformation in, as Webb suggests, reducing ritualisation and promoting personalised use of knowledge. In this section, we take the idea of the threshold concept/capability as promoting personalisation one step further into development of a personal theory of practice. In a variation theory approach to the teaching of interviewing, different theories of practice may have been exposed as variations in themselves. The troublesome nature of the threshold may differ for trade mark attorneys and solicitors, but equally, so may an appropriate theory of practice. Both individual and practice sector distinctiveness may be unduly flattened by over reliance on a protocol. A protocol, indeed, emphasises what is constant in interviews, rather than what varies. Repeating activities that are the same does, of course, contribute to learning, by allowing patterns (‘schemata’) to be developed from multiple

examples. A protocol which represents a ‘good interview’ has embedded in it factors which are not necessarily brought to students’ direct attention, and which form part of the hidden curriculum of the subject (or, indeed, the profession). Consequently an initial step in determining the variations to be addressed is to consider factors that might be particularly troublesome for students who are (only) at the threshold.

A Using Studies of Experts and Novices to Identify Troublesome Factors as Candidates for Selection as ‘Variations’

The majority of interviewing students on vocational courses will normally be the novices the protocols are designed to support. Salthouse suggests that novices suffer a combination of ‘processing limitations’, only some of which are, it is suggested, addressed by the standard form of protocol:

a) Not knowing what to expect (ameliorated by the structure and key prompts provided in a protocol).

b) Lack of knowledge of interrelations among variables (not addressed in the protocol but the core focus in a variation theory approach).

c) Not knowing what information is relevant (not addressed in the protocol but the core focus in a variation theory approach).

d) Not knowing what to do and when to do it (protocols and specimen seek to address this but may inadvertently suggest that there is a limited number of possible solutions).

e) Lack of production proficiency (i.e. needing to work through all variables mechanically; this may be assisted by the focus on highlighting and evaluation of key variables in a variation theory approach).

f) Difficulty in combining information (not addressed in the protocol but the core focus on a variation theory approach).

A protocol can assist, therefore, with limitations a) and d). As a variation theory approach to the threshold alerts learners to the existence and implications of variations, it is suggested that supplementary use of this approach can usefully address limitations b), c), f) and to some extent e).

If the threshold is seen as a ‘capability’, however, this carries with it the obligation to develop strategies for moving past the threshold, which includes increasing the range of variables to be taken into account when


115 Lam, above n 107.

116 Dahlin, above n 97, 341.

proposing a solution. In vignettes provided by Blasi, Ned, the novice straight out of law school, analyses the law and concludes the client should make an application for summary judgment. Ellen, the expert, comes to the opposite conclusion based on her alertness to variables – and the interplay between them – including the effect of an application on the dilatory strategy of the opposing lawyer; the likely approach of the judge (and, as the judge would also be the trial judge, the effect on trial); the legal cost/benefit of bringing the application; and the likelihood of appeal. All of these – as with the list drawn from experience given earlier – are variations that might be highlighted with students.

Colon-Navarro carried out a study of expert/novice differences using an immigration law scenario. His experts had studied, taught/supervised and practised immigration law for between three and twenty years and were able to start with a very specific, filtering set of questions designed to determine which of a limited number of possible scenarios fitted the situation. In this, they were more similar to the trade mark attorneys whose ‘pre-liminality’ includes a tightly defined repertoire of issues: registration of a mark domestically and/or internationally; infringement of a mark; and challenge to registration of a mark. Possibly because they were already in practice, the trade mark students were also particularly conscious of some variables such as limitation and budget, which the aspiring solicitor students were, in the main, less likely to have thought of. By contrast, the aspiring solicitor students could be met by a client with a lengthy story stuffed with ‘red herrings’ that might impact on a range of areas of law. This suggests that it is useful to interrogate the pre-liminality and current context of the students in selecting variations that are not already in their repertoire.

118 Jeanette A Lawrence, ‘Expertise on the Bench: Modeling Magistrates’ Judicial Decision-Making’ in Micheline TH Chi, Robert Glaser and Marshall J Farr (eds), The Nature of Expertise (Lawrence Erlbaum, 1988) 229. Lawrence, evaluating the sentencing approach of three Australian magistrates – two expert and one novice – found distinctions in approach in (a) overall frames of reference; (b) in some, but not all, cases, selection of relevant information; (c) inferences drawn from available information, such that the ‘experience’ of the experts had created ‘patterns for reducing workloads’, similar goals and perspectives as well as ‘ideas about what to look for, and ways to follow up leads in the data. The simulations of the experts were markedly different from that of the novice in pulling leads out of the files and reports’: 256-7. See similar results in Leah M Christensen, ‘The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law’ (2008) 2008 Brigham Young University Education and Law Journal 53, 117.


120 Ibid, 321.

121 Ibid, 322.

122 ‘[A]ll the expert attorneys asked the client how they had entered the country, whether or not they had relatives in the US, whether or not the client had been detained by the Immigration and Naturalization Service, and whether or not the client was presently employed’. Fernando Colon-Navarro, ‘Thinking Like a Lawyer: Expert-Novice Differences in Simulated Client Interviews’ (1997) 21 Journal of the Legal Profession 107, 132.
The troublesome variations do, however, appear to be more strongly related to selection and evaluation of facts rather than the structure of the interview, which is scaffolded by the protocol. Colon-Navarro found a much smaller difference between experts and novices in the kinds of questions used (closed or open-ended); number of facts elicited; the relationship between number of facts elicited and the appropriateness of the solution suggested and in the hierarchy of solutions suggested for the problem. He did, however, find that the experts were more likely to close the interview with a clear plan of action (and to exhibit confidence in it). This factor is related to Salthouse’s finding that novices may be unclear about ‘what to do and when to do it’ and indicates a need not simply to identify variations in the situation, but to be in a position to evaluate their implications for the solution. The solution is, it is suggested, a component of the threshold: in conventional academic study covering only the first Carnegie apprenticeship, students are generally asked only to advise on the law, rather than suggest pragmatic solutions which may not include assertion of legal rights in litigation.

Clearly a comparatively short university based interviewing course cannot create expertise in its students either in the law or in the skills of eliciting information, analysing and solving problems. The protocol approach is an attempt, of course, to provide the novice with some of the armoury, at least in terms of structure, that might be adopted by the expert. Beyond the protocol, attention to the implications of the different variables within the situation can, it is suggested, highlight the fact that variables are present and provide some permissions, not provided by the protocol of itself, to adapt the lawyer’s response to meet them. This is a first, transformative, step in developing an individual theory of professional and ethical practice.

B Using Different Theories of Practice to Promote Independence and Capability

There has been in the US a longstanding debate about the role of client centred ‘counselling’ as opposed to a more directive, lawyer

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123 Ibid 117. The scenario used for Colon-Navarro’s exercise included a number of deliberate ‘red herrings’. This, therefore, represents Salthouse’s ‘not knowing what information is relevant’.

124 A similar phenomenon has been seen in a comparative study of medical students and doctors where it was suggested that, as earlier education tended to focus on diagnosis, ‘less advanced students, when confronted with a management task, are likely to deal with it as if it were a diagnostic task, which is the kind of task they have some experience with’: Alireza Monajemi, Henk G Schmidt and Remy MJP Rikers, ‘Assessing Patient Management Plans of Doctors and Medical Students: An Illness Script Perspective’ (2012) 32 Journal of Continuing Education in the Health Professions 4, 5.

125 This is an approach endorsed, at least as a starting point, by the authors of the Carnegie Report. An approach to educational design based on deconstruction of expert practice is provided in Joan Middendorf and David Pace, ‘Decoding the Disciplines: A Model for Helping Students Learn Disciplinary Ways of Thinking’ (2004) 98 New Directions for Teaching and Learning 1.

126 The debate may have been prompted by the different focus on litigation in that jurisdiction: Brown, above n 49. See also for some examples Thomas L Shaffer et al,
centred approach that might be more precisely described as ‘advising’.\textsuperscript{127} The protocols appear to represent a ‘client centred’ theory of practice.\textsuperscript{128}

A client centred approach is not, of course, wrong, and such an approach can be derived empirically for teaching purposes.\textsuperscript{129} However, the implications of client centredness, which may be more or less troublesome to different individuals, could usefully be brought to the fore for students.\textsuperscript{130} A variation theory approach, indeed, suggests that students

\begin{itemize}
\item A more palatable modern conception of the directive approach, particularly evident in the trade mark attorney approach, might be more closely aligned to teaching. See also Barclay, above n 48, 1 n 4 summarising earlier socio-legal discussion of the topic. Further: ‘Legal counseling is an exercise in value choices; in the choice between legality and authority, between historical tradition and immediate needs and circumstances, between transcendent social values and immediate private preferences, between possibility and compulsion, between humanistic concern and the values of rigor and discipline, between concern for self and concern for others, between self-limiting honesty and self-aggrandizing seeking, between the exercise of power and the predominance of humane concern, between change and constancy, and the list of opposites could go on. The tendency to view counselling as a simple ministerial act or an essentially technical exercise misses the richness and complexity of the choices and interchanges in value that go on, both procedurally and substantively, as the enterprise is transacted from beginning to end by lawyers and clients’, Robert S Redmount, ‘An Inquiry into Legal Counseling’ (1979) 4 The Journal of the Legal Profession 181, 183.
\item For examples, see: ‘... identify possible courses of action, the legal and non-legal consequences of a course of action (including the costs, benefits and risks) and assist the client in reaching a decision’: Solicitors Regulation Authority, Legal Practice Course Outcomes <http://www.sra.org.uk/students/lpc.page>. ‘They should be given work that helps them understand the need to ... help the client decide the best course of action’; Solicitors Regulation Authority, Training Trainee Solicitors <http://www.sra.org.uk/trainees/training-contract.page>. ‘Identifying possible courses of action and their consequences and assisting clients in reaching a decision’: Solicitors Regulation Authority, above n 53. ‘Encourages client to make decision (if appropriate, lawyer makes recommendation)’: Law Society of British Columbia, above n 3. ‘They should assist the client in his or her understanding of problems and solutions and in making an informed choice, taking potential legal, economic, social and psychological consequences into account’: The Client Interviewing Competition for England and Wales, Assessment Criteria <http://www.clientinterviewing.com/pages/assessment_criteria_guidelines.htm>.
\item Pinnington and Somerlad found young Australian solicitors to have tacit conceptions of what ‘competence’ meant that, once surfaced, may be alarming: ‘the ability to bill more hours, establish and maintain relationships with clients, command a degree of respect from colleagues and the business community, possess a business orientated approach to work and display a keen interest in increasing one’s knowledge and expertise, whether this be through more credentials or diversifying interests in other niche areas of law pertinent to the work group’. Ashly H Pinnington, and Hilary Somerlad, ‘Competence
can only really understand what a client centred approach is by experiencing it as contrasted with something else. Exploring the implications of client centeredness, rather than simply prescribing it, would, it is suggested, aid in exploration of the third Carnegie apprenticeship’s ethical and professional implications of, on the one hand, telling the client what to do or, on the other, working with the client to reach a consensus about what to do.

Comparison of the behaviour of experts when compared with novices does not assist in examination of differences in approaches between experts in, for example, being more, or less, client centred. There is a developing range of empirical evidence about differing theories of practice amongst lawyers. Wilkinson, Walker and Mercer, for example, in 2005 investigated Canadian lawyers’ concepts of their own role as mentor or hired gun. Sandberg and Pinnington, in 2009, found a hierarchy of increasingly sophisticated ‘ways of practising corporate law’ amongst Australian lawyers: from ‘minimising legal risks so clients can achieve what they want to achieve’; through ‘managing legal risks so clients can achieve what they want to achieve’; ‘managing commercially important legal risks so clients can achieve what they want to achieve’ to ‘identifying clients’ level of risk tolerance and managing it so they can achieve what they want to achieve’. Sandberg and Pinnington, in 2009, found a hierarchy of increasingly sophisticated ‘ways of practising corporate law’ amongst Australian lawyers: from ‘minimising legal risks so clients can achieve what they want to achieve’; through ‘managing legal risks so clients can achieve what they want to achieve’; ‘managing commercially important legal risks so clients can achieve what they want to achieve’ to ‘identifying clients’ level of risk tolerance and managing it so they can achieve what they want to achieve’.

Most useful in this context is, however, the conversation analysis conducted by Smith in 2007 of two US attorneys, both asked to carry out an interview of a client on the basis of the same, simulated, scenario. Conversation analysis considers language used, formal or informal, politeness and power. Indeed, Smith suggests that conversation analysts ‘urge that well-meaning instructors should not prescribe a structure for an interview without first understanding the structure in the conversations that are naturally occurring’.


133 Smith, above n 33.

134 Coupland provides an example of instinctive change of register by a lawyer from the formal to the informal to extract reassurance on a sensitive issue (whether the client would be likely to injure her child) in Justine Coupland, Small Talk (Routledge, 2014) xvi.

135 Smith, above n 33, 585.
One of Smith’s pair of attorneys followed a client centred model, providing the client space to explain the problem before following up with questioning in the approach recommended by the protocols. Attorney B, on the other hand ‘made many of the mistakes we warn our students about. He interrupted the client’s narrative very early and tried to control the interview in ways that prevented rather than helped the client to present the situation’. Attorney B, possibly as a result, had to work harder in asking questions, asking twice as many as Attorney A, of which almost 80% were either leading or required a yes/no answer. He also appeared to prejudge the nature of the client’s problem, spending time asking about an irrelevant topic and driving the interview by reference to particular case theories rather than, in the method adopted by Attorney A, asking questions by reference to an apparent sequence of ‘what happened to get us here, what is happening now in light of this problem ... and what solutions might one imagine’. Nevertheless, the client preferred the approach of Attorney B, possibly because ‘[h]is frequent pursuit of legal theories and questioning about what the opposing party was claiming not only convinced the client that he knew the law well, but probably convinced her that he cared about her situation and solving her problem’. Smith’s results endorse the protocols that recommend a client-centred initial stage of allowing the client space to talk. She also suggests an approach which might lead us to treat our solicitor and our trade mark attorney (and other practitioner) students differently:

[N]ovice interviewers who do not have substantial substantive law expertise [should] question by developing the story presented and [ask] related questions about the present and the possible future without worrying overly much about what ‘legal theories’ to explore ... An attorney with subject matter expertise might well focus on topics that are typically legally relevant, beginning each topic with an open question and following up with narrow questions in the t-funnel structure.

Rapport, however, particularly when the response may, as with Smith’s client, be counterintuitive, is more complex, particularly if there is pressure on the novice interviewer to adopt a style that is foreign to them:

[I]t is probably much more feasible for law students (and for attorneys) to learn about their own conversational styles and tendencies than to arbitrarily adopt unnatural styles. ... If a law student realizes she speaks quickly, tends to interrupt without realizing it, and feels the need to be in charge of the conversation, ... we can work with her to become more aware of others’ styles of talk, and to let the client at least begin with a complete narrative.

136 Ibid 582.
137 Ibid 594.
138 Ibid 639.
139 Ibid 642.
140 Ibid 644.
141 Ibid 646.
In a modern context, it is suggested not only that it is professionally responsible and, indeed, ethical, to surface and explore these differences in approach but that doing so may be critical because teachers will, increasingly, need to equip students and lawyers to work in a cross-cultural and multi-disciplinary context. They will, it is suggested, not only need to have penetrated the threshold represented by this microcosm of practice, but to have developed independence and capability in developing it beyond the initial threshold.

VI CONCLUSION

Competence statements validate the argument that interviewing is a key legal skill, indeed, a threshold capability which renders ‘thinking like a lawyer’ concrete. Protocols provide valuable support for learners in supporting process and providing prompts for critical issues as well as in tacitly endorsing a client-centred approach to practice. They are not, however, an incantation or a magic spell. If, as suggested in this article, client interviewing is a threshold concept or, more helpfully, a threshold capability, then this highlights its critical position as a microcosm of, and a portal towards, legal practice. It is also an activity that is, for students, often troublesome, and troublesome in different ways for different kinds of students. There is, it is suggested, more empirical work to be done, on a phenomenographic basis, to determine the different ways in which students perceive and experience interviewing, as well as how they relate it to their understandings of the normal world of social relations and to their concepts of what lawyers are and what legal practice entails.

Interviewing is by definition a task involving combining and evaluating the interplay between variables, including the individual lawyer-interviewer and the client-interviewee. It is an archetype of the interrelationship between the three apprenticeships identified in the Carnegie report. The next step is, it is suggested, to focus in teaching and in design of scenarios and client briefs on helping students work beyond the protocol. This entails engagement with the variables in the situation, their interrelationships and their implications in analysis and determination of viable solutions for this client, in relation to this problem,

at this time. In doing so we work with students where they are, as individuals whose pre-liminality already includes sophisticated modes of social interaction, some of which can be translated with confidence into the professional arena. It is not only useful that interviewing should be taught by reference to variation but, in pursuit of client service and development of ethical theories of practice which are more than merely espoused, necessary that it should. There is more to be done in working towards an understanding of variations, both favourable and injurious, for the enhancement of future legal practice:

This preservation of favourable variations and the destruction of injurious variations, I call Natural Selection, or the Survival of the Fittest.143

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MORE THAN THE RULES: USING PLEADING DRAFTING TO DEVELOP LAWYERING AND TRANSFERABLE SKILLS

KATHERINE CURNOW*

I INTRODUCTION

This article seeks to contribute to the ongoing debate in Australia about what should be taught at law school1 and assist legal academics in the design and implementation of learning and teaching activities for pleading drafting. Prior research has sought to identify the lawyering and transferable skills law students will ultimately require for practice, should they ever practise law, and for careers that will most likely traverse a number of disciplines.2 While the skills development potential of some law student activities (such as mooting)3 has been considered in the literature, pleading drafting has not been analysed in a similar manner. This article examines why pleading drafting exercises are an appropriate forum for students to develop a level of proficiency in aspects of several lawyering and transferable skills different to those attained through other university activities. An example of pleading drafting activities at a law school level is then explored, namely, the simulated experience pleading drafting exercises in the Civil Procedure course4 at the University of

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1 This includes that generated by the Legal Admissions Consultative Committee’s (LACC) ongoing review of the Academic Requirements for Admission: <http://www1.lawcouncil.asn.au/LACC/index.php/review-of-academic-requirements>.


4 The term ‘Civil Procedure’ is used in this article to describe the undergraduate course in which students study the procedural law applicable to civil litigation.
Queensland (UQ). The theoretical basis for the design of those exercises and data about student perceptions of them is discussed. To begin, this article analyses the nature of pleading drafting, what differentiates it from other legal writing genres, and the lawyering and transferable skills it requires. The article then examines why experiential learning is effective for pleading drafting, as it promotes a deep approach to learning and, in turn, promotes lifelong learning. The Civil Procedure tutorial program at UQ is used to explore how lawyering and transferable skills training can be integrated into pleading drafting exercises in a Civil Procedure course at a law school level in a manner designed to foster experiential learning. The results of a survey of student perceptions of the pleading drafting learning and teaching activities in the UQ Civil Procedure course are then utilised to discuss the potential effectiveness of the activities in cognitively and/or affectively motivating students. Finally, it is argued that the different aspects of lawyering and transferable skills required for pleading drafting and the need to give students progressively more complex activities to master them warrant the inclusion of pleading drafting at a law school level.

II PLEADING DRAFTING AND SKILLS

There is widespread recognition of the need to introduce more lawyering skills into legal education, including legal research skills, problem solving skills, dispute resolution skills, negotiation, the ability to recognise and resolve legal ethical dilemmas, and counselling skills. In addition, compelling arguments have been made for law students to develop more generic or transferable skills as part of their legal education. Transferable skills include communication skills, information gathering skills (locating and evaluating relevant information sources and then extracting relevant information from them), problem solving skills (including creative problem solving and decision-making) and teamwork skills. Development of high-level transferable skills can assist students to adapt and change in a competitive and evolving legal profession. Further,

5 Gillespie, above n 3; Lynch, above n 3.
9 ALRC, above n 2 [2.89]; Kift, Field and Wells, above n 2, 150.
they are relevant to careers outside practice, such as government, business and the not-for-profit sector. This is significant as many law graduates will never practise law or complete professional legal training (PLT). Many others who do enter the law immediately after graduating will later transition into other careers. Thus, law school must lay the foundations not only for graduates to enter a legal profession in considerable flux, but for other career paths as well.

The standards agreed by the Council of Australian Law Deans (CALD) as the self-regulatory framework for Australian law schools (Standards) require that law students develop both lawyering and transferable skills during their law degrees. The Standards incorporate the Threshold Learning Outcomes for the Bachelor of Laws (TLOs) as well as requiring that a university legal education curriculum develop skills of research, analysis, reasoning, problem-solving and oral and written communication. The TLOs include thinking, research and ethical, communication and collaboration as well as self-management skills.

Significantly, the communication skills students develop at law school should include an appreciation of the different forms of legal writing and the ability to use appropriate communication for different contexts.

Pleading drafting is a form of legal drafting. As discussed above, legal drafting skills are identified as a ‘lawyering skill’ law students should develop at law school. Unlike many other forms of legal writing, pleading drafting is strictly governed by the relevant court rules. What must, may or may not be included in a pleading is dictated by the rules in the relevant court.

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10 Kift, Field and Wells, above n 2; Johnstone, above n 2, 8-9.
11 Keyes and Johnstone, above n 8, 557.
12 See generally Gillespie, above n 3, 23.
13 The TLOs were developed as part of the Learning and Teaching Academic Project managed by the Australian Learning and Teaching Council: Australian Learning and Teachings Council (ALTC), Learning and Teaching Academic Standards Project - Bachelor of Laws – Learning and Teaching Academic Standards Statement (December 2010)
14 ALTC, above n 13.
15 Ibid 21.
16 Kift, above n 8, 55.
for pleading. The communication style in pleading is concise (in many jurisdictions the rules require it be as brief as the case permits) and factual rather than argumentative because pleadings set out material facts and not evidence or legal argument, unless specifically required by the rules. But pleading can also be strategic. A party’s pleadings are critical to the presentation of their case to other parties and any adjudicator. They must clearly and persuasively detail or respond to all the material facts necessary to establish a cause of action while complying with the relevant rules. As some of the first documents that adjudicators and other parties review, pleadings may influence the perceptions of other parties and any adjudicator about the strength of a particular party’s case. Further, pleadings can be used to draw out information and admissions from other parties in order to obtain a more comprehensive picture of their case. Finally, the pleadings in a case may influence party decisions about preferred dispute resolution processes and strategy in those processes.

As evident from the discussion above, pleading drafting requires written communication skills. The style of writing is succinct, factual, rule driven and forensic and therefore unlike other written communication activities used in law and non-law university subjects such as essay writing. The notes on the TLOs refer to effective communication skills requiring an appreciation of the appropriate communication style and format for different contexts. Pleading drafting provides an opportunity for students to engage with a style of writing different to that which they encounter in most other university courses. Pleading drafting activities are therefore an important opportunity for students to further develop their written communication skills and, through discussion of the objectives of a pleading, appreciate the need for different forms of communication in different contexts.

In addition to written communication skills, effective pleading drafting requires the exercise of other lawyering and transferable skills. Before setting out the material facts in a pleading, the drafter must locate

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19 Cairns, ibid, 217.
20 Cairns, ibid, 217; Colbran, above n 18, 494.
23 Cairns, above n 18, 219-220.
25 For example, see Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd ( Receivers and Managers Appointed) (in liquidation) & Ors [2014] VSC 516.
26 ALTC, above n 13, 21.
and evaluate relevant oral and written information sources and then extract pertinent information from them. Legal research skills are also needed to identify relevant substantive and adjectival law. The drafter must then utilise their knowledge of substantive and procedural law to analyse the particular case scenario to determine what is required to establish a cause of action and what must, may or may not be pleaded. This analysis will, in most Australian jurisdictions, require differentiation between evidence, fact and legal argument. For the reasons set out above, a pleading is also an exercise in advocacy and the influencing of other parties as well as any adjudicator. In this sense, pleading drafting is a legal research, problem solving and advocacy related exercise. While other law related learning and teaching activities (for example, mooting) may require students to exercise similar skills, pleading drafting is an excellent base for further developing those skills, including different aspects of those skills and in a different context. A pleading drafting exercise at law school can therefore provide an opportunity for students to develop analytical and communication skills and challenge them to demonstrate a succinct, factual style of writing. These types of skills are necessary for legal practice, as well as careers in government, business or the non-profit sector where they are required for preparing, for example, reports, executive summaries and submissions to parliament or government inquiries.

Beyond an exploration of the pertinent procedural rules and development of the skills necessary for drafting pleadings, a pleading drafting exercise can, in the author’s experience, also provide a basis for discussing broader issues about the civil justice system and practice. Pleadings perform the role of defining the issues in the dispute between the parties and thereby shaping subsequent steps in the proceedings (such as disclosure/discovery and the evidence to be adduced at trial). As such, pleading drafting activities provide a context for discussing issues associated with the cost and efficiency of the justice system as well as the overall objectives of the system, including ensuring fairness and justice. Whether or not students ultimately enter practice, appropriately designed pleading drafting activities allow students to develop a greater understanding of critical considerations for the modern civil justice system, and thereby develop a greater appreciation of the system and how it operates. Further, pleading drafting activities provide a platform through which to discuss ethical and client care issues with students. For example, when considering what should be included in a pleading, the

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27 Douglas, above n 22.
28 Ibid.
29 Morrison, above n 24.
30 Cairns, above n 18, 207-208; Andrew Hemming and Tania Penovic, Civil Procedure in Australia (LexisNexis, 2015) 289.
31 Bamford and Rankin, above n 21, 7-9, 74-75; Hemming and Penovic, above n 30, 21-28.
32 Hemming and Penovic, above n 30, 15-16.
33 Required by TLO 2: ALTC, above n 13, 14-16.
duties of a lawyer to their client as well as to the court naturally arise. The further issue of what happens if those duties conflict can then be explored.

III EFFECTIVE PLEADING DRAFTING LEARNING

As established above, pleading drafting requires communication, research, analytical, problem solving and advocacy skills. Any learning and teaching activities associated with pleading drafting should therefore seek to develop the skills required to successfully draft a pleading and not simply focus on the procedural rules that govern pleading.

A What Promotes Effective Learning of Skills?

A deep learning approach where students are actively engaged and motivated to learn by interest in the subject matter is required for high quality and effective learning. This necessitates a student-centred learning environment. A key factor for effective skills learning is motivation. Learners who are cognitively and/or affectively motivated to undertake an activity and achieve a particular outcome are more likely to achieve good learning outcomes because they will approach the activities in a manner that facilitates obtaining those outcomes. As Ambrose et al explain, ‘motivation influences the direction, intensity, persistence and quality of the learning behaviours in which students engage.’ Student motivation is enhanced by their perception that the learning and teaching activities have value, positive expectations about their likelihood of success and a supportive environment. An early sense of achievement is a key factor for a student’s expectations and thus for their motivation and engagement.

Few learners will master a skill on their first attempt. Learners should be given opportunities to learn and develop basic skills through initial activities in which they can gain a sense of achievement. Subsequent activities involving more challenging tasks can then be utilised to further develop the learner’s proficiency in the skill. The linkage between particular skills and future professional careers will also almost certainly act as a strong motivator for many students because they will see the activity as having value for their future careers. Consequently, student perceptions of the value of, their ability to succeed in, and the

38 Ambrose, ibid, Ch 3; Biggs, above n 34, 140. See also Baron, above n 36.
39 Kift, above n 8, 57-58; Biggs, above n 34, 140.
40 ALTC, above n 13, 9.
41 Ambrose, above n 37, 84.
supportiveness of the environment in which they undertake an activity will be key factors in their approach to learning.

An additional consideration for the design of learning and teaching activities for skills is that effective learning and teaching strategies must seek to accommodate different learners with different learning styles. However, they should also seek to assist students to develop the ability to use different learning styles in order to increase their learning potential. Consequently, learning activities for the development of skills in law schools must use methods suited to skills learning, accommodate different learning styles, and develop the ability of students to use a range of learning styles.

B The Experiential Learning Model

Experiential learning theory insists that experience is central to the learning process. Kolb defines experiential learning as ‘the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience’. Experiential learning encourages students to build their own understanding of abstract concepts and skills through personal experience of the application of those concepts and skills. It engages students in both cognitive and affective approaches to learning, that is, strategies for learning, motivations and affective responses.

Experiential learning theory has its origins in philosophical pragmatism, social psychology and cognitive-developmental genetic epistemology. It differs to cognitive learning theories in that it focuses on affect rather than simply cognition. It is also different to behavioural learning theories ‘which deny any role for subjective experience in the learning process’. Kolb asserts that experiential learning theory provides ‘a holistic integrative perspective on learning that combines experience, perception, cognition, and behaviour.’

Kolb’s experiential learning model (see figure 1) involves 4 stages. Concrete experience (‘do’) leads to reflective observation (‘reflect’), which forms the basis for the development and refinement of abstract concepts and skills (‘form principles’) that can then be tested in new environments.

44 Lynch, above n 3, 74-75, 79.
46 Ibid.
47 Kolb, above n 43, 21.
situations ('plan'). Concrete experience in this context includes a simulated experience. The cycle may be entered at any of the learning activities as long as each stage in the cycle then follows sequentially from the point of entry. It is the sequencing of the activities that promotes the personalisation of knowledge. This occurs in two ways. Firstly, reflection by the learner about their own ‘real’ experience enables them to translate ‘abstract concepts’ into reality. Secondly, putting abstract concepts into action can arm the learner with the skills and motivation to use them.

Figure 1
Kolb’s Experiential Learning Model as modified by Kift

Concrete Experience (Do) → Observations and reflections (Reflect)

Testing implications of concepts in new situations (Plan) → Formation of abstract concepts and generalisations (Form principles)

A further strength of experiential learning is its suitability for learners with different learning styles. Each stage of the model involves abilities associated with a different learning style. The ability to enter the cycle at any point means those with different learning preferences may be engaged in an activity at different points in the cycle, and with appropriate motivation, may be encouraged to engage in subsequent steps.


Kolb, Boyatzis and Mainemelis, above n 45, Ch. 9.

Kolb and Lewis, above n 48, 100.

Kift, above n 8, 62. It is beyond the scope of this article to explore how experiential learning should be modelled, however, it is noted that Kolb’s experiential learning cycle has recently been reconceptualised as a twin-cycle experiential learning model to address criticisms relating to the conceptualisation and categorisation of concepts such as learning modes and stages: Harald Bergsteiner and Gayle C Avery, ‘The Twin-cycle Experiential Learning Model: Re-conceptualising Kolb’s Theory’ (2014) 36(3) Studies in Continuing Education 257. The stages and sequencing of the Kolb cycle referred to in this article remain unchanged in that reconceptualization.
in the cycle. Moreover, encouraging learners to engage with all the stages of the cycle can assist them to develop the ability to undertake tasks at all stages of the experiential learning cycle, including those associated with other learning styles. Doing so will equip them to be more effective learners and promote their capacity to engage in lifelong learning.

A discussion of how learning and teaching exercises in the UQ tutorial program were designed to create an experiential learning cycle is set out below.

C Experiential Learning and Pleading Drafting

Purely verbal and written explanations of the theory underpinning a skill will not facilitate effective learning of that skill. Traditional methods of teaching law, including a didactic approach focusing on the conveyance of legal rules and principles to students, are therefore ill suited to skills learning. Effective skills learning will also not occur if students are left to master the skill by practising without supervision and feedback. There is a risk in those circumstances that learners will reinforce bad habits. Students must instead be given the opportunity to practise the skill in a reflective and supervised manner. Gibbs argues ‘[i]t is not enough just to do, and neither is it enough just to think. Nor is it enough simply to do and think. Learning from experience must involve links between doing and thinking.’ Experiential learning is accepted as an effective model for skills learning. Further, an experiential learning model is an appropriate pedagogical approach for legal skills training.

As noted above, student perception of the value of learning and teaching activities is an important factor for their motivation. In the case of lawyering skills, the linkage between particular skills and practice will act as a strong motivator for many students. Hewitt contends that

[e]ngaging students in activities which simulate the practice of law is likely to inspire their interest, enhance their perceptions of the relevance of the subject-matter, deepen their understanding of the principles learnt, and lead to greater retention of that knowledge.

52 Kolb and Lewis, above 48, 100.
53 Kift, above n 8, 64.
54 Kift, above n 8. See also Keyes and Johnstone, above n 8, 545-547.
55 Kift, above n 8, 60-61.
57 Kift, above n 8, 56-64.
58 Kift, above n 8, 56-67; Kift, Field and Wells, above n 2, 153; Allan Chay and Frances Gibson, ‘Clinical Legal Education and Practical Legal Training’ in Kift et al, above n 2, 501-506; Lynch, above n 3.
A further significant consideration for a challenging task like pleading drafting is ensuring learning and teaching activities are carefully designed to ensure student motivation is not diminished. The initial exercises given to learners should be within their capabilities so that they can build confidence for the reasons detailed above.

IV A SIMULATED EXPERIENTIAL LEARNING EXPERIENCE: PLEADING DRAFTING ACTIVITIES AT UQ

A Civil Procedure at UQ

Most Australian law students study civil procedure during their law degrees. Civil Procedure is an elective subject at UQ. However, almost all law students take the Civil Procedure subject as it is a pre-requisite for admission as a legal practitioner.61 Most UQ law students take Civil Procedure in their final or penultimate year of law school. It is a large course with an enrolment of 250 students in 2012 and 360 students in 2013.

Civil Procedure necessarily involves a focus on the legal rules and procedures governing the adjudication of civil disputes. However, at UQ, it also presents a key opportunity for students to understand how civil law is (or, in many cases, is not) enforced and to experience the civil legal system in action. It is also a fitting forum for lawyering and transferable skills learning through simulated activities.62 A project lead by the author developed a simulated case scenario with a series of activities relating to common steps in a civil legal proceeding for implementation in the UQ Civil Procedure subject in a manner aimed at fostering experiential learning. Students were then surveyed about their perceptions of those activities.

B The Project

The overarching goal of the project was to explore the effect on student learning experience of implementing into the UQ Civil Procedure subject a related series of learning activities designed to facilitate experiential learning. Due to the large number of students taking the subject, the concrete experience utilised was a simulated experience. A case scenario and a series of tutorial activities in relation to it were developed in conjunction with barrister Jennifer Sheean. The ‘simulated experience’ tutorial program was developed and implemented in 2012,

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61 LACC, Uniform Admission Rules 2014: Schedule 1 Prescribed Areas of Knowledge.
2013 and 2014, with modifications for the 2013 and 2014 offerings. The case scenario was principally presented to students in the form of letters, memoranda and emails. It comprised a relatively straightforward commercial transaction leading to contract and negligence claims. This simple scenario formed the platform for exploring the rules of civil procedure and skills training. Documents were gradually released to students at different points during the semester. In essence, the students were given the simulated experience of following a single case through the key steps in a civil proceeding with developments in the facts and legal argument as the case proceeded. This article will focus on the pleading drafting exercises.

C The Simulated Experience Pleading Drafting Activities

Students in the UQ Civil Procedure subject were asked to engage in a number of activities intended to promote an experiential learning cycle in relation to the skills associated with pleading drafting. The activities were as follows (with the stage in the experiential learning cycle in brackets):

- Hearing a contextual explanation of the rules of pleading in a lecture in which pleading drafting was explained by John McKenna QC using example pleadings to illustrate the relevant principles. The lecture included tips about strategies for approaching pleading drafting. (Form)
- Undertaking prescribed readings and reviewing example Statements of Claim. (Form)
- Planning and drafting a Statement of Claim in preparation for the tutorial. The Statement of Claim related to the tutorial case followed through the entire tutorial program and was intended to give the students an early sense of achievement. (Plan and Do)
- Attending a tutorial (the Pleading Tutorial) and discussing their draft Statement of Claim with other students in a small group, and then in a discussion lead by a tutor with the entire tutorial group. Again, tips about strategies for approaching pleading drafting were given during tutorials. (Reflect)
- Reviewing an example Statement of Claim for the tutorial case. Students could also seek further feedback from teaching staff through online or traditional consultations. (Form)
- Planning and drafting a Statement of Claim as part of an assignment. (Plan and Do)

The principle modification was the introduction of 5 additional tutorial exercises for 2013 and 2014. In 2012, the Civil Procedure tutorial program was 5 tutorials so 5 activities were developed. In 2013 and 2014, the Civil Procedure tutorial program was extended to 10 tutorials and so further exercises were added. Other minor modifications were made to the activities to improve clarity and reflect alterations in the law.
• Receiving written and oral feedback about their Statement of Claim assessment. (Reflect)

An aspect of the pleading drafting exercise for the tutorial was that students were asked to consider how they would respond to a request from a client to plead a cause of action with no prospects of success. The strategies that could be employed should such a context arise were canvassed in tutorials. This aspect provided students with an opportunity to practise recognising and resolving ethical dilemmas. The importance of law students developing these skills is recognised in TLO 2, and has been emphasised by Australian and United States academia.

D The Surveys

All students enrolled in the 2012 and 2013 Civil Procedure subject at UQ were invited to complete a survey. Invitations were sent to the 2012 and then 2013 student cohorts by email towards the end of the relevant semester. The surveys included questions covering a range of issues relating to the UQ Civil Procedure tutorial program. The findings reported in this article are only the statistically significant results relevant to the discussion of pleading drafting. Thirty-two students completed the 2012 survey and 43 students completed the 2013 survey. As a result of the relatively low response rate, it is possible that those who responded do not constitute a representative sample of the entire Civil Procedure student cohort in 2012 and 2013. The analysis of the data collected through the survey was conducted with this in mind.

1 The Respondents

Most respondents (91.4%) were aged 18-25 years. Slightly more females than males responded to the survey with 59% of respondents being female. Over 96% of the respondents were fulltime students. Almost three quarters were enrolled in a dual program, and about 22% were Bachelor of Law (Graduate Entry) students. Approximately one third of the respondents were already working in practice. Consistent with the course plan for law students at UQ, the respondents were principally later year law students.

64 ALTC, above n 13, 14-16.
65 For example, Michael Robertson, ‘Embedding ‘Ethics’ in Law Degrees’ in Kift et al, above n 3, 110-112.
66 For example, Carnegie Report as cited in Scott, above n 6. Johnstone argues the Carnegie Report is largely applicable to Australia: Johnstone, above n 2, 8.
2 Student Perceptions of the Pleading Drafting Learning Activities

A number of the questions in the surveys were designed to elicit information about student perceptions of the particular learning and teaching activities. Information about student perceptions was sought because of its importance to student motivation and, consequently, student approaches to learning. The questions included indicating on a Likert scale whether they strongly agree, agree, disagree or strongly disagree with, or are neutral about, the following statements:

- ‘I used the knowledge I developed in the activities associated with the Pleading Tutorial\(^67\) in the Drafting Claim and Statement of Claim assignment.’ [Question 7(e)].

- ‘I felt better able to complete the Drafting Claim and Statement of Claim assignment as a result of the Statement of Claim preparation and tutorial exercises associated with the Pleading Tutorial.’ [Question 7(f)]

Students were also asked to rate the helpfulness in developing their pleading drafting skills of several activities in the Pleading Tutorial (i.e. very helpful, helpful, neutral, not very helpful and not at all helpful). These activities were as follows:

- ‘Specific feedback from my group member/s about the Statement of Claim that I drafted in preparation for the tutorial.’ [Question 8(a)]

- ‘Discussion of the Statement of Claim lead by my tutor.’ [Question 8(b)]

Further, students were asked to rate their level of confidence in their pleading drafting skills before the preparation and tutorial exercise in the Pleading Tutorial and then after the tutorial [Question 11]. They were asked to rate their skills before and after the tutorial as excellent, good, satisfactory, poor or very poor. The data that follows is aggregated data from the 2012 and 2013 surveys.

Most of the students who completed the survey perceived the tutorial related activities as helpful in preparing for assignment and agreed that their pleading drafting skills improved through them. A majority of students (86%) agreed that they used knowledge they developed in the activities associated with the Pleading Tutorial in the undertaking the

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\(^67\) The survey question in 2012 referred to Tutorial 2 instead of ‘the Pleading Tutorial’ and the survey question in 2013 referred to Tutorial 4 instead of ‘the Pleading Tutorial’. In each year the wording reflected the tutorial number of the tutorial in which pleading activities were undertaken. The tutorial number changed because the number of tutorials in the UQ Civil Procedure subject was increased, as noted above, from 5 to 10 in 2013. The term ‘the Pleading Tutorial’ is used in this article instead of ‘Tutorial 2 or Tutorial 4’ for brevity and clarity.
assignment [Question 7(e)]. Univariate analysis of student responses to Question 11 revealed four out of five students (80%) agreed that their pleading drafting skills had improved after preparing a pleading for the pleading tutorial and attending the tutorial. There was also a statistically significant relationship (see Table 1) between a student feeling more confident in their pleading drafting skills after the pleading drafting tutorial exercises and students agreeing that:

- the knowledge they gained from the Pleading Tutorial was useful for their Drafting Claim and Statement of Claim assignment [Question 7(e)];
- the Pleading Tutorial made them feel better able to complete the Drafting Claim and Statement of Claim assignment [Question 7(f)]; or
- the Statement of Claim discussion lead by their tutor was helpful [Question 8(b)].

Table 1: Bivariate analysis of whether students felt more confident about their pleading drafting skills after the tutorial program and their responses to questions 7(e), 7(f) and 8(b)

<table>
<thead>
<tr>
<th>Student's confidence improved for pleading drafting skills after the tutorial program</th>
<th>Neutral / Disagree</th>
<th>Agree</th>
<th>p</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>7(e) I used the knowledge I developed in the activities associated with the Pleading Tutorial in the Drafting Claim and Statement of Claim assignment.</td>
<td>1</td>
<td>1.67</td>
<td>*</td>
<td>73</td>
</tr>
<tr>
<td>7(f) I felt better able to complete the Drafting Claim and Statement of Claim assignment as a result of the Statement of Claim preparation and tutorial exercises associated with the Pleading Tutorial.</td>
<td>1</td>
<td>1.83</td>
<td>**</td>
<td>73</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Neutral/ Unhelpful</th>
<th>Helpful</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>8(b) Discussion of the Statement of Claim lead by my tutor.</td>
<td>1</td>
<td>1.75</td>
</tr>
</tbody>
</table>

Statistical Significance: * = 95%; ** = 99%; & *** = 99.9%

In open-ended feedback at the end of the survey, one student stated about the overall tutorial program that they:

… appreciated having the tutorial exercises as a way to test my skills.

Another student stated that it would be:

… great…to give students the opportunity to develop complex skills (eg, pleading, negotiation) over several weeks.68

68 This student completed the course in 2012 when there were five tutorials. This comment was made as part of an argument as to why there should be more tutorials in the course. It is included here because of the point being made that pleading drafting skills would be better developed over more than one tutorial.
The majority of students (73%) felt that discussion lead by the tutor of the statement of claim in the Pleading Tutorial was helpful or very helpful [Question 8(b)]. However, only just over one quarter (26%) viewed the feedback from other students in small group exercises in the Pleading Tutorial as helpful or very helpful [Question 8(a)]. In open-ended feedback, a number of students commented on the small group discussions with other students in tutorials generally. While the comments relate to the small group discussions in tutorials throughout the semester rather than in the Pleading Tutorial specifically, they arguably reveal some helpful insights into what influenced the perspectives of students about the feedback they received from other students. A number of students said they felt other students were not sufficiently knowledgeable or prepared to give adequate feedback. One felt that the small group work was ‘the blind leading the blind’. A number of further comments were made about how particular tutors managed tutorials and implemented the activities. For example, one student said:

For my tutorial there was too much emphasis on the discussion part of the tutorial. Sure have a quick 5-10 [minute] discussion with peers at the start is helpful to get some extra [information], but in my tutorial it was always rushed at the end because we ended up having 40 [minutes] discussion and a quick 10 [minute] glance of answers.

Another student said:

I also don’t think the tutor was connected to the course material enough (as compared with practice) and did not give us any further information or guidance from the lectures.

Yet another student said:

I think that the practical nature of the tutorial tasks was great and I learnt a lot in preparing for the [tutorials] but not much in the [tutorials] themselves.

Finally, some students felt the way feedback was given by their peers detracted from the effectiveness of the small group activities. For example, one student said:

…. many law students [are] very judgmental [about] the views of others making some people feel reluctant to contribute.

E Analysis

The data set out above suggests simulated experience pleading drafting activities can provide students with a sense of achievement in the development of skills necessary to undertake a pleading. A high proportion of the students who responded to the surveys agreed that the tutorial related activities were useful and that they developed their pleading drafting capability in a manner that would assist them with the subsequent assignment. A sense of achievement derived from the perceived improvement in their skills through the tutorial pleading learning activities could act as a motivator for students to engage with
further experiential learning activities, including those associated with completing the assessment pleading task and subsequent pleading drafting in LPT and early practice. As set out above, motivation is a key factor for achieving good learning outcomes.

Further, analysis of the data collected in the surveys indicates that the quality of the feedback a student receives is significant for the student’s perception of the utility of the learning and teaching activities. Where students perceived that the tutorial related activities were useful, in particular that the discussion lead by the tutor in the tutorial was helpful, they were highly likely (99%) to also perceive that their pleading drafting skills improved through the activities associated with the pleading tutorial. This suggests that where students receive feedback they perceive to be useful, they are more likely to feel a sense of achievement. Notably, many students did not perceive the feedback they received from other students in the UQ tutorial activities to be helpful. The open-ended question comments cited above suggest the design and implementation of student feedback activities may be a key factor in how students perceive the value of those activities. In combination, these findings suggest learning and teaching activities must be carefully structured and implemented to incorporate feedback students feel is helpful.

Finally, analysis of the survey data suggests simulated experience pleading drafting activities can be perceived as valuable by students. As evidenced by the comment from the student above about the practical nature of the tutorial activities generally, this may be because of a perception the activities will be of use for their future careers. However, a number of students made general comments (see above, for example) indicating they were not motivated by association with practice but by success in forthcoming assessment instead.

V SHOULD WE ENGAGE STUDENTS IN PLEADING DRAFTING AT LAW SCHOOL?

A key argument for law students learning and developing lawyering and transferable skills by the completion of law school is that those skills can facilitate the learning transition from tertiary education to PLT and practice, or into other careers. 69 This transition is comparable to that from high school to university. 70 Further, a graduated learning process involving law school and continuing through PLT and practice, or in careers in other fields, may enhance the learning of skills. 71 In the case of some transferable skills, this learning process will have commenced before university. 72 Possessing solid transferable and lawyering skills by

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69 Kift, Field and Wells, above n 2, 150.
70 Ibid, 146, 153.
71 ALTC, above n 13, 9.
72 For example, as in the United Kingdom, many Australian law students will be proficient in oral and written communication skills before they commence at law school: ALTC, above n 13, 21.
the end of university may therefore assist students to develop even higher level transferable and lawyering skills through PLT, practice or other relevant careers.

The discussion of the nature of the lawyering and transferable skills involved in pleading drafting above establishes that pleading drafting engages unique aspects of legal drafting, communication, research, analysis, problem solving and advocacy skills. It can further provide an opportunity for exercises and assessment that explore, in context, legal ethical dilemmas. Over 80% of the students who responded to the surveys agreed the discussions of ethical dilemmas in tutorials prompted them to consider how they would deal with such issues in practice. As such, pleading drafting is an activity that could be used at law school to develop lawyering and transferable skills in a similar way to mooting, albeit with an emphasis upon different aspects of those skills.

Drafting a pleading is, however, a task many experienced lawyers find challenging. 73 This is not, in and of itself, sufficient reason not to introduce it at a law school level. In fact, the challenging nature of the task arguably gives greater impetus to introducing students to it through appropriate activities at law school so that students will have basic skills that can be further developed in PLT and in early practice. As noted above, few learners will master a skill on their first attempt. The staged development of the skills necessary to effectively undertake pleading drafting activities through a series of progressively more complex tasks at law school, in PLT and practice may assist students to develop the relevant skills to a high level. The survey results reported in this article suggest that law students can develop a sense of achievement through appropriately designed pleading drafting activities. Those entering practice or PLT will be able to further develop their pleading drafting skills in those environments with a level of confidence and understanding of the tasks they are asked to undertake. Those students who do not enter practice will have been engaged in tasks designed to develop different aspects of certain transferable skills that can be useful to them in the transition to the workforce and throughout their careers.

The difficulty of pleading drafting does, however, warrant careful design of the learning and teaching activities associated with it. An experiential learning model is an appropriate theoretical basis for planning learning and teaching of pleading drafting, for the reasons set out above. Significantly, any pleading tasks must be at a suitable level for law students in order that they develop a sense of achievement, as explained above. Finally, any assessment criteria must also focus on the level of skills it is reasonable to expect of law school students and ensure requisite levels of skill are appropriate.

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73 See, for example, Mio Art Pty Ltd v Macequest Pty Ltd & Ors (2013) 95 ACSR 583; [2013] QSC 211, particularly [58] - [72]. See also the discussion of particulars versus material facts in Bamford and Rankin, above n 21, 100.
VI Conclusion

Students can be assisted in the transition from university to PLT, practice or the wider workforce by obtaining lawyering and transferable skills that equip them to undertake tasks in those contexts. This article has argued that pleading drafting is an activity that requires different aspects of lawyering and transferable skills to those of other legal and non-legal activities at university. As such, it can provide a platform for students to enhance their lawyering and transferable skills. This article has further established that experiential learning is an appropriate and effective mechanism for learning pleading drafting at law school, including by reporting on the results of surveys of students about their perceptions of the utility of simulated experience pleading drafting activities in the UQ Civil Procedure subject. The majority of the students who responded to the surveys perceived the learning and teaching activities in that subject to be beneficial in learning pleading drafting skills. Student perception of the value of an activity is critical to their motivation to undertake that activity which in turn influences their approach to learning and the learning outcomes they achieve.

The survey results, however, further suggest that feedback mechanisms, particularly those involving peers, need to be carefully designed and implemented to ensure students perceive the feedback they receive about their performance of a skill as helpful. If so, they are better equipped to identify an improvement in their skills, which may in turn positively motivate them. These results should be of assistance to teachers designing learning and teaching activities for skills, including pleading drafting activities.

Finally, this article has demonstrated that the quintessentially legal task of drafting pleadings can be a platform for learning and teaching about broader issues relevant to the civil justice system and practice. Pleading drafting can be a forum through which to explore ethical and client care issues as well as key issues in relation to the civil justice system. An understanding of these issues will give students a holistic understanding of the law and the civil legal system.
TEACHING CORPORATIONS LAW FROM A TRANSACTIONAL PERSPECTIVE AND THROUGH THE USE OF EXPERIENTIAL TECHNIQUES

ANDREW GODWIN*

I INTRODUCTION

Much has been written of the trend toward the development of a transactional law focus within the law school curriculum. Also referred to as the ‘transactional law movement’ or the ‘practice skills reform movement’, it is particularly evident in the United States.1

The term ‘transactional law’ can embrace a variety of approaches and methodologies, ranging from the teaching of substantive law from a transactional perspective, where the focus is on how the substantive law regulates and supports business transactions, to the teaching of skills that transactional lawyers need to develop in order to perform their role effectively (e.g. advisory, drafting and negotiation skills). At the very least, however, teaching law from a transactional perspective involves an examination of how law and lawyers become relevant in the context of business transactions. The transaction provides the practical context in which the relevance of law is examined. In this sense, the law might be referred to as ‘applied law’ by contrast with ‘pure law’ (or doctrinal law) in the same sense that we refer to ‘applied physics’ as distinct from ‘pure physics’. Because of the relevance of the broader context, teaching law from a transactional perspective also involves looking at the commercial context in which transactions take place or the commercial motivations or drivers. Inevitably, it also involves a consideration of the role that

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1 For an overview of the literature in this area and suggestions as to why this trend is stronger in the United States than elsewhere, see A Godwin, ‘Teaching Transactional Law: A Case Study from Australia with Reference to the US Experience’ (2015) 16(2) Transactions: The Tennessee Journal of Business Law 343. Increasingly, law schools in the US are strengthening the focus on experiential education to the point where some schools devote the whole of the third year of a law degree to this approach.
transactional lawyers perform, including the professional and ethical challenges that arise in this context.2

Another way of putting this is that teaching law from a transactional perspective involves examining law through the prism of a transaction and from the perspective of a transactional lawyer. It involves learning law through transactions rather than learning transactions through law. Such an approach may be based on an examination of the law and legal concepts that are relevant to a transaction or a series of transaction across a broad range of areas such as contract law, property law, obligations and remedies. In this context, the emphasis is on breadth over the depth that would be possible in a single-area subject and is a useful approach for capstone subjects; namely, subjects that integrate previously acquired knowledge, skills and experiential learning and are designed to prepare students for their future careers.

Alternatively, a transactional law approach may be based on a single-area subject, such as corporations law, where transactional aspects and techniques are incorporated into the curriculum. This is the focus of this paper; namely, how a corporations law course might be taught from a transactional perspective and through the use of experiential techniques.3

In recent years, law schools around Australia have taken steps to strengthen the transactional focus within the curriculum in response to increased expectation in the workplace that law graduates understand the role that transactional lawyers play in both a domestic and cross-border context and develop an awareness of essential skills in areas such as advising, drafting and negotiation. Although much of the learning that is required for this purpose can be imparted through the conventional seminar-based approach, the use of experiential techniques can enhance the learning process by replicating the work undertaken by transactional lawyers and providing students with opportunities to experience and reflect on the role of transactional lawyers, the challenges that they confront in a transactional context and the skills that they need to develop in order to perform their role effectively. This paper contributes to the discourse in this area by examining various experiential techniques and suggesting ways in which they might be applied in a transactional context to teach corporations law.

2 In particular, writers have noted the benefits of client-based problems and simulations for teaching ethical issues. See Anne M Tucker, ‘Teaching LLCS by Design’ (2014) 71 Washington and Lee Law Review 525, 527, where the writer points out the benefits of simulations in terms of cultivating students’ ethical and professional identities. See also Carol Goforth, ‘Use of Simulations and Client-Based Exercised in the Basic Course’ (2000) 34 Georgia Law Journal 851, 853: ‘I find that simulated exercises also offer an excellent opportunity to integrate ethical issues applicable to representation of business clients into the basic course.’ See also Deborah Maranville, ‘Re-vision Quest: A Law School Guide to Designing Experiential Learning Courses Involving Real Lawyering’ (2012) 56 New York Law School Law Review 517, 525.

3 It is also interesting to review the literature that considers teaching the whole curriculum from a transactional perspective. For example, Cynthia Batt, ‘A Practice Continuum: Integrating Experiential Education into the Curriculum’ (2015) 7 Elon Law Review 119 considers how the whole curriculum can be redesigned as a ‘continuum’ that gets increasingly more transactional the further students are in to their degrees.
Teaching law from a transactional perspective requires students to gain an understanding of what transactional lawyers do and how they think and, in the case of simulations or other experiential learning techniques, to practise what transactional lawyers do in a virtual context. This does not call for any radical departures from the conventional manner in which law subjects are taught. However, it may involve radical departures from the conventional approach, particularly where students are required to participate in virtual transactions through the use of simulated exercises or simulated courses and other techniques such as client interviews and technology-based learning. The trend towards participation in virtual transactions has become particularly pronounced in courses that focus on skills such as drafting and negotiation. Even further along the spectrum are clinical law programs or business clinics in which students get involved in real deals for real clients.

Unavoidably, single-area subjects such as corporations law must place their focus on teaching the substantive law and on providing students with an in-depth understanding of the doctrines and principles that arise in that regard. Although this necessarily means that an examination of the broader transactional context is less relevant (and less realistic) than in the case of a subject that is designed around a specific transaction or a specific skillset, it does not rule out the possibility of adopting simulations and other experiential learning techniques that strengthen the transactional aspects.

In fact, experience suggests that single-area subjects lend themselves well to the adoption of a blended approach where simulations and other experiential learning techniques are utilised for the purpose of teaching legal doctrine, and that various benefits flow from such an approach. These benefits include opportunities ‘for students to apply the law and practice the skills that were previously only discussed’ and also to transform the process of ‘deconstructing statutes from a passive endeavour to an active learning exercise where students [have] to understand and apply the statutes to achieve an assigned client objective’. Part II of this paper provides an overview of four experiential techniques: client-based problems, client interviews, drafting and negotiation simulations and what this writer refers to as ‘facilitated reflection’. Part III of this paper suggests ways in which experiential

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4 For an example of a course that is designed around a cross-border business transaction, see Daniel Bradlow and Jay Finkelstein, ‘Training Students to be International Transactional Lawyers: Using an Extended Simulation to Educate Law Students About Business Transactions’ (2007) 1 Journal of Business Entrepreneurship and Law 67.

5 Clinics have been said to offer ‘the opportunity to understand what being a lawyer and practicing law is all about. The clinic structure allows students to draw upon and further develop their substantive knowledge, doctrinal reasoning, lawyering skills, ethical engagement and professional identity’: Lisa Bliss and Donald Peters, ‘Delivering Effective Education in In-House Clinics’ in Maranville et al (eds), Building on Best Practices: Transforming Legal Education in a Changing World (LexisNexis, 2015) 3.

6 Tucker, above n 2, 534. See Part III below for a suggestion as to how this might be applied to the teaching of corporations law in Australia.
learning techniques might be adopted or utilised more effectively for the purpose of teaching corporations law in Australia. Part IV provides some concluding observations.

II EXPERIENTIAL LEARNING

There are three tasks that figure prominently in the work that transactional lawyers undertake: (i) providing legal advice, including advice on how to structure transactions to comply with the legal requirements; (ii) drafting agreements; and (iii) negotiating deals and documents. In order to undertake this work effectively, transactional lawyers must have an understanding of the commercial context in which clients operate and the specific issues and problems that clients face.

Experiential learning provides students with insights into what transactional lawyers do by getting them involved in experiences that, so far as possible, replicate what transactional lawyers do in practice. As Tucker suggests, ‘[e]xperiential learning is intended to contextualize studying the law and equip students with lawyering skills required in practice.’ Ferber explains that experiential learning occurs in a four-stage cycle, in which a learner (1) ‘engages in concrete experience’; (2) ‘engages in reflection and observation on that concrete experience’; (3) forms ‘abstract principles, concepts and generalizations based on the reflective observations of the experience’; and (4) ‘actively experiments with the implications of those principles, concepts or generalizations in new situations.’

Techniques for experiential learning include the following: (i) the use of client-based problems; (ii) client interviews to teach advisory, communication and interpersonal skills; (iii) simulation exercises to teach skills such as drafting and negotiation; and (iv) facilitated reflection. The first three techniques are experiential in the sense that they replicate the work undertaken by transactional lawyers and provide students with opportunities to experience that work in a learning environment. The

7 It should be acknowledged that many of these techniques are already used to varying degrees in law schools around Australia, including in corporations law subjects, and that this paper does not undertake an empirical analysis of the benefits of experiential learning. Instead, it examines experiential techniques that might be adopted in a single-area subject, such as corporations law, and suggests a transactional context in which these techniques might be applied. For an empirical analysis of the benefits and challenges of teaching transactional law generally, see Godwin, above n 1.

8 Tucker, above n 2, 526.

9 Paul Ferber, ‘Adult Learning Theory and Simulations: Designing Simulations to Educate Lawyers’ (2002) 9 Clinical Law Review 417, quoting David A Kolb, Experiential Learning: Experience as the Source of Learning and Development (Prentice-Hall, 1984). There is literature suggesting that a dichotomy exists between ‘experiential learning’ and ‘experiential education’. Batt, above n 3, for example, suggests that experiential learning is something that is ‘random and without design or intent’, whereas experiential education ‘is designed with specific learning objectives that students are expected to achieve.’ See also Maranville et al, ‘Incorporating Experiential Education throughout the Curriculum’ in Maranville et al (eds), Building on Best Practices: Transforming Legal Education in a Changing World (LexisNexis, 2015).
fourth technique is experiential in the sense that it encourages students to reflect on the broader context in which the law and legal doctrine have developed and the relevance of transactions and transactional lawyers to that development. Each of these techniques is discussed below.

A Client-based problems

It is important to be aware of the difference between hypothetical problems, such as those that have traditionally been utilised in teaching substantive law subjects, and client-based problems. Hypothetical problems tend to be backward-looking; that is, they focus on a dispute and require students to look back at the actions of the parties and examine the way in which the dispute might be resolved through the application of the substantive law to the facts of the dispute. In addition, they tend to be closed-ended; that is, they confine the student’s attention to a specific context (e.g. a legal principle as reflected in case law or a statutory provision) and to a limited range of possibilities within that context. The reason for this is that the purpose of such hypothetical questions is to test knowledge of law as developed in cases in which similar disputes have arisen. In other words, the conventional hypothetical questions take their cue from the case law instead of from transactions.

By way of example, a traditional hypothetical question in a corporations law subject might test knowledge of the law governing conflicts of interest by posing the following question:

X is a director and has failed to disclose a majority shareholding in a competing company to the other directors. Advise X on whether she is in breach of the duty of loyalty under the Corporations Act and liability for breach.

Such a question would require students to identify section 191 of the Corporations Act, to define a ‘material personal interest’ by reference to case law and to examine the statutory exceptions in determining potential liability for breach. In effect, the focus is on interpreting case law and statute and demonstrating knowledge of how the law might be applied to the given facts.

On the other hand, a client-based problem is forward-looking and open-ended. It requires the student to look forward to a goal that a client wants to achieve (such as the entering into of an activity or transaction) and invites the student to identify what issues might be relevant and what further information might be required in order to advise fully. For example, a client-based problem might ask the following:

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10 For further comment on this point, see Constance Wagner, ‘Training the Transactional Business Lawyer: Using the Business Associations Course as a Platform to Teach Practical Skills’ (2014) 59 Saint Louis University Law Journal 1, 1, where the writer suggest that law schools mislead students by placing such a strong focus on case law analysis, leaving ‘students with the misimpression that business law practice is primarily about litigation. In fact, business law practice is about preventing legal disputes from arising in the first place by proactive lawyering.’
X is about to be appointed a director and requires advice on whether she is required to make any disclosures in respect of her shareholding in other companies and what she needs to do in order to comply with any applicable requirements in this regard.

Such a question would require students to consider whether the shareholding constitutes a ‘material personal interest’ and to advise the client on the circumstances in which section 191 of the Corporations Act might apply. It would also encourage students to think more broadly about other applicable requirements, such as those in the company constitution, and the implications in terms of voting. It is forward-looking in the sense that it anticipates action rather than focusing on past action and is open-ended in the sense that the student needs to consider how the position might change depending on the circumstances, and what further information should be requested from the client in order to advise fully. In this way, it reflects the issues and questions that would arise in practice.11

B Client Interviews

In line with the general approach of experiential learning as outlined above, the purpose of client interviews is to simulate the experience of communicating with, and advising, clients in real life. This technique can be utilised in different ways. This writer has trialled the technique in the subject Deals, where the focus was on testing students’ knowledge of the law and their ability to explain technical concepts in language that is clear and comprehensible to an informed lay person. The exercise was based on a memorandum of advice that each student had prepared in response to client questions concerning a technical legal issue.

The technique has also been utilised more comprehensively to test a broad range of communication skills in the context of vocational legal education. This has involved the use of standardised clients, which Johnson defines as ‘actors who are trained to portray clients in a simulation and to assess the advice and communications provided by student attorneys in their [counselling] sessions’.12


C. Drafting and Negotiation Simulations

In response to recommendations in the McCrate Report of 1992 and the Carnegie Report of 2007 and in line with trends generally, many law schools in the United States have adopted simulation techniques for the purpose of skills-based education. Inspired by research on experiential learning generally and the experience of other disciplines such as medicine, academics have promoted the benefits of simulation techniques across a range of courses, including clinical law programs. These techniques have been utilised in both doctrinal law subjects and also simulation-based courses.

Gouvin has described the difference between a doctrinal law course (also known as a ‘problem course’) and a simulation-based course as follows:

[T]he hypothetical in the simulation course drives the syllabus in an organic way as the hypothetical scenario unfolds. This is opposed to a problem course, where the problems do not drive the syllabus, but instead are there to illustrate and develop the issues set out in the syllabus.16

Katz notes that ‘there are three curricular paths by which law schools can [provide more experiential education that integrates the teaching of doctrine, skills and professional identity]’: (1) ‘[c]linics in which students directly represent actual clients under the supervision of faculty members’; (2) ‘[e]xternships or field placements, in which students work with practicing lawyers on real legal problems (and sometimes engage in direct representation of clients under the supervision of those lawyers, depending on the state's student practice laws)’; and (3) ‘[c]ourse simulations, in which students play the role of lawyers in simulated legal problems. These simulations may be small-scale, occupying only a few class periods or even a portion of a class period, or large-scale, with the

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13 These reports called for the narrowing of the gap between law schools and the profession and reforms to prepare graduates better for legal practice. They observe that ‘the bridge is too underdeveloped to safely carry across the tens of thousands of law graduates who enter the profession each year’: Deborah Maranville, ‘Re-vision Quest: A Law School Guide to Designing Experiential Learning Courses Involving Real Lawyering’ (2012) 56 New York Law School Law Review 517, 524. Much has been written about how these gaps can be bridged: Alexa Z Chew and Katie R G Pyral, ‘Bridging the Gap Between Law School and Law Practice’ (2015) The 25th Annual Festival of Legal Learning 1.

14 See Paula Schaefer, ‘Injecting Law Student Drama into the Classroom: Transforming An E-Discovery Class (Or Any Law School Class) With a Complex, Student-Generated Simulation’ (2011) 12 Nevada Law Journal 130, 133, who notes that ‘[m]edical schools have used simulations with great success in training doctors: actors play the part of patients and interact with medical students, who practice interviewing and diagnosing’.


whole course being a simulation. Many legal writing courses include simulations.\(^\text{17}\)

In line with the drivers behind the transactional law movement generally, the move towards experiential learning reflects concerns about the narrow focus of the conventional approach to legal education, which has been dominated by the analysis of appellate cases.\(^\text{18}\) By incorporating experiential learning into the core curriculum, it is argued, ‘the divide among “skills,” “theory,” or “substance” courses can be eliminated.’\(^\text{19}\)

The move towards incorporating simulation and other experiential learning techniques has also been driven by requirements of the American Bar Association for ‘law schools to expand their simulation offerings.’\(^\text{20}\)

As noted by Batt, ‘ABA Standard 303 now requires that students complete at least six credits of experiential education, defined as a clinic, a field placement, or a simulation course; and ABA Standard 304 provides new definitions of clinical and simulation courses.’\(^\text{21}\) By contrast, although the admission rules in Australia require practical legal training for professional qualification and include skills within the prescribed competencies, they do not prescribe the use of experiential education in the academic requirements and only refer generally to ‘workplace experience’ in the context of practical legal training.\(^\text{22}\)

Ferber defines simulations as ‘an activity composed of three essential elements: (1) the performance of a lawyering task; (2) using a hypothetical situation which emulates reality; and (3) a “significant” (relative to the task to be performed) period of time to perform the task.’\(^\text{23}\)

Ferber suggests that the third element


\(^{18}\) James Moliterno, ‘Legal Education, Experiential Learning, and Professional Responsibility’ (1996) 38 William and Mary Law Review 71, 122. This conventional approach is commonly referred to in the US as the Langdellian method after Christopher Columbus Langdell, who was Dean of Harvard Law School from 1870 to 1895 and is credited as having introduced the case method to law teaching. See also Michelle Harner and Robert Rhee, ‘Deal Deconstructions, Case Studies, and Case Simulations: Toward Practice Readiness with New Pedagogies in Teaching Business and Transactional Law’ (2014) 3 American University Law Review 81, 82.


\(^{21}\) Batt, above n 3, 35.

\(^{22}\) See, for example, Law Admissions Consultative Committee, Uniform Admission Rules 2014.

\(^{23}\) Ferber, above n 9, 418.
task. The immediacy of the in-class hypothetical prevents students from developing the process for doing tasks.\textsuperscript{24} 

Ferber divides simulations into three categories: a simple simulation, which is 'similar to a hypothetical role play but provides students with reflection and preparation time';\textsuperscript{25} a complex simulation, which 'involves the creation of a partial world in which to set the learning experience';\textsuperscript{26} and an extended simulation, which 'usually involves expanding a complex simulation... [and] can be used in any of the three major lawyering contexts: transaction planning, pre-action advice-giving, or dispute resolution'.\textsuperscript{27} 

Noting that 'simulations have their pedagogic roots in experiential learning theory', Ferber explains that experiential learning is based on the fact that 'people learn from their everyday life experience' and 'provides a foundation for an approach to learning as a lifelong process, inside and outside the classroom'.\textsuperscript{28} 

The following have been identified as the benefits of simulations: the opportunity to integrate the teaching of doctrine, skills and professional identity, including ethical issues and responsibilities, into the law school curriculum;\textsuperscript{29} higher levels of interest, enthusiasm and motivation than might otherwise be the case with the conventional approach;\textsuperscript{30} the opportunity for students to engage in \textit{ex ante} analysis and risk assessment;\textsuperscript{31} the illumination and synthesis of the doctrines in basic substantive law courses\textsuperscript{32} and the benefits that students derive from being exposed to 'complex concepts through learning by doing'.\textsuperscript{33} They have been likened to flight simulators, where the process

\textsuperscript{24} Ibid 419. 
\textsuperscript{25} Ibid 419. 
\textsuperscript{26} Ibid 421. Ferber suggests that the difference between a simple simulation and a complex simulation is that '[u]nlike the simple simulation where all the facts directly relate to the learning point, [a complex simulation occurs where] the facts (and documents) expand the information base to provide a broader factual context.' 
\textsuperscript{27} Ibid 425-6. 
\textsuperscript{28} Ibid 428-9, suggests that 'learning how to learn from experience is an integral part of professional life' and that '[w]hile continuing legal education helps, learning from experience is particularly important for lawyers. Three years of legal education barely scratches the surface of what lawyers must learn to be competent professionals.' See also Goforth, above n 2, 853: '[M]ost students need the exposure because they will not get it elsewhere while they are students.' 
\textsuperscript{29} Katz, above n 17, 833; Goforth, above n 2, 853; Kirsten Dauphinais, ‘Using an Interviewing, Counselling, Negotiating, and Drafting Simulation in the First Year Legal Writing Program’ (2013) 15 Transactions: The Tennessee Journal of Business Law 105, 111; Lisa Bliss and Donald Peters, ‘Delivering Effective Education in In-House Clinics’ in Maranville et al (eds), above n 9, 15. 
\textsuperscript{31} Tucker, above n 2, 535. 
\textsuperscript{33} Sonsteng, above n 19, 417. Binford notes that ‘according to pedagogical research, practice by doing has the second-highest rate of long-term retention of any learning
can be tailored to student learning in ways that real cases in a clinic cannot. Teachers can omit the months of wait time between significant events in a case. And they can create facts that might not exist in a real case, allowing students to explore legal and ethical issues that might not arise in a particular case. 

Various challenges have been identified with the use of simulations. For a start, simulated courses are very broad in scope and go much further than an examination of the substantive law. The substantive law can sometimes be overwhelmed by the broader context. In addition, teachers have less control and the process is less predictable because students are active participants in the learning process – a process in which the lecturers often act more like facilitators than like teachers.

There are also challenges relating to the practical constraints in terms of the limited time in which to cover the doctrinal issues and the cost and effort that is required to design and deliver simulation exercises and simulation-based courses.

Another challenge that has been identified is the extent to which simulations may ‘incorporate hidden assumptions that may not entirely reflect reality’ and the associated challenge of authenticity, namely, the risk that the effectiveness of the exercise is undermined by the realisation on the part of students that the exercise is not authentic. Further challenges include the lack of practice experience on the part of teachers; uncertainty and anxiety on the part of students in relation to assessment; and the need for students to have a good understanding of the law, which limits many simulations to later-year students. These challenges have led to experimentation involving the use of technology to deliver simulations.

**D Facilitated Reflection**

Facilitated reflection is the process by which students, under the guidance and facilitation of the teacher, are invited in class to reflect on issues that relate to the broader context in which a dispute has arisen or a
particular concept or doctrine is examined. In the context of case law, for example, the process would involve examining not just how the facts were relevant for the purpose of determining the application and development of legal concepts and doctrines, but also how the facts threw light on other issues that are relevant from a transactional perspective. These issues might include issues concerning the type of deal that the dispute involved and whether there were any issues specific to that type of deal and the way in which it was structured; the commercial context in which the dispute arose; why the dispute was not settled; and the role of the lawyers and other protagonists.

Wagner has expressed this as follows:

I often speak to my students about how a bad result in a case can be used as a learning experience. I call this the lawyer as planner approach. I ask my students to speculate about the cause of the breakdown in the relationship between the parties that led to the litigation. Was it due to poor drafting of the contract that could have been avoided if the lawyer had done a better job? Was the failure due to lack of identification of legal issues that should have been addressed? Was the problem caused by poor communication among the parties or with their lawyers? I ask my students to identify ways in which better communication, counseling or drafting could have avoided the litigation altogether or at least mitigated the risk that litigation would occur. If a contract clause is involved, I may request that they redraft the provision to correct the ambiguity or mistake that led to litigation. I also ask them to think about how they would plan to approach similar situations that might arise in their future practice in ways that would avoid litigation.42

This point has also been emphasised by Maranville et al:

Teachers provide value during an experiential course in any of five primary ways: providing in-depth conceptual frameworks for individual skills, intensive supervision of student preparation and performance of work, specific feedback on simulated or real performances, and structuring opportunities for broader student reflection. During the experience, the teacher will choose from these options the ones that suit the structure of the course, with reflection being a priority in all types of experiential courses.43

In many ways, facilitated reflection simply involves making more of the conventional materials to teach ‘context’ in addition to ‘text’. It involves approaching the conventional materials with a broader focus, one that determines relevance by reference to the transactional aspects and not just the doctrinal aspects.44

42 Wagner, above n 10, 27.
43 Deborah Maranville et al, ‘Incorporating Experiential Education throughout the Curriculum’ in Maranville et al, above n 5, 15.
44 See Godwin, above n 1, 362, for a discussion of how teachers can make more of conventional materials by examining the issues from a broader, transactional perspective.
III Teaching Corporations Law from a Transactional Perspective

In Australia, ‘corporations law’ or ‘company law’ is a compulsory teaching area identified by the Law Admissions Consultative Committee in the Uniform Admission Rules 2014 [Schedule 1]. It is a necessary academic requirement for students seeking admission in Victoria and New South Wales.45

A typical curriculum for corporations law in Australia covers the following topics:

1. Introduction to Companies and the Regulatory Scheme
2. Incorporation and its Effects
3. Managing Companies
4. Duties and Liabilities of Directors and Officers
   a. Framework of Duties, Duty to act in Good Faith and Duty to act for a Proper Purpose
   b. Duty of Care
   c. Loyalty
5. Shareholder Actions
6. Corporate Liability
7. Share Capital
8. Introduction to Corporate Insolvency

Although many of the topics will require a seminar-based, Langdellian approach, there are various ways in which certain topics might be taught from a transactional perspective by adopting one or more of the techniques previously discussed. Some suggestions are set out below.

A Client-Based Problems

Many, if not all, of the topics in the curriculum could commence with client-based problems that are premised on an umbrella transactional scenario such as that set out below. This scenario concerns the incorporation of a joint venture company and would be a particularly useful scenario for the purpose of teaching the topic ‘managing companies’.46

John Smith is the sole shareholder and director of a company (the “Company”). In order to expand the Company, John proposes to invite investment from two other shareholders: your client, a private equity company called ABC, which is proposing to acquire a 40% shareholding, and a company called XYZ, which will acquire a 20% shareholding. John Smith will hold the remaining 40%. The investment will be undertaken by a combination of the purchase of existing shares from John Smith and the subscription of new shares (i.e. an increase in capital).

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45 Uniform Admission Rules 2014 s 2. In the US, the subject ‘Business Associations’ is compulsory or strongly recommended in most law schools. See Wagner, above n 10, 21.
46 See Tucker, above n 2, for a similar approach in relation to unincorporated business associations.
You are instructed that the investors and John Smith have agreed that the following arrangements will be included in the Shareholders’ Agreement between the three parties:

- Each of ABC and John Smith will have the right to appoint 2 directors and XYZ will have the right to appoint 1 director.
- ABC will have the right to appoint one of its two directors as the Chair of the Board.
- The Chair will not have a casting vote.
- Resolutions in respect of certain matters will require a Special Majority of Directors (namely, at least four directors).
- Resolutions in respect of other matters will be made by the affirmative vote of a Simple Majority of Directors (namely, at least three directors).
- No Shareholder will be permitted to transfer its Shares except in the following circumstances:
  - Where it has offered the Shares first to the other shareholders.
  - Where it transfers its Shares to a member of the Shareholder Group of which it is a member.
  - As otherwise provided in the Shareholders’ Agreement.
- A non-competition provision will be included in the Shareholders’ Agreement.

Such an approach in respect of this topic would bring various issues into play, including the internal governance rules of the company, including the replaceable rules set out in the Corporations Act and, where applicable, the constitution of the company; the manner in which directors are appointed; the reason why the shareholders might enter into a shareholders’ agreement and the relationship between that agreement and the constitution; and how the parties might negotiate and agree key issues such as whether the Chair should have a casting vote, on what basis new shares may be issued and whether a shareholder may transfer its shares to third parties.

The above issues could be taught by requiring students to answer questions such as the following:

Is it necessary for the Company to adopt a constitution?

If a constitution is adopted, which replaceable rules in the Corporations Act need to be displaced or modified to accommodate the instructions set out in Part of the Scenario?

How should any inconsistencies between the constitution and the shareholders’ agreement be dealt with?

What are the procedures for adopting a constitution and how should this be reflected in the share purchase agreement and the share subscription agreement in order to protect the interests of ABC?
The answers could be prepared in the form of a client memorandum of advice, which could constitute part of the assessment in the subject (eg 30 per cent of the total marks in the subject) and could be completed in the first four weeks of the semester as an interim assessment. For the purpose of preparing the memorandum of advice, the students could be given a briefing pack (the ‘Briefing Pack’), which would include extracts from the Corporations Act concerning replaceable rules and the constitution. It could also include references to in the relevant parts of the prescribed text and additional reading.

**B Client Interviews**

In place of, or in addition to, the memorandum of advice, the students could be asked to attend a client interview to explain the legal position and to answer standardised questions raised by the client. The following assessment criteria could be applied for the purpose of grading each student:

- Understanding of the legal issues and the commercial context
  - Does the student demonstrate a good understanding of the legal issues?
  - How well does the student understand the practical implications of the advice and the commercial context in which the advice might be relevant?

- Ability to provide oral advice
  - Is the student able to provide an oral summary and explanation of the written advice in an authoritative and confident manner?

- Communication skills
  - How well does the student answer questions about the written advice?
  - Is the student able to anticipate the concerns behind the questions and answer them fully and coherently?
  - Is the student able to use language that is clear and comprehensible to an informed lay person?

The standardised questions could include technical legal questions as well as general, open-ended questions that are designed to test the student’s ability to anticipate the concerns behind the client’s questions and to answer them fully.

**C Drafting and Negotiation Simulations**

For the purpose of utilising simulations, the Briefing Pack provided to students could include sample clauses from a shareholders’ agreement for an incorporated joint venture. This would provide a framework within which students could draft and negotiate certain provisions in accordance with the client’s instructions.
A drafting simulation could be introduced to give students the opportunity to draft a document, such as a memorandum of understanding concerning the proposed investment, or clauses from the shareholder’s agreement, such as the matters requiring a resolution by a special majority of directors, the pre-emptive rights applicable on a transfer of shares or a non-competition clause. Similar to the memorandum of advice, the students could be given a set of client instructions, except that the instructions would differ depending on the party for which they were acting. In order to simulate the conditions for a real-life negotiation, the instructions could disclose the client’s position on the relevant issues according to three categories: (1) best-case position; (2) bottom-line position; and (3) compromise positions.

By way of example, a non-competition clause lends itself well to a simulated negotiation because of the various elements that need to be agreed and the different positions that could be taken in relation to each element. The relevant elements that need to be agreed in order to make the clause work include the following: (1) the scope of the business to which the covenants apply; (2) the period during which the covenants apply; and (3) the geographical areas to which the covenants apply. Other elements include any applicable exceptions and any additional restrictions that might be agreed. A scenario could easily be designed based on different client instructions that incorporate the various positions of the relevant parties.

The scenario could build on the umbrella transactional scenario outlined above and involve negotiations between John Smith and the new shareholders in relation to the non-competition clause. Teams of two to three students could be allocated to represent each party in the tripartite negotiations, which would be particularly dynamic given the different interests and priorities of the parties. For example, John Smith, as a 40 per cent shareholder in the company, would have an interest in imposing the maximum restrictions on the ability of the other shareholders to compete with the company. On the other hand, ABC would want to negotiate exceptions to accommodate its private equity investment activities and XYZ would want to minimise the extent of the restrictions by virtue of the fact that it will only acquire a 20 per cent shareholding.

In order to ensure that students have a sufficient understanding of the law governing non-compete (or restraint of trade) clauses, extracts from, or references to, the relevant materials (ie case law, academic commentary and statute) could be included in the Briefing Pack.

D Facilitated Reflection

The technique of facilitated reflection could be adopted in class to enhance the teaching of cases in an Australian corporations law subject and to explore the issues from a transactional perspective. The benefits of

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47 Another transaction document that could be used for designing a simulated drafting and negotiation exercise is a debt restructuring agreement. This would be particularly useful for the purpose of teaching loan transactions and corporate insolvency.
facilitated reflection could be reinforced by incorporating a reflective writing component into the assessment for the subject. An example of a case that would easily lend itself to such an approach is *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investment Commission v Adler.*48 This case is commonly included in the curriculum to teach the duties of directors. In addition to breaches of the provisions concerning the duties of directors,49 the case involved breaches of other provisions, including those governing the giving of financial benefit to a related party.50 The related party aspect of this case is of particular interest from a transactional perspective as it touches on the nature of advice that the directors sought from the lawyers, the provision of misinformation to the lawyers and the inappropriate reliance on the legal advice by the directors to justify their improper transactions. By examining the broader context in which the related party provisions were breached, it is possible to reflect on the role of the transactional lawyer, the challenges that arise when clients instruct lawyers and the nature of the lawyer-client relationship generally.51

IV CONCLUSION

As shown by the trends in the US, law schools are increasingly being expected to produce graduates who are practice-aware, whether in the context of private practice, in-house practice or government practice, and who have developed an understanding of the skills that they need to develop in order to practise effectively in a transactional context, both domestic and cross-border.

This paper has discussed the use of experiential learning techniques to strengthen the transactional focus within the law school curriculum and has demonstrated how a transactional approach that incorporates experiential learning techniques might be applied to a single-area subject such as corporations law in Australia. These experiential learning techniques include client-based problems, client interviews, drafting and negotiation simulations and facilitated reflection. Although there are various challenges associated with such an approach, the literature in the US and elsewhere overwhelmingly highlights the benefits of incorporating experiential learning techniques into the curriculum and the relative ease with which this might be done. In addition, as argued by this paper, much can be achieved in this regard simply by broadening the context in which the doctrinal issues are taught and making more of the conventional materials.

49 *Corporations Act 2010* ss 180-3.
50 *Corporations Act 2010* ss 208 and 229.
51 This could include the ethical challenges that arise in this context.
LEGAL EDUCATION, LEGAL PRACTICE AND ETHICS

MARIANICOLAE*

I INTRODUCTION

The law degree has increasingly become a generalist degree.\(^1\) This is due to two principal factors. First, not all students who undertake and complete a law degree do so with a view to pursuing a legal career.\(^2\) Although two thirds of law students seek admission post-graduation (either as barristers or solicitors), far fewer remain within the profession three to five years post admission.\(^3\) Nonetheless, by and large, these students continue to hold professional positions in other capacities – for example as accountants, directors of corporate entities, in the foreign diplomatic service, as politicians, or as advisors to government departments.\(^4\) Second, law programs market themselves to prospective students as not simply teaching students the law, but rather as equipping students with a number of transferrable skills that remain relevant and applicable post-graduation, irrespective of their chosen career or profession.

The direct consequence of this increased heterogeneity of the student cohort is that law schools have had to satisfy the requirements and demands of two groups with seemingly disparate educational needs, namely future legal practitioners and future non-legal practitioners. On the one hand, the student cohort intending to pursue a legal career increasingly calls for more practicality in the law curriculum so as to increase readiness for practice. In essence, this demand calls for a narrower coverage of subject matter focusing exclusively on the legal profession and the areas of law most likely to be encountered in practice, with the attendant lawyering skills needed. On the other hand, the section of the student cohort not intending to pursue a legal career would benefit more from, and therefore favour, a broadening of the coverage of subject matter so as to enable graduates to utilise the knowledge and practical skills acquired during the law degree in other professional circumstances.

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2 Adrian Evans, The Good Lawyer (Cambridge University Press, 2014) 1.
3 Murray, above n 1, 71.
4 Evans, above n 2, 3.
As an example of this dichotomy, with respect to the area of ethics, future legal practitioners request a better understanding of the current rules regulating the legal profession, whereas future non-legal practitioners request a broader approach to the study of ethics so as to enable them to transfer the knowledge acquired within the legal context to other professional contexts.

Although the aim of a generalist degree appears to be in direct contradiction to a program which aims to produce ‘practice ready’ legal professionals, the contradiction is illusory only. This is so because most, if not all, professions share similar requirements with respect to the conduct of their members. For example, in Queensland, under the Australian Solicitors Conduct Rules 2012 (Qld), at rule 4.1.1, a solicitor is required to act in the best interests of the client. Under the Barristers’ Conduct Rules 2011 (Qld), at rule 37, a barrister is required to promote the client’s best interests. Similarly, directors of companies are required to act in the best interests of the company, as evidenced by s 181 of Corporations Act 2001 (Cth). Additionally, the legal profession operates in a highly dynamic environment, where, more often than not, the specific laws taught over the duration of the degree may well be repealed or at the very least amended by the time law students gain admission to the profession. For the benefit of all law students, then, contemporary legal education ought to focus on teaching legal skills and principles, rather than primarily specific legal rules.

This article seeks to examine whether the current pedagogy of the law degree satisfies the needs and demands of either or both of the two principal student cohort groups, namely future legal practitioners and future non-legal practitioners, in the context of the teaching of legal ethics. To remedy what the current pedagogical model lacks in its methodology and/or content, the article proposes an alternative model for the teaching of ethics, and identifies the advantages of the proposed model.

II CURRENT MODEL

A Method and Content

For those students seeking admission to the legal profession post-graduation, the rules of admission require applicants to be both eligible and suitable. To be eligible, applicants must have attained the age of 18

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5 The management and administration of the legal profession is a matter for each State and Territory. Nonetheless, the rules with respect to the legal profession and the duties of practitioners in other Australian States and Territories are similar to those in Queensland.

6 Not all areas of law are equally dynamic and subject to amendments/repeals. However, some areas are notoriously so, such as taxation law, corporations law, immigration law and environmental protection. For example, the Corporations Act 2001 (Cth) has already been amended 27 times since its initial enactment. As a consequence, at least some of the rules learned by students during their law degree, which generally takes three to four years to complete, would have changed between their studies and admission to practice.

7 See for example, Legal Profession Act 2007 (Qld) ss 30, 31.
years, completed approved academic qualifications (for example an LLB or JD degree), and undertaken practical legal training requirements.

To be awarded approved legal qualifications, as part of the LLB and JD programs, students must have studied the following subjects: administrative law, civil procedure, company law, contracts, criminal law and procedure, equity, ethics and professional responsibility, evidence, constitutional law, property and torts. With respect to methodology of teaching ethics and professional responsibility, the subject is traditionally taught as a stand-alone subject, usually towards the end of the law degree. With respect to the content of the subject itself, a brief perusal of the syllabi of various universities across Australia reveals that the majority of the tertiary institutions teach what would most appropriately be termed professional conduct, rather than the broader area of ethics or morality, as the focus of the subjects undertaken in this area appears to be primarily restricted to the regulation of the legal profession.

In addition to the requisite completion of a recognised law degree, prior to admission students must also complete practical legal training. The Queensland Law Society, for example, states that to comply with this requirement, the applicant must either complete a Practical Legal Training course or serve as a supervised trainee solicitor in a law firm. Practical Legal Training courses are offered by a number of providers,
including universities, and their duration ranges from twelve to fifteen weeks of structured lessons and modules, followed by another fifteen weeks in a law firm. In Queensland, similar to other Australian States, the duration of a supervised traineeship is one year.

B Drawbacks

The current law school pedagogical model for teaching ethics and professional conduct is undesirable for a number of reasons. First, such an approach is unrealistic because ethical dilemmas and professional responsibility matters are pervasive within the practice of law, and generally do not arise separately from other areas of substantive law. Second, students may not fully grasp the importance of ethics and morality to their future professional careers. For example, as the subject is taught towards the end of the degree, students, particularly those who intend to pursue a legal career, may not appreciate that at least some aspects of their ethical and professional conduct, such as plagiarism, are not under scrutiny from the time of admission to the profession, but rather from the time of admission to law school.

Third, the amount of time dedicated to the study of ethical issues is very limited: generally just one semester. This is particularly detrimental to students who do not intend to pursue a legal career, because, unlike students who are required to undertake Practical Legal Training, they may not receive further education in this subject area. As mentioned above, the Practical Legal Training can be completed either by undertaking a traineeship with a firm (which lasts one year) or undertaking a course (which lasts approximately 30 weeks). As the Practical Legal Training option allows students to be admitted to the profession in almost half the time of a traineeship, there is little wonder that students increasingly choose this option. The choice of program may well have implications for the readiness and ability of law students to effectively resolve practical and ethical dilemmas that commonly arise in practice. This is not because one program is superior to the other, but because, as a matter of practicality, by virtue of its length and nature, the traineeship program allows students to be exposed to a larger number of circumstances arising

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14 For example, Legal Profession Uniform Admission Rules 2015 (NSW) r 6(2)(b); Supreme Court (Admission) Rules 2004 (Qld) r 9G; Legal Practitioners Education and Admission Council 2004 (SA) r 2.4(c); Legal Profession Uniform Admission Rules 2015 (Vic) r 6(2)(b).
16 For example, Legal Profession Uniform Admission Rules 2015 (NSW) r 6(2)(b); Supreme Court (Admission) Rules 2004 (Qld) r 9G; Legal Practitioners Education and Admission Council 2004 (SA) r 2.4(c); Legal Profession Uniform Admission Rules 2015 (Vic) r 6(2)(b).
17 Practical Legal Training courses are provided by various accredited institutions. For example, College of Law offers a course that is 30 weeks in duration; Bond University offers a PLT course which is 27 weeks in duration; and QUT offers a Practical Legal Training course which is 24 weeks in duration.
in practice, and therefore has the potential to expose students to a larger and more varied number of ethical dilemmas. To overcome this potential shortcoming of the Practical Legal Training program, legal educators have increasingly advocated two measures: first, the inclusion of practical legal skills exercises, such as negotiations and moots, as a form of assessment in various substantive law subjects throughout the law degree, and, second, the addition of an ethical dimension to most, if not all, law assessments, whether written or otherwise.\(^\text{18}\) The case for augmenting the study of ethics in law schools was put forward as far back as 1999, when the Australian Law Reform Commission recommended ‘increasing the emphasis at university law schools on teaching legal ethics and professional responsibility’.\(^\text{19}\)

Fourth, the content of most current law school ethics subjects focuses primarily on the rules and regulations governing the legal profession, rather than the ethical principles and morality underpinning them. For students not intending to pursue a legal career, the knowledge acquired in such a subject would be of somewhat limited use as it is law focused, rather than equipping students with transferable skills and enabling them to apply ethical principles to an alternative professional context. However, students intending to pursue a legal career are equally disadvantaged by the current model because conduct rules, although designed to provide guidance to new practitioners, are not the definitive source of ethical obligations.\(^\text{20}\) The conduct rules, if studied in isolation, give students a false sense of security in relation to their conduct obligations in practice.\(^\text{21}\) This is so because (1) the conduct rules apply in addition to the principles established by the common law;\(^\text{22}\) and (2) all rules, irrespective of whether their origins are statutory or common law, cannot cover all possible dilemmas or scenarios that may arise in practice because they are established in response to past conduct and mischiefs.\(^\text{23}\) Additionally, in the practice of law, the interpretation of certain rules do not just allow for


\(^{20}\) Evans, above n 2, 55.

\(^{21}\) Ibid.

\(^{22}\) See for example, Australian Solicitors Conduct Rules 2012 (Qld) r 2, Solicitors Rules 2013 (NSW) r 2.

a moral component, they require it. For example, in seeking to ascertain the requirement that a director of a company must act in the best interests of the company, an ethical component is inescapable.  

III PROPOSED MODEL

A Background

In the current tertiary education climate, the role of law schools has expanded and their aim is to produce not only good legal practitioners, but good professionals, good citizens and ultimately good human beings.  

James posits – and his view is echoed by the industry – that good lawyers are ethical lawyers.  

Building on James’ suggestion that good lawyers are ethical lawyer, Evans, more specifically, states that the key virtues of good lawyers are wisdom and knowledge; courage; and justice.  

Evans defines wisdom as ‘perspective’, which synonymously to ‘standpoint’ refers to the position from which something is viewed.  

The role and importance of ‘perspective’ in the teaching and learning of ethics and morality is evidenced by recent sociological behavioural research. One example of such research was presented in October 2013 by Paul Piff on TedTalk, where he outlined the finding of an experiment that sought to ascertain the impact of money, or more generally financial wealth, on ethical or pro social behaviour.  

The experiment consisted of approximately 100 pairs playing a game of Monopoly. Unbeknownst to the participants, the game was manipulated such that one player, who was selected at random by the flip of a coin, was unfairly privileged throughout the game by having more money, more opportunity to move around the board and more

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26 Nick James, ‘Teaching First-year Law Students to Think Like (Good) Lawyers’ in Leon Wolff and Maria Nicolae (eds), The First-Year Law Experience: A New Beginning (Halstead Press, 2014) 32, 33. Additionally, the legal profession, via the Australian Law Reform Commission, has called for an increase in the study of ethics and professional conduct at university law schools: Australian Law Reform Commission, Managing Justice: A Review of the Federal Civil Justice System (AGPS, 1999) 11.  
28 Ibid.  
30 Paul Piff is Assistant Professor in the Department of Psychology and Social Behaviour at University of California, Irvine.  
access to resources. The study sought to ascertain how the experience of being a privileged player changed the way that player thought about himself/herself and regarded the other player (the poor player). The study found that the privileged players were more likely to be more inconsiderate of the poorer players’ feelings and to attribute their success to their own skill and strategy rather than chance.\textsuperscript{32} The results of this experiment are consistent with other studies indicating that upper class (or privileged) individuals are more likely to behave more unethically ‘in both naturalistic and laboratory settings’, and are more likely to moralise greed and the pursuit of self-interest.\textsuperscript{33}

More generally, however, the findings of the experiment are illustrative of ‘self-serving bias’, a psychological tendency to interpret events and circumstances in a way that tends to favour the interpreter.\textsuperscript{34} Within the context of legal practice – in part due to the adversarial nature of legal proceedings that require the advocate to present to the court facts and circumstances that favour their client’s version of events – zealous advocacy, aided and fuelled by self-serving bias, is expected and praised.\textsuperscript{35} However, Evans cautions that, although role morality may be useful in the context of criminal law (where the advocate represents and protects the rights of the client against an all-powerful State), in matters resting primarily in contractual or transactional relationships such as most commercial transactions, general morality (also known as virtue ethics, as opposed to ethics of duty or role morality) is required because the participants in the transaction are more interdependent and the best outcome results from cooperation rather than strict competition.\textsuperscript{36}

The Monopoly game experiment evidenced the prevalence and the ease with which ‘self-serving bias’ affects participants. The authors also wished to ascertain whether ethical behaviour (in this case what Evans refers to as role morality), once learned, is static or can be relearned. More specifically, they wished to test whether the behaviour of the privileged players, which was seen to be self-serving and unethical, could be modified. To do so, at the conclusion of the experiment, the privileged players were shown a video with a different viewpoint on wealth distribution, namely the experience of those members of society who suffer due to an unequal and unfair distribution of resources and wealth. Once the video was viewed and the players were shown the benefits of cooperation and the advantages of community, the opportunistic behaviour of the players became more congruent with pro social or ethical behaviour,\textsuperscript{37} or what Evans called ‘general morality’.

\begin{flushright}
\textsuperscript{32} Ibid. \\
\textsuperscript{33} Piff et al, ‘Higher Social Class Predicts Increased Unethical Behavior’, above n 31, 4088. \\
\textsuperscript{34} Daniel Chandler and Rod Munday, \textit{A Dictionary of Media and Communication} (Oxford University Press, 2011). \\
\textsuperscript{35} Evans, above n 2, 7. \\
\textsuperscript{36} Ibid 93. \\
\textsuperscript{37} Piff, ‘Does Money Make You Mean?’, above n 31.
\end{flushright}
B Implementation

Any discussion about how to teach ethics or principles of general morality must, by necessity, consider first what constitutes ‘ethics’ and the more narrow concept of ‘professional ethics’, and second how such principles are learned. ‘Professional ethics’ are codes and guidelines that embody the application of principles of general morality and ethical conduct to the specific contexts of professional relationships.\(^{38}\) ‘Ethics’ is the study not just of morality and moral systems but their incorporation and application to every day contexts and circumstances.\(^{39}\)

This article posits that human beings learn ethics and moral behaviour through experience. As Maharg noted ‘[i]t is, after all, not in the statement of qualities \textit{per se} that ethical behaviour is tested, but in the clash and dissonance of one quality against another.’\(^{40}\) Put simply, principles of ethics cannot be learned and internalised through theoretical study, but rather in the midst of the messiness, conflict and complexity of life itself.

The findings of the Monopoly game experiment indicate that perspective is not only a powerful tool in changing unethical or anti-social behaviour, but also an expedient one. This article proposes that the benefits of increased perspective demonstrated by the Monopoly game experiment could be transposed into the legal education context. The remainder of this article will explore possible methods for incorporating increased ethical perspective into legal education.

One option is to teach students ethical behaviour in more traditional ways, for example, through the use of literature or popular culture. Literature and its characters allow readers to insert themselves into the story, to become the characters they read about, ‘to insert [themselves] into another (albeit fictional) person’s mind and hear their thoughts’.\(^{41}\) The advantage of literature, whether fiction or nonfiction, is its ability to expose students to situations and circumstances they may not be able to experience themselves. For example, very few people could \textit{experience} being stranded on a desert island as in \textit{Robinson Crusoe},\(^{42}\) or act as a criminal lawyer in the 1930s southern USA defending a black man accused of rape as in \textit{To Kill a Mockingbird},\(^{43}\) or live through the Civil War in USA as in \textit{Gone with the Wind}.\(^{44}\) In essence, literature exposes students to the unique perspectives of a myriad of characters and in doing so, allows students to have a more well-rounded view of themselves and

\(^{38}\) Ted Honderich (ed), \textit{The Oxford Companion to Philosophy} (Oxford University Press, 2nd ed, 2005).

\(^{39}\) Evans, above n 2, 62.


\(^{44}\) Margaret Mitchell, \textit{Gone with the Wind} (Macmillan, 1936)
the world around them. However, a study in America undertaken at the beginning of the new millennium indicated that less than half of the adult American population read literature.\textsuperscript{45} It is noted that the decline in literary reading mirrors a decline in empathy found in American college students, with the contemporary student cohort scoring forty percent lower in empathy than their counterparts two to three decades ago.\textsuperscript{46} Although the study was undertaken in the American context, its results are relevant to the Australian jurisdiction: a survey undertaken in 2005 indicated that the amount of time spent reading by the Australian population was similar to that of the US population. Specifically, the mean amount of time per week spent reading in the US was 5.7 hours and in Australia was 6.3 hours. (The highest mean was observed in India at 10.7 hours per week, and the lowest was observed in Korea at 3.1 hours per week.\textsuperscript{47})

Ethical behaviour can also be taught using examples from popular culture. Movies and television are laden with examples of legal and courtroom dramas, e.g. Damages, Ally McBeal, Law and Order, Suits, The Good Wife, Boston Legal, The Practice, JAG, The Firm and Harry’s Law, Philadelphia, Erin Brockovich, The Verdict, A Few Good Man, Primal Fear, The Client, Dead Man Walking, Double Jeopardy and Judgement at Nuremberg. The advantage of employing popular culture in the teaching of ethics is that students will be familiar with the characters and stories and will therefore be able to relate to them. The disadvantage in using popular culture examples rests in the stories’ very setting. The great majority of popular TV series and movies are set in a foreign jurisdiction and, therefore, some of the matters espoused will not be applicable within the Australian jurisdiction. This is because, at the same time that morality underpins and forms conduct rules, the reverse is equally true. Even when set within the Australian jurisdiction – e.g. Underbelly, Rake and Prisoner – the motivation of the producers of these shows is increased ratings rather than education, so their value within the classroom is limited as they transmit an unrealistic, and even false, image of the legal profession and its key actors.

Another option, and this article suggests it is a better option, is to teach ethical behaviour using experiential learning methods, by exposing students to ethical dilemmas that commonly arise in the legal profession and allowing them the opportunity to resolve these dilemmas as part of a larger assessment piece. This assessment method is primarily based on the principle that assessment is part of learning. It is an opportunity for students to continue their learning as opposed to an opportunity to simply test and outline the knowledge already acquired. In its execution, this method provides students with an experience that is as close as possible to

\textsuperscript{45} Gallacher, above n 21, 145.
\textsuperscript{46} Ibid.
the traineeship experience: the perspective of the legal practitioner specifically, or of the professional more generally.

In their book, *What the Best Law Teachers Do*, Schwartz, Hess and Sparrow explain that one of the common practices among all twenty-six ‘best’ law teachers they studied was that they strove to provide students with connections between the subject material and their application in practice in order to make the experience as realistic as possible.48 These law teachers were also more inclined to use active learning techniques, such as simulations, because students were shown to learn best when they are actively engaged in their own learning,49 and when they regard the exercises as relevant to their learning and future careers.50 As one of the teachers interviewed in *What the Best Law Teachers Do* explained: ‘Students learn what they are motivated to learn … And they’re learning because they care deeply about something … How [much] they learn is really connected to why they’re learning.’51

Practical simulations can be incorporated into all substantive law subjects with varying degrees of complexity to facilitate student engagement and, ultimately, student learning. By way of example, in a subject such as *White Collar Crime* or *Corporate Law*, an assessment scenario could be created involving a dispute between the Australian Securities and Investment Commission (‘ASIC’) (the regulator), an errant director, shareholders and/or company creditors. Students would then be placed in groups of three to four students and asked to provide advice to their respective clients, or further represent the clients in various circumstances such as negotiations or preparation of court documents. In the course of bringing the legal matter to a conclusion, the groups would necessarily need to communicate and engage with the opposing side. It is this very interaction that would provide the opportunity for ethical dilemmas to arise and for students to seek to address them. In doing so, each group would attain the perspective of that particular stakeholder and primarily engage in what Evans describes as ‘role morality.’ To overcome this shortcoming and encourage the transition from role morality to general morality, at the end of the learning activity, the different groups would engage in a joint debriefing. During the debriefing session, students would discuss their respective experiences and provide each other with the perspective of their particular clients. This part of the learning exercise would provide students with the opportunity to view a complex legal problem from a variety of perspectives and obtain a better understanding of the role of law and its continual attempt to balance rights and liabilities of various stakeholders, with the subject co-ordinator providing structure and context to the experience.52 This would allow the students to outline and contextualise the lessons learned and their applicability to their future professional lives, while at the same time providing the subject co-ordinator the opportunity

48 Schwartz, Hess and Sparrow, above n 25, 200.
49 Ibid 211. See also Roy Stuckey et al, *Best Practice for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007) 143.
50 Ibid 194.
51 Ibid.
52 Ibid, 187.
to ensure that the issues arising from the scenario, whether legal or ethical, were appropriately resolved and/or understood.

The number of students per team may well vary with the overall number of students in the particular subject and the complexity of the scenario itself. However, the teams should not be too large: the greater the number of students per team, the more unwieldy the team becomes, and, in a large team, it may be easier for some members to do less work by simply passing it on to the other members of the team. Teams that are too small present a different challenge. One of the aims of the assessment exercise is to encourage students to work collaboratively, and for the experience to be rich in its lessons. Groups of only two students would lack the complexity of human interaction that normally exists in real life scenarios and that are more likely to give rise to personality conflicts and professional discontent. As such, larger groups would be better suited to present students with intra-group dynamics likely to give rise to conflict and to require the students to manage such practical considerations and further develop their interpersonal skills. Groups of three to four students have been found to be optimal for learning. Groups of more than six students have been found not to positively contribute to student learning.

Although the scenario used as an example is in the context of corporate law, similar scenarios can be incorporated in other substantive law subjects. For example, in criminal law the parties may be the Crown, the defendant and the victim; in tort law the parties may be the plaintiff, the defendant and the insurance company or an industry body such as the Australian Medical Association; and in consumer law the parties may be the plaintiff, the defendant and the Australian Competition and Consumer Commission.

C Advantages

1 Students

The role of the law school and legal education is an expansive and pervasive one. According to Vines, in addition to producing good legal practitioners, it is well within the scope of law schools to develop resilient

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53 Sumangala P Rao, Heidi L Collins and Stephen E DiCarlo, ‘Collaborative Testing Enhances Student Learning’ (2002) 26(1) Advances in Physiology Education 37, 41. The authors suggest that for small cohorts, groups of two to three students would be most appropriate, while for large cohorts, groups of three to four students would be most beneficial to learning. Robyn M Gillies, Cooperative Learning: Integrating Theory and Practice (Sage Publications, 2007) 7 also indicated that the optimal size for learning was three to four students per group, with research finding that students in larger groups of between six and ten members performed no better than if the students were placed in no groups at all.

54 Gillies, above n 53, 7.


56 Gillies, above n 53, 7; Dick et al, above n 55, 293.
practitioners. Vines referred to the 2009 Brain & Mind Institute survey of over 700 law students, 900 solicitors and 700 barristers that showed that over 35% of law students, 30% solicitors and 20% barristers had levels of depression that were regarded as disabling. She also referred to additional literature that reveals no significant psychological differences between law students, who begin to experience depressive symptoms within six to twelve months of commencing their legal studies, and the general population. She concluded that this suggests that that the law school environment itself contributes to the likelihood of depression and other mental illness. Contributing factors include lack of social connectedness and lack of preparedness and practice in contending with ethical crises.

Similarly, Evans suggests that the general unhappiness and the depression experienced by members of the legal profession are connected to their commitment to role morality and a lack of understanding and implementation of general morality in practice. Evans maintains that the exploration of ethical principles and their incorporation into practical contexts must start in law school and must be pervasively present in all aspects of legal pedagogy.

The experiential assessment method proposed by this article is likely to effectively address these factors. Although law students have been shown to dislike group work, working in groups promotes social connectedness and contributes to the development of interpersonal skills, both of which are important in practice. More than 600 studies conducted over the past 100 years have consistently demonstrated that co-operative learning produces higher achievement, more positive relationships among students and more psychologically resilient individuals than competitive or individualistic learning models. Professional careers, whether in law or other disciplines, require practitioners to interact with other individuals ranging from clients to other practitioners and management executives, and this, in turn, calls for advanced interpersonal skills, as the object of interaction will vary with the individual subject to it.

Those students who choose to attend law school for reasons that are intrinsic, rather than extrinsic to them, are more likely to do so because of a desire to fight for justice and to help others. These are the students most likely to be affected by ethical dilemmas. In providing students with practical, realistic exercises where they are faced with circumstances giving rise to such dilemmas, students are given the opportunity to

58 Ibid 84.
59 Ibid 89.
60 Evans, above n 2, 87.
61 Ibid 207.
63 Stuckey et al, above n 49, 119-120.
64 Vines, above n 57, 92.
develop skills to manage such circumstances.\textsuperscript{65} Practice in managing such circumstances increases student resilience.

\section*{2 Academic Staff and the Legal Profession}

The primary advantages of the experiential assessment model to the academic staff arise from its flexibility, realism and promotion of a deep approach to learning. By its very design, this assessment model requires students to consider multiple, at times competing, factors in answering the assessment question. For example, in regards to the ASIC example, the decision to pursue a matter against an errant director depends not only on the alleged act, the subject of the proposed proceedings, but also on the strength of the evidence, the costs of proceedings and the prospects of success. The learning of ethics, or more precisely the experience of the interaction between morality and legal practice, is facilitated by the very clash and dissonance between the obligations of the different parties to the matter and the outcomes sought by each.\textsuperscript{66}

Effective legal practitioners must be more than just consumers of legal knowledge, they must play an active role in assessing and developing the current legal infrastructure.\textsuperscript{67} In truth, the same can be said of all citizens in a representative, democratic system. The assessment scenario can be structured to accommodate and encourage such considerations, and to promote students’ critical thinking.

Finally, the implementation of experiential approaches to assessment in most, if not all, law subjects has significant advantages for the legal profession itself: practitioners entering the profession are more likely to be well-rounded, with a better understanding of the realities of practice, the methodologies of dispute resolution, and ethical and professional conduct.

\section*{IV Conclusion}

The role of the law school is an expansive one, due in part to the heterogeneity of the student cohort in terms of both background and career goals. Increasingly, the role of the law school is to produce, not only good legal practitioners, but also ethical and resilient ones who are consummate professionals.

This article posits that the current pedagogy of ethics in most Australian universities is inadequate – in relation to both method and content – in addressing the needs of those students who seek to pursue a future legal career and those who wish to utilise their law degree in other professional contexts. This article has proposed that ethical and professional considerations are best learned using experiential learning exercises that are complex and realistic. This is because ethical behaviour is learned and understood, not in the statement of principles themselves, but in the experience of the clash and dissonance of one principle pitted

\begin{itemize}
  \item \textsuperscript{65} Ibid.
  \item \textsuperscript{66} Maharg, above n 40, 116.
  \item \textsuperscript{67} Schwartz, Hess and Sparrow, above n 25, 288-289.
\end{itemize}
against another. Participation in assessment exercises such as those proposed by this article, where students work as part of a team, provide students with the opportunity to view a legal dispute from the perspective of the legal practitioner, the client, the opposing side and the legal institutions entrusted with the production and administration of legal rules and infrastructure. It is in the opportunity to observe and experience the different perspectives themselves that ethical and professional conduct is learned.

One of the key benefits of the pedagogical methodology outlined in this article is its ability to teach students to identify not only the legal professional rules of conduct, but also the ethical and moral considerations underpinning and supporting the current regulatory framework. This benefits not only future legal practitioners, but all future professionals.
DEVELOPING AN ANIMAL LAW CASE BOOK: KNOWLEDGE TRANSFER AND SERVICE LEARNING FROM STUDENT-GENERATED MATERIALS

SOPHIE RILEY*

I INTRODUCTION

This article discusses the development of an animal law case book as part of an elective subject, ‘Animal Law and Policy in Australia’, taught at the University of Technology Sydney (UTS). The Animal Law Case Book Project (the CB Project) provides an example of an innovation in learning and teaching, demonstrating how practice-oriented learning in an emerging area of legal scholarship can also potentially make a meaningful contribution to the field of study.

The CB Project was initially funded by a Vice-Chancellor’s Learning Grant at UTS in 2014,1 which was then extended by a Voiceless Grant in 2015.2 The project had three aims: first, to provide students with a learning experience that was consistent with the UTS Model of Learning (UTS Model),3 as well as Learning 2014 (now Learning.Futures)4 and the graduate attributes established by the Faculty of Law;5 second, to make a specific contribution to animal law in Australia; and third, to enable students to make a contribution to the community of practice in animal law. In order to fulfil the first aim, the CB Project targeted elements of the

* Senior lecturer, University of Technology Sydney. The helpful advice of Dr Nicola Parker from the Institute for Interactive Media and Learning at the University of Technology Sydney is gratefully acknowledged, as are the helpful comments and suggestions from the anonymous reviewers.

1 The grant application was titled ‘Teaching Beyond the Comfort Zone: Flipped Lessons, Blended Learning and Student-Led Scholarship’. The grant project ran across two environmental law subjects taught by the author and Dr Angela Dwyer, and also the subject Animal Law and Policy in Australia taught by Sophie Riley and Geoffry Holland.

2 The grant application was titled ‘The Animal Law Case book’. It provided funding for the final editing and conversion of the book into an electronic version. Voiceless will be arranging the printing of the electronic materials.


5 Faculty of Law, University of Technology Sydney, Graduate Attributes (12 May 2015) <http://www.uts.edu.au/current-students/current-students-information-faculty-law/graduate-attributes/bachelor-laws>.
UTS Model and graduate attributes that emphasise practice-oriented learning and public service. These elements acted as a catalyst for enlisting the students’ legal knowledge and skills to write case notes that comprise the case book. The production of the case book achieved the second aim of the project, and the dissemination of the case book achieved the third aim of the project.

In Australia, animal law is a recent area of legal scholarship, with the literature and materials being in their early stages of development. In particular, the field lacks a case book, representing an appreciable gap in animal law scholarship. Although much of animal law is derived from legislation, case law is significant to interpreting and fine-tuning legislation. Moreover, case law provides examples of the human-animal relationship in a legal context, highlighting the advantages, deficiencies, inconsistencies and trends in the law. Such matters are not only relevant to practitioners but also to all who are concerned with society’s interactions with animals. Indeed, the lack of case-based information and knowledge likely means that some animal law materials remain inaccessible to stakeholders. In these circumstances, the notion of ‘stakeholders’ includes all those who have an interest in animal law, ranging from students to NGOs, legal and policy makers, and the wider community. Accordingly, an important objective of the CB Project was to open up animal law to a wide range of participants. This is commensurate with the public service component of the UTS Model and Graduate Attributes in the Faculty of Law, and is also consistent with concepts of service learning and knowledge transfer that are increasingly seen as pathways enabling universities to ‘give back’ to society.

The concept of service learning is still evolving and varies in accordance with the circumstances. It traditionally encompasses direct service where students immerse themselves in community projects. For law students, this includes volunteering in legal clinics, working for pro bono projects, and engaging with internships. Service learning can also include derivatives comprising more modest and non-direct interventions, such as inquiry or research, which nevertheless benefit students and the public.

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7 Alex Bruce, Animal Law in Australia, an Integrated Approach (LexisNexis, 2012); Deborah Cao, Animal Law in Australia (LawBook Co, 2010) chapter 3.
In this article, the concept of service learning is used in the latter sense to describe a low-key and inquiry-based activity comprising case notes written by students and compiled into a case book. The dissemination of the case book involves a form of knowledge transfer, a concept that – like service learning – enjoys a diversity of meanings. In a legal context, knowledge transfer can encompass the writing of reports, undertaking research on a specific topic, and inquiry-based learning, an active form of learning involving gathering evidence and drawing conclusions. For universities, knowledge transfer traditionally stemmed from dissemination of research and post-graduate work occurring in a commercial or semi-commercial setting. However, knowledge transfer can also extend beyond commercially-based research to include ‘knowledge as a resource for civil society’.

Part II of this article commences by setting the pedagogical framework for the CB Project, drawn from the UTS Model and the graduate attributes in the Faculty of Law. An examination of service learning and knowledge transfer follows, before the discussion turns to the CB Project itself, explaining how the case book was built up from cases notes written by students. The discussion ends with a critique of the project, concluding that it affords an illustration of how practice-oriented learning can also be a form of service learning that opens the minds of the students to the expanded role they can play in advancing knowledge for the community of practice in animal law.

II Pedagogical Background

A Models and Concepts of Learning

As noted in the introduction, one of the conceptual underpinnings of the CB Project was putting the UTS Model into operation. This model, which is set out in Figure 1, focusses on providing students with a practice-oriented education that integrates the use of technology with

14 Gomez, Perera and Manning, above n 8, 102.
15 Ozga, above n 8, 75.
research-inspired learning methods. The objective is to equip graduates with skills to participate in professional practice in a changing world.

Practice-oriented learning is a broad concept. It includes experiences such as internships and placements, but it also extends to ‘case-based approaches to learning’ and to the making of student-generated learning resources that demonstrate and/or incorporate professional practice.\footnote{UTS, Model of Learning, above n 3. Generally, see Wendy B Davis, ‘Collaborating with Students as Co-authors’ (2013) 47 (1) The Law Teacher 32.} It is one way of affording students opportunities to engage in learning in a manner that stops them from being a passive audience in their education. In addition, the UTS Model encourages students to develop their learning by ‘analysing, understanding, appreciating the significance [of, and] interpreting’ their learning materials.\footnote{Paul Ramsden, Learning to Teach in Higher Education, (RoutledgeFalmer, 2003) 24.} Moreover, the ‘Learning.Futures’ initiative reinforces the importance of student-focussed experiences by underscoring that teachers need to support processes that identify and enhance student learning.\footnote{UTS, Learning.Futures, above n 4.} For these reasons, the CB Project focussed on those parts of the UTS Model that emphasise practice-oriented learning against the backdrop of inquiry-based approaches.

*Figure 1 – UTS Model of Learning*

<table>
<thead>
<tr>
<th>UTS Model of Learning</th>
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<tbody>
<tr>
<td>The UTS Model of Learning provides a framework for practice-oriented learning and teaching at UTS, which links to the development of graduate attributes and curriculum design that values diversity and inclusivity and draws on implications of different ideas about learning.</td>
</tr>
<tr>
<td>The model has three distinctive features that are interrelated in the UTS student experience of practice oriented learning:</td>
</tr>
<tr>
<td>- An integrated exposure to professional practice through dynamic and multifaceted modes of practice-oriented education.</td>
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<tr>
<td>- Professional practice situated in a global workplace, with international mobility and international and cultural engagement as centre piece.</td>
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<tr>
<td>- Learning that is research-inspired and integrated, providing academic rigour with cutting edge technology to equip graduates for life-long learning.</td>
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</table>

In addition to the UTS Model and ‘Learning.Futures’, each faculty at UTS, including the Faculty of Law, has prepared graduate attributes that augment the UTS Model.\footnote{Faculty of Law UTS, Graduate Attributes, above n 5.} The Law Faculty has the developed six graduate attributes set out in Figure 2. These attributes range from the acquisition of disciplinary knowledge to the achievement of disciplinary skills and the development of personal qualities such as self-management and public service. These graduate attributes complement the UTS Model in a number of ways. For example, ‘Legal Knowledge’, ‘Ethics and Professional Responsibility’ and ‘Self-management’ are allied with practice-
oriented learning. Moreover, ‘Ethics and Professional Responsibility’ includes an element of ‘public service’, an indication that service learning and knowledge transfer can form key building blocks in the development of socially responsible attributes.

*Figure 2 – Graduate Attributes*

<table>
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<tr>
<th>Graduate Attributes in the Faculty of Law UTS</th>
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<tbody>
<tr>
<td><strong>Graduate Attribute 1: Legal Knowledge</strong></td>
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<tr>
<td>A coherent understanding of fundamental areas of legal knowledge including the Australian legal system, social justice, cultural and international contexts and the principles and values of ethical practice.</td>
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<tr>
<td><strong>Graduate Attribute 2: Ethics and Professional Responsibility</strong></td>
</tr>
<tr>
<td>A capacity to value and promote honesty, integrity, accountability, public service and ethical standards including an understanding of approaches to ethical decision making, the rules of professional responsibility and, an ability to reflect upon and respond to ethical challenges in practice.</td>
</tr>
<tr>
<td><strong>Graduate Attribute 3: Critical Analysis and Evaluation</strong></td>
</tr>
<tr>
<td>A capacity to think critically, strategically and creatively including an ability to identify and articulate legal issues, apply reasoning and research, engage in critical analysis and make reasoned choices.</td>
</tr>
<tr>
<td><strong>Graduate Attribute 4: Research skills</strong></td>
</tr>
<tr>
<td>Well-developed cognitive and practical skills necessary to identify, research, evaluate and synthesise relevant factual, legal and policy issues.</td>
</tr>
<tr>
<td><strong>Graduate Attribute 5: Communication and Collaboration</strong></td>
</tr>
<tr>
<td>Effective and appropriate communication skills including highly effective use of the English language, an ability to inform, analyse, report and persuade using an appropriate medium and message and an ability to respond appropriately.</td>
</tr>
<tr>
<td><strong>Graduate Attribute 6: Self-management</strong></td>
</tr>
<tr>
<td>The ability to implement appropriate self-management and lifelong learning strategies including initiating self-directed work and learning, judgment and responsibility, self-assessment of skills, personal wellbeing and appropriate use of feedback and, a capacity to adapt to and embrace change.</td>
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</tbody>
</table>

**B Service Learning**

As already mentioned, the construct of service learning varies according to context. It includes direct interactions such as volunteering\(^{21}\) and internships\(^{22}\), as well as indirect engagements that incorporate


research and inquiry. For law students, service learning can comprise volunteering in legal clinics, undertaking internships, working on pro bono projects, conducting research for organisations, and contributing to communities of practice. This variety of activities creates complex and diverse views of service learning. Einfeld and Collins, for example, categorise five service learning models that have differing objectives and outcomes. Goss, Gastwirth and Parkash identify the ‘research service-learning gateway’ as being a synthesis of service-learning and ‘community-based research’. This paradigm incorporates low-key elements of indirect service learning with knowledge creation and knowledge transfer, allowing students to work on research or inquiry-based topics relevant to their learning and the community’s interests.

The array of undertakings germane to ‘service learning’ means that the term does not have a settled meaning. Furco calls this the ‘service-learning struggle’. He notes that initial versions of the concept contained two clear-cut components: a learning experience for the student and a benefit to the recipient community. Definitional complications partly stem from the contradictory emphasis placed on each component. Versions of service learning that stress the learning component typically describe service learning in terms of ‘an academically rigorous instructional method that incorporates meaningful community service into the curriculum’. However, community service itself is sufficiently malleable to expand the reach of service learning to concepts that emphasise the ‘service’ component such as community engagement and service for the common good. Ideally, student learning and community benefit should be mutually compatible and advantageous. One gain from the students’ perspective stems from the development of cognitive and interpersonal skills that enable them to become better lawyers. At the same time, the community benefits by gaining access to university resources and enhanced knowledge and information systems. At a more

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23 Preece, above n 9, 270.
25 Goss, Gastwirth and Parkash, above n 11, 119.
26 Ibid 118.
27 Thomson, Smith-Tolken, Naidoo and Bringle, above n 9, 217, 223.
28 Furco, above n 21, 71.
29 Ibid.
31 Preece, above n 21, 270.
32 Dipadova-Stocks, above n 16, 435.
33 SpearIt and Ledesma, above n 10, 262.
34 Alexander W Astin, Lori J Vogelgesang, Elaine K Ikeda and Jennifer A Yee, How Service Learning Affects Students (Higher Education Research Institute, University of California, 2009) 84.
36 Gomez, Perera and Manning, above n 8, 105.
fundamental level, service learning allows universities to reformulate the way they and their students interact with society.\textsuperscript{37} However, the reality may fall short of expectation. A number of commentators consider that direct service learning such as volunteering reinforces stereotyping that equates ‘service’ with charity.\textsuperscript{38} If this is the case, students are at a disadvantage due to the absence of ‘transformative potential’ often seen in this type of service learning.\textsuperscript{39} Indeed, for some commentators, service learning is a way of facilitating social change\textsuperscript{40} by ‘consciousness raising’.\textsuperscript{41} At the same time, this may involve long-term goals that cannot be achieved within the space of one or two semesters, making it difficult to evaluate whether students have in fact attained social objectives.\textsuperscript{42} With respect to the CB Project, these complications also overlap with the challenges presented by knowledge creation and knowledge transfer.

\textbf{C Knowledge Transfer}

The term ‘knowledge transfer’ is a comparatively recent innovation.\textsuperscript{43} As discussed in the introduction to this article, it initially described a technique for universities to derive economic benefit\textsuperscript{44} as they transferred their research to analysts, investigators and other industry stakeholders.\textsuperscript{45} The term, however, also supports values that spread beyond economic utility.\textsuperscript{46} It can underpin approaches that call for greater communication and exchange of research, knowledge and ideas among universities, communities and other stakeholders.\textsuperscript{47} This formulation is more akin to a public service than a commercial transaction.\textsuperscript{48} Indeed, for some, the public service component is seen as a way of making higher education more socially relevant, allowing universities to give back to the community.\textsuperscript{49} In this way knowledge transfer effectively becomes a new form of social contract between universities and society.\textsuperscript{50}

\begin{thebibliography}{99}
\bibitem{37} Thomson, Smith-Tolken, Naidoo and Bringle, above n 9, 220.
\bibitem{38} Jones, above n 30, 10, 14-15; Einfeld and Collins, above n 24, 98.
\bibitem{39} Jones, above n 30, 10; Einfeld and Collins, above n 24, 98.
\bibitem{41} Bowen, above n 11, 53.
\bibitem{42} Ibid.
\bibitem{43} Grant Harman, ‘Political Instruments Employed by Governments to Enhance University Research and Knowledge Transfer Capacity’ (2009) 17 (2) \textit{Higher Education Management and Policy} 75, 76.
\bibitem{44} Ozga, above n 8, 63.
\bibitem{45} Harman, above n 43, 76.
\bibitem{46} Wersun, above n 12, 669. Harman, above n 43, 76.
\bibitem{47} Ibid 69.
\bibitem{48} Gomez, Perera and Manning, above n 8, 102.
\bibitem{50} Maria Alice Lahorgue, ‘Managing Relations with Industry: The Case of Brazilian Universities’ (2009) 17 (2) \textit{Higher Education Management and Policy} 127, 129; Jenny
\end{thebibliography}
Wersun and others take this argument further and contend that knowledge transfer can potentially comprise an accountability process to evaluate the legitimacy of universities. Such accountability can occur on two levels: first, by producing graduates who give back to society, and second, by making knowledge more ‘useful’. With respect to the first level, knowledge transfer should be seen as a means of encouraging students to participate in civil society, not only for students to gain a practice-oriented education, but also for students to use their knowledge and skills for the benefit of society. One way of benefiting society is to make knowledge more useful. To achieve the second level, knowledge creation and transfer need to be more receptive to the wants of the community and stakeholders. Waghid argues that for knowledge transfer to reach this level of responsiveness, two types of knowledge, Mode 1 and Mode 2, need to be combined. Mode 1 knowledge is ‘rigidly institutionalised’, it being drawn from a particular field of study and practice. By way of contrast, Mode 2 knowledge stems from ‘sites of knowledge production’ that extend beyond universities and disciplines. These sites comprise groups drawn from academia, professional practice and the community. Amongst other things, Mode 2 knowledge can potentially bring universities and communities together, allowing them to resolve difficulties, gaps and challenges in a cooperative manner. Moreover, society is increasingly calling upon universities to generate ‘socially useful knowledge’ that complements prevailing information systems. Waghid’s argument centres on the premise that by supplementing Mode I with Mode 2 knowledge, universities are more likely to engage in activities that are pertinent to societal needs. At its aspirational apex, this type of cooperation prompts universities and communities to become catalysts for transforming the social order. Accordingly, while the concept of knowledge transfer varies, the aim is to integrate university-based research with existing knowledge in order to help communities of practice.


Wersun, above n 13, 669.

Gomez, Perera and Manning, above n 8, 104-5.

Ozga, above n 8, 63; Gomez, Perera and Manning, above n 4, 101.

Waghid, above n 49, 477.

Ozga, above n 8, 64.

Ibid.

Waghid, above n 49, 457, 458, 466-7.

Thomson, Smith-Tolken, Naidoo and Bringle, above n 9, 218.

Ibid; see also Ozga., above n 8, 66.

Waghid, above n 49, 457, 458, 461.

For law students, blending Mode 1 and Mode 2 knowledge encompasses legal research and inquiry projects that are relevant to the community, have community input and are transmitted to the community. Arguably, one such example stems from CB Project.

III THE ANIMAL LAW CASE BOOK PROJECT

One rationale for the CB Project stemmed from the somewhat prosaic need for an animal law case book in the Australian jurisdiction. The lack of a case book is not surprising if it is kept in mind that the study of animal law in Australia is a comparatively recent innovation. White, writing in 2005, noted that there were no animal law subjects available for undergraduate students, nor were animal law textbooks available in this country. By 2014, at least fourteen Australian law schools offered animal law courses and three animal law textbooks were available. In addition, a number of other useful publications had been generated by academics, law groups such as the NSW Young Lawyers Animal Law Committee (Young Lawyers) and NGOs such as Voiceless and the RSPCA. The growing interest in animal law has created a ‘market’ for legal knowledge among stakeholders, especially those who lack legal

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63 White, above n 6, 298.
67 The NSW Young Lawyers Animal Law Committee has been operational for approximately 10 years and has developed a number of publications on animal law issues, particularly companion animals; see <http://www.lawsociety.com.au/about/YoungLawyers/Committees/AnimalLaw/>; Animal Law Committee, Animal Resources <http://www.lawsociety.com.au/about/YoungLawyers/Committees/AnimalLaw/Resources/index.htm>.
experts and will likely need legal knowledge in a user-friendly format. As already discussed, other crucial rationales for the CB Project centred on providing students with a practice-based learning experience that also enabled them to contribute to the community of practice in animal law.

A The Project

In spring 2013, the CB Project was rolled out in the subject Animal Law and Policy in Australia. The learning objectives for the subject were designed to facilitate student learning in the context of the animal welfare/animal rights debates. As such, the objectives especially focussed on: the interpretation and evaluation of legal and policy instruments; the identification of areas of deficiency with respect to legal, economic, social and ethical issues; and the development of students’ skills in drawing conclusions. The learning activities comprised class presentations, a research essay and the CB Project. Each of these provided students with opportunities to display their knowledge and, to varying degrees, their analytical skills. In particular, writing accurate and accessible case notes required students to condense large volumes of material while still capturing the essence of the decision.

The student cohort comprises mainly law students, although the subject is open to any student across the university at UTS. At the time of writing, the subject had run for three years and had attracted a number of non-law students (mainly science students) and also a handful of international students. In the experience of the writer, the science students are an important component of the student cohort, providing a counterbalance to the often emotive response that animal issues tend to evoke. Additionally, international students afford outlooks on animal law and regulation that frequently differ from Australian perspectives. This is particularly evident with students from developing countries who invariably highlight the importance of capacity building and alleviation of poverty as pre-requisites to effective animal protection.

The building blocks of the CB Project consisted of case notes that students were required to complete as part of their assessment in the subject. Each student was asked to prepare three case notes from a list that was compiled by the teaching team. The cases covered a range of animal issues such as Defining an Animal; Animals as Property; Standing; Procedural Matters; Torts and Damages; Wills and Family Law; Service Animals; Experimentation; Animals, Religion and Culture; Animals and Commerce; Animals and Environmental Protection; and Criminal Law. The cases were selected from a number of jurisdictions including Australia, Canada, Israel, the United Kingdom and the United States of America. The choice of cases was limited by the fact that the cases needed to be available in English and also had to be formally reported, so that the students had access to them. In compiling the case

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70 Waghid, above n 49, 465.
71 The two teachers are Sophie Riley and Geoffry Holland.
72 An exception to this is the decision in Department of Local Government and Regional Development (WA) v Emanuel Exports et al (Magistrates Court, 8 Feb 2008). There has
list, the teaching team sourced cases from the text book used in the subject, *Animal Law in Australia, an Integrated Approach* written by Alex Bruce, as well as from cases the teachers used in their teaching of other subjects such as environmental law, international law and media law.

From the outset it was intended that the case notes would be both an educational and a community resource. For these reasons, the assessment criteria focussed on a synthesis of elements such as legal knowledge, communication skills and public service, informed by social justice concerns. By way of example, the assessment criteria required that the case notes be set out in plain English and presented in a manner suitable for lawyers and non-lawyers alike. The students were also set a limit of 750 words and asked to use a template to ensure that the material was written in a standardised format. The template set out the name of the case; the court dealing with the case; the facts of the case; the issues; the decision and reasons for the decision; and the significance of the case.

The overlay of social justice was largely incorporated in two ways: first, by asking students to explain the significance of the case; and, second by collating the case notes into a book that would be freely available to the community. With respect to the first element, in order to explain and reflect on the importance of the case, students needed to link their allocated cases to material drawn from areas of the subject such as the theoretical underpinnings of animal law, statutory interpretation and social justice. This encouraged students to think about the way the law operates in specific instances, highlighting the law’s benefits, gaps and deficiencies. It is also an exercise that is consistent with the UTS Model and ‘Learning.Futures’, which encourage interventions designed to improve the quality of student learning. The second element, the production and dissemination of the case book, relates to knowledge creation and the availability of that knowledge. These matters are also relevant to social justice issues, particularly where knowledge gaps lead to knowledge becoming inaccessible. In the case of animal law, knowledge gaps potentially create barriers that hinder stakeholder engagement. Accordingly, part of the community engagement process lies in making the law more available, accessible and easy to understand.

The case note set out in Figure 3 provides an example of how one student explained and evaluated the decision of *Jarvis and Weston* [2007] FamCA 1339, linking the reasoning to the concept of animals as property.

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been much written on this important case and the students were able to provide a case note based on secondary materials.

73 Bruce, above n 7.

74 Ozga, above n 8, 75.

The students wrote some 80 case notes, and 78 of these were selected for inclusion in the case book.\(^7^6\) The assessment task was a type of formative assessment in the sense that it assessed both the quality of legal knowledge created by the students and the way that the students used that knowledge. Accordingly, it was assessment for learning. Given that law is ever-changing and legal practitioners are constantly learning, it was seen as important that assessments facilitate students becoming skilful and proficient learners.\(^7^7\)

At first instance the cases were marked as an assessment and then underwent three rounds of editing: by the author, by volunteers from the Young Lawyers, and by Emmanuel Giuffre, the legal counsel of Voiceless. In 2014 the author was awarded a grant from Voiceless to assist with the final editing and production of electronic and print versions of the case book. At the time of writing, the case notes were undergoing a final editing, and it is anticipated that the electronic and print versions of the book will be available by late 2015. The students will be acknowledged as the authors of their case notes and the electronic version will be hosted by the Australasian Legal Information Institute (AustLII).

The CB Project presented many challenges, for both students and teachers alike. To start with, some students found it more difficult than anticipated to prepare materials for readers outside their discipline. The project team saw this as a positive development because it emphasised to students that plain expression can be difficult to achieve but is important for good communication. In this respect, the project team advised students that it would be helpful for them to have a lay person read or view their work. Another challenge stemmed from the word limit allocated to each case note. The rationale behind this requirement was to encourage students to be concise in their thinking and writing. The teachers, however, were flexible, as some cases clearly raised more complex issues than others. From the teachers’ perspective, challenges mainly centred on workload matters and the time involved in setting up the project, and marking and editing the students’ work. As with any class, the students’ work reflected a variety of standards and abilities, and this was reflected in the differing times that the marking and editing processes took per case note.

On the positive side, the students were mainly enthusiastic about the CB Project. The author obtained approval from the Human Research Ethics Committee at UTS to set up an anonymous survey to gauge the students’ response.\(^7^8\) The survey was made available at the end of the semester. Possibly due to ‘survey fatigue’, few students took part in the CB Project survey, so no usable data was gathered. However, students did

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\(^7^6\) This is not to be taken as an indication that the case notes not included were written to a sub-standard level. The author of this article erred in giving more than one student the same case note. The material was combined in the editing process.


\(^7^8\) Sophie Riley, ‘Teaching Beyond the Comfort Zone: Flipped Lessons, Blended Learning and Student-Led Scholarship’, Human Research Ethics Committee Approval number 2013000007, 6 February 2013.
make comments on the standard faculty surveys that are conducted for every subject, and they also approached their teachers personally at the conclusion of the subject. One student expressed the view that there were too many assessments, while others were more encouraging, remarking for example that: ‘[the] assessment was varied and interesting. I like the way that it is being used in the case book.’ The personal comments were all positive, with students expressing enthusiasm about being part of the project, and asking about the launch of the casebook and whether they could take animal law internships or otherwise volunteer.

It is anticipated that subsequent student cohorts will add to the casebook, and that over time it will be built into a comprehensive resource.

**Figure 3 – Sample Case Note**

<table>
<thead>
<tr>
<th>Jarvis and Weston [2007] FamCA 1339</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Court</strong></td>
</tr>
<tr>
<td>Family Court of Australia</td>
</tr>
<tr>
<td><strong>Facts</strong></td>
</tr>
<tr>
<td>Jarvis, the applicant, and Weston, the respondent, had separated and were in dispute over the final arrangements regarding the custody of their 11-year-old son. Areas of dispute included where the boy would live and the school which he would attend. The question of where the child’s dog should reside was also contested.</td>
</tr>
<tr>
<td><strong>Issues</strong></td>
</tr>
<tr>
<td>• The content of the custody arrangement in respect to the child</td>
</tr>
<tr>
<td>• Whether the child’s dog should reside with his mother or father</td>
</tr>
<tr>
<td><strong>Decision and Reasons for the Decision</strong></td>
</tr>
<tr>
<td>The custody arrangement</td>
</tr>
<tr>
<td>The Court held that the son was to stay for the greater part of the time with his mother and go to the school near her home. He was to stay with his father every second weekend. The burden of travel associated with attending school represented a practical difficulty with the father’s proposal. The Court found, ‘[w]hen his interests are weighed in the balance overall, the burden of such frequent travel on school days cannot be diminished. That fact, as well as the child’s need also to spend leisure time in his mother’s household, compels the adoption of the mother’s proposal as being more consistent with his best interests overall.’</td>
</tr>
<tr>
<td>Where the dog should reside</td>
</tr>
<tr>
<td>Once the arrangements for the child’s custody had been drafted, a dispute arose</td>
</tr>
</tbody>
</table>
as to with whom the child’s dog would reside. The father took issue with the mother’s collection of the dog as the issue had not been raised previously and he wanted more time to think about it.

He also claimed that the Court had no jurisdiction to make an order about the dog. With respect to the matter of jurisdiction, the Court stated that ‘whether the issue falls to be considered under the accrued, associated, inherent, or parens patriae jurisdiction of the Court it can be found should the need arise.’ It then held that ‘The boy is attached to the dog. The dog is to go with the boy.’

**Significance of the Case**

**Jurisdiction in the federal sphere is possible**

Moore J made a decision about the dog in the federal jurisdiction of the Family Court of Australia, rather than treating the issue of the animal’s future as to be determined under state property law.

Justice Moore acknowledged the arguments of the father’s legal counsel regarding lack of jurisdiction to decide the dog’s future may have been correct, but jurisdiction could be found ‘under the accrued, associated, inherent, or parens patriae jurisdiction of the Court’.

**Recognition of the relationship between boy and dog**

This is the most significant aspect of the decision. The relationship between human and animal was recognised and taken into consideration – ‘The boy is attached to the dog. The dog is to go with the boy’. There is no legally recognised framework within which to consider such emotional attachments. It is solely up to the discretion of the Court to decide how to evaluate and make a decision about acknowledging such relationships.

**Distribution of the pet as property to a person not party to the custody dispute**

It could be inferred that although the boy was not in actuality one of the disputing parties, marital ‘property’ under dispute, in the form of the dog, was effectively distributed to him. The attachment of the boy to the dog trumped conventional property law rules. Here the Court is taking the attachment between human and animal into account in its decision about how to distribute marital property.

This case illustrates the need to have better legislative frameworks that are underpinned by a more complex approach to animals that goes beyond the definition of animals as property. It also points to the ability of the common law, in some circumstances, to move beyond the definition of animals as property and enable a more nuanced judicial approach to animals.

**B Discussion**

1 *The Project*

Asking students to write case notes contributed to their acquisition of disciplinary knowledge in a way that is consistent with practice-oriented learning. Beyond this aspect of the project, the assessment also helped
students to understand how judges deal with legal argument and how the law deals with animals in range of situations. Moreover, the case notes also facilitated the development of skills and attributes important to community engagement. For example, the requirement that the case notes be written succinctly and in language that could be easily understood by non-lawyers required students to distil the facts and reasoning of the cases as well as consider how to communicate complex legal matters to non-law audiences. This involves exercising legal skills as well as providing a community benefit. The field of animal law draws together a range of stakeholders including lawyers, animal activists, NGOs, farmers, government, scientists, veterinarians and those that deal with animals in trade and commerce. In essence, the CB Project challenged the students to write the case notes from the standpoint of a ‘community need’. In this way, a conventional student assessment became practice-oriented at a more advanced level. Moreover, the CB Project delivers the benefit of a resource that can encourage dialogue and action on animal matters.\(^79\) For these reasons, the discussion in this article places the project within the framework of service learning and knowledge transfer.

2 Service Learning

Although, as already explained, the notion of service learning varies, at its core it involves providing students with a learning experience gained through helping and assisting others. As Steffes points out, ‘[s]ervice learning activities also offer much-needed assistance in local organizations and give students valuable skills and expertise.’\(^80\) For law students, traditional service learning consists of volunteering at legal clinics, internships and undertaking pro bono work. In this way students immerse themselves in the community and learn from the service they provide to the community. The CB Project does not sit within this category of service learning. It is more a derivation of service learning, in a similar way to the research service-learning gateway described by Goss, Gastwirth and Parkash.\(^81\) As already pointed out, this gateway introduces low-key elements of service and research/inquiry into student learning. One of the benefits of this type of service learning is that it is available to greater numbers of students than would normally be possible with traditional service learning projects such as clinics and internships.\(^82\) Research or inquiry based projects possess innate flexibility, enabling the work to be allocated in accordance with the number of students, giving each of them a chance to participate.

Notwithstanding these benefits, teachers also need to be aware of pedagogical and ethical considerations flowing from student involvement.

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\(^{79}\) Ozga, above n 8, 75.


\(^{81}\) Goss, Gastwirth and Parkash, above n 11, 119.

\(^{82}\) SpearIt and Ledesma, above n 10, 255.
Furco, quoting Sigmonds, notes that service learning should provide benefits to both the recipient and the student, which should occur in an ‘academic context’ that facilitates student learning. Accordingly, where emphasis is placed on the service component without comparable learning benefits, it is doubtful that this provides a good learning experience or is ethically justifiable. The CB Project was based on a form of assessment routinely given to law students and directly related to their studies. Thus, even in the absence of the CB Project, the writing of case notes would have facilitated student learning. However, as explained above, the students who worked on the CB Project were writing for an identified audience knowing that their work would reach the public domain. Accordingly, the students’ work did not become ‘buried’ once it was marked. Often the teacher is one of only a handful of people, if not the only person, other than the student to peruse the student’s work. By foreshadowing that the case notes would be available to the community, the project gave students ownership of their work and encouraged them to be professional.

Notwithstanding these positive features, a common difficulty with service learning is assessing the impacts of the project on student learning. As Kezar points out, the challenge often stems from the fact that teachers benchmark student learning by recourse to objectives such as problem solving and critical thinking, which may overlook benefits to personal development of skills and attributes. At least one study, for example, noted that although research service learning may not deliver measurable outcomes with respect to cognitive skills, it may ‘open students eyes to future opportunities in academic research and non-profit and public sector work’. This is borne out by the CB Project, where students made positive comments to their teachers about the experience of working on the case notes and mentioned that they were inspired to become more involved with animal law matters. It is not clear, however, whether this enthusiasm stemmed from the CB Project, the animal law subject, or a combination of the two.

3 Knowledge Transfer

The dissemination of the case book represents the knowledge transfer component of the CB Project. These impacts have not been formally evaluated because knowledge transfer is the next stage of the project. However, it is useful to consider the benefits, in a general sense, of providing a case book for animal law and to examine preliminary and informal feedback provided by interested parties.

Antoine F Goetschel, speaking in 2013, explained that the basic needs for educating animal lawyers include textbooks and case books.

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85 Goss, Gastwirth and Parkash, above n 11, 131.
86 Antoine F Goetschel is a lawyer who specialises in animal law. He has published widely in this field, including Gieri Bolliger, Antoine F Goetschel, Michelle Richner and
As already discussed, although animal law in Australia is largely statute-based, case law is still important for understanding how the law is interpreted and applied. Cases reveal trends in the law that highlight recent developments, spotlight whether regulation is effective and draw attention to gaps and inconsistencies. These matters are relevant to lawyers and non-lawyers who form the community of practice in animal law. Indeed, the teachers of Animal Law and Policy in Australia considered that compiling case notes and arranging them into convenient chapters with an index and legislation list would make the case law more accessible by locating it in one place and formatting it in a user-friendly manner.

Apart from the need for a case book, preliminary and informal feedback on the CB Project has been very valuable. This includes the input from law students referred to above, as well as commentary and advice from the Young Lawyers, Voiceless, the Centre for Compassionate Conservation at UTS, and a number of animal law teachers. In particular, the Young Lawyers and Voiceless perused drafts of the case book and their observations were useful and very positive, pointing to the fact that such a resource is vital for disseminating animal law and encouraging stakeholder engagement. In a similar vein, an overview of the CB Project was well-received at the Animal Law Teachers’ Workshop held at Bond University over the weekend of 18 and 19 October 2014.

The decision to disseminate the case book by producing electronic and print versions was made for a number of reasons. The first stemmed from benefits provided by using differing media. For example, digital media are popular because they can be interactive and provide access to quick scanning and sourcing of information. However, research also shows that readers perceive digital media to suffer from technical inadequacies

Alexandra Spring Guide, Animals in the Law (German) (Schulthess Verlag, 2008); Gieri Bolliger, Antoine F Goetschel and Manfred Rehbinder, Psychological Aspects of the Animal in the Law (in German) (Stämpfli Verlag, 2011).

Antoine F Goetschel, Keynote Address, speaking at Sydney University at the 2013 Voiceless Lecture Series, 12 April 2013.

The Centre for Compassionate Conservation operates within the Institute for Sustainable Futures at UTS. The Centre is involved in research and education that proffers a compassionate approach to the protection of wild animals. These approaches are particularly relevant at the intersection of animal welfare and environmental conservation. The Centre also acts in an advisory capacity to NGOs, government bodies and other stakeholders: UTS, Centre for Compassionate Conservation (15 December 2014) <http://www.uts.edu.au/research-and-teaching/our-research/centre-compassionate-conservation>.

with respect to readability’.  Perhaps partly for this reason, Huang, Chen and Ho conclude that printed materials are favoured for in-depth reading and for when readers want to ‘construct meaning’. Moreover as a rule, older readers tend to select print over digital media more than younger readers, although this rule needs to be qualified because another study concluded that almost 2/3 of students (young and old) printed learning materials that were available electronically. Given the fact that print is still a popular and useful delivery method, it was considered important to provide both electronic and print versions of the case book so that participants or stakeholders were not excluded.

Another reason for choosing both electronic and print media stemmed from the way the project developed and was resourced. The original Vice-Chancellor’s Grant at UTS related to the editing and compilation of the case notes into a PDF book. The teachers of the animal law subject viewed this as a cost-effective way of producing and disseminating the materials. However, following the first stage of the CB Project, feedback from members of the Young Lawyers inspired the application for the Voiceless Grant. It is telling that the Young Lawyers provide some of their own publications in both PDF and print versions in order to reach as wide an audience as possible.

An important counter-consideration is what Blackman and Benson refer to as ‘stickiness’ in knowledge transfer. This term describes processes and influences that hinder the transfer of knowledge to those that would use and benefit from it. One way of preventing stickiness is to envisage knowledge transfer in terms of developing a community of practice that engages all relevant stakeholders. These stakeholders command an array of expertise and knowledge and can ‘share [this]…as a collective and extend it through their practice.’ In the case of the CB Project, this enlivens deliberation on whether the establishment of an interactive web site should supplement or replace the electronic and print versions of the case book. An interactive web site would be relatively straightforward to update and would enable a range of stakeholders to proffer their experience and expertise in the way depicted by Blackman

Ernst, above n 89, 582.

Kuo-Liang Huang, Kuo-Hsiang Chen and Chun-Heng Ho, ‘Promoting In-Depth Reading Experience and Acceptance: Design and Assessment of Tablet Reading Interfaces’ (2014) 33 (6) Behaviour & Information Technology 606, 607, 608, 616.

Greaney et al, above n 89, 60.


Greaney et al, above n 89, 60.


Ibid.

Ibid 585.
and Benson. However, it also raises questions as to who would design, host and maintain the web site and how the web site would be funded. This issue will be re-visited once the case book has been launched into the public domain and feedback obtained from users. If the CB Project can be widened through the establishment of a web site, there is scope for multi-institutional collaboration with students from across Australia.

IV CONCLUSION

The CB Project was designed as a practice-oriented learning experience that was also a form of derivative service learning involving knowledge transfer. It provides an example of an innovation in learning, demonstrating how practice-oriented learning can lead to the production of a resource that makes a potentially meaningful contribution to the field of study and to the community. Concepts of knowledge transfer and service learning resonate with both the UTS Model and the Law Faculty’s graduate attributes.

The practice-oriented approach to learning emphasised by the UTS Model readily lends itself to learning that also encompasses community service. Although the scope of activities that come under the umbrella of service learning and community service is vast, at their core is the aim ‘to demonstrate social responsibility and a commitment to the common good’, something that is also consistent with graduate attributes that incorporate public service and social justice issues. It is also important to bear in mind that elements of public service and a commitment to the common good do not take the place of student learning; rather, they inform it by placing students at the centre of knowledge creation that answers both a societal and pedagogical need. The CB Project fulfilled these aims by focussing on student-prepared learning materials that could be used beyond the class room to contribute in a meaningful way to the animal protection community.100

99 Preece, above n 9, 268.
100 Dipadova-Stocks, above n 16, 437.
This article explores the role of law schools in attracting international students for postgraduate study. This is a pressing pedagogical and economic issue that is of concern to many institutions. It is proposed to analyse these dynamics from a comparative perspective, with a view to addressing the elements of a successful positioning for a law school in an increasingly competitive global market.

The enquiry will focus on Master of Laws (LLM) programs, which in many Law Schools account for the largest enrolment of postgraduate students. From the perspective of the education provider, an LLM by coursework is often both efficient and economically viable. This will be explored against the theme of internationalisation, recognising the intense competition among law schools for a cohort of students who are diverse, mobile and discriminating.

Attention will be directed to institutions that do not typically fall in the top echelon of world university rankings and which operate with limited resources. A number of perspectives and strategies will be canvassed, with the obvious caveat that any initiatives will be counterproductive if they compromise academic standards.

This article draws broad qualitative distinctions between different law schools and their LLM programs. General perceptions as to status and reputation are largely impressionistic, although they are formed against the background of leading academic ranking exercises, such as The Times Higher Education assessment exercise uses 13 calibrated performance indicators for achieving balanced comparisons.
Times Higher Education World University Rankings\(^2\) and the QS World University Rankings.\(^3\) This article does not purport to draw fine distinctions in matters of reputation and standing, but the views expressed are generally consistent with global university league tables and established affiliations. For example, it is assumed that the Russell Group in the UK and the Group of Eight Universities in Australia fall in the higher echelons and that membership of global networks such as Universitas 21 signifies certain benchmark standards.

It is important to note that the LLM program takes diverse forms in terms of content, specialisation, duration and course delivery. Examples include a general LLM, an LLM with specialisations and subject clusters, nominate Master’s degrees taught wholly or partly at law school, cross-disciplinary programs, and cross jurisdictional Masters degrees taught by partner institutions in different jurisdictions.\(^4\)

**II INTERNATIONAL DIMENSIONS OF LEGAL EDUCATION**

A notable feature of certain LLM programs is the high ratio of international students to domestic students. In some cases the former predominates. This is particularly pronounced in a number of top tier US law schools. The Harvard class of 2013/2014 comprised 181 students, of whom 98% were international students.\(^5\) Cornell University’s LLM program is almost entirely composed of international students, recruiting between 65-75 students from 25-30 different countries.\(^6\) Other US law schools cite statistics attesting to the diverse international nature of the LLM program.\(^7\) Some, such as Stanford, offer dedicated LLM courses for overseas students.\(^8\)

Similar trends are evident in law schools throughout the Commonwealth. At the National University of Singapore, over 90% of


\(^4\) These programs are discussed more fully below.

\(^5\) Harvard’s website states that the LLM program ‘typically includes 180 students from more than 70 countries’. The Graduate Program has the stated objective of seeking candidates from a variety of legal systems. See *Harvard Law School* (2016) <www.law.harvard.edu>.

\(^6\) Cornell’s website states that ‘the LL.M. degree program has been designed for students holding a law degree from outside the United States …’ See ‘Cornell Law School: Degrees’ on *Cornell Law School* (2016) <http://www.lawschool.cornell.edu/international/degrees.cfm>. This program was established in 1948.

\(^7\) For example, in the 2013/2014 academic year, Yale’s 23 LLM students originated from 12 different countries, while New York University had 70 percent foreign trained lawyers in its LLM and JSD programs. Again, Columbia University’s 250 graduate students came from over 50 jurisdictions.

\(^8\) Stanford offers four one-year, course-based LLM programs. These are limited to students whose primary law degree was conferred outside the United States. See *Stanford Law School* (2016) <www.law.stanford.edu>. 
graduate students in law are from overseas. At the University of Toronto approximately one half of the graduate students in law hold non-Canadian degrees. In the United Kingdom, the leading law schools post similar statistics. Of the 160-180 LLM students admitted to Cambridge each year, approximately two thirds come from overseas. Comparable figures apply for Oxford, where the 2013/2014 BCL/MJur intake of 124 students comprised more than 80% international students.

The benefits of a diverse cohort of international students have been expressed in different, sometimes unrelated ways. In crude economic terms, international students are a source of revenue and – unlike domestic students – the fees are not necessarily controlled by government policy. Fees for international students may be higher than for domestic students. This may confer positive benefits to the postgraduate program as a whole in providing a means of cross-subsidising domestic students. Universities in the UK have consciously targeted international students for this reason. As one academic manager remarked, ‘on overseas

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9 The National University of Singapore website notes that its graduate students come from more than 35 countries. See National University of Singapore (2016) <http://law.nus.edu.sg>.

10 University of Toronto Faculty of Law (2016) <www.law.utoronto.ca>. Although the ratio of domestic and international students studying law is not specifically identified, leading Canadian universities indicate that their postgraduate programs attract a significant number of international students. For example, the University of British Columbia’s website states: ‘UBC values diversity and strongly encourages international students to apply for our graduate programs. 25 percent of our total graduate student body are international students’. See ‘International Students’ on The University of British Columbia (2016) <https://www.grad.ubc.ca/prospective-students/international-students>. Similarly, McGill’s website states that its graduate students come from over 150 countries, and that 38 percent of its graduate students are non-Canadian citizens. See ‘International Students’ on McGill (2016) <https://www.mcgill.ca/gradapplicants/international>. Dalhousie records a lower figure of 12 percent international students. See ‘International Students’ on Dalhousie University <http://www.dal.ca/admissions/international_students.html>.

11 University of Cambridge Faculty of Law (2016) <www.law.cam.ac.uk>.

12 University of Oxford Faculty of Law (2016) <www.law.ox.ac.uk>. Similarly the University of Nottingham Law School website states: ‘The diversity of the program is matched only by the cosmopolitan nature of the academic and student body: each year we admit about 150 students, typically from over 40 different countries around the globe.’ See The University of Nottingham School of Law (2016) <www.nottingham.ac.uk/law>.

13 For example, in 2014 the domestic and international fees for the University of Auckland taught LLM program are NZ$7,562-$8,891 and NZ$29,700 respectively; ‘Fees and Money Matters’ on The University of Auckland – Auckland Law School (2016) <http://www.law.auckland.ac.nz/uoa/home/for/future-postgraduates/fees-and-money-matters#2c5>. Note that in some contexts the term ‘domestic student’ may have an extended definition. For example, fees levied for EU students may be the same as for permanent residents of the UK. In private universities in the US, tuition fees are the same for national and international students. See generally, OECD, Education at a Glance 2012: OECD Indicators (OECD Publishing, 2012) 366 <http://www.oecd.org/edu/EAG%202012_e-book_EN_200912.pdf>.
students we make a profit, on undergraduate home and EU students we make a loss.\textsuperscript{14}

However, the exploitation of an economic opportunity is not necessarily consistent with wider social and educational ideals. Financial assistance is an important element in attracting the best students, irrespective of their means or background. There is great diversity in the scale and type of funding assistance for postgraduate students. At the apex are top-tier law schools with substantial resources to match these ideals. Speaking of admission policy for the LLM at Harvard, it has been said:\textsuperscript{15}

\begin{quote}
[W]e work hard to maintain a need-blind policy of admission for all our students. This is especially noteworthy regarding our LL.M. and SJD students, particularly as the pool of students applying for admission to the LL.M. has shifted increasingly toward developing countries and emerging democracies and includes a growing number of excellent candidates with limited financial resources. We feel that it has borne much fruit – in the quality of our LL.M students … I realize that we are exceptionally fortunate to have the means to carry out such a policy … but I very much hope that other schools will see the enormous value that lies in this type of strong institutional and financial commitment to the LL.M. degree.
\end{quote}

While Harvard is sufficiently endowed to implement an admissions policy of this kind, other law schools are less fortunate.\textsuperscript{16} Indeed, as noted above, for many the perspective is reversed and postgraduate programs are regarded as a source of revenue rather than an outlet for philanthropy.

From a pedagogical perspective, it has been urged that students must directly experience legal pluralism in the classroom. To this end, some universities actively promote classroom diversity. In speaking to the relationship between domestic Juris Doctor (JD) students and international LLM students, it has been observed that the latter enhance the learning experience of the former: ‘[t]he presence of LLMs is not only important for them, to get the valuable experiences of American law

\begin{itemize}
\item\textsuperscript{14} Quoted in C Bolsmann and H Miller, ‘International Student Recruitment to Universities in England: Discourse, Rationales and Globalisation’ (2008) 6 Globalisation, Societies & Education 75, 84.
\item\textsuperscript{16} This includes high ranked US law schools. Georgetown University international LLM students are limited to commercial loans. The University of California, Berkeley’s website states: ‘Berkeley Law does not provide full-tuition fellowships, tuition waivers, need-based grants, nor graduate teaching assistantships.’ The University of Michigan offers need and merit based scholarships and private loans. Duke Law School states that it has very limited financial assistance to offer international students. Leading Australian Law Schools such as the University of Melbourne, University of Sydney, Monash University and the University of Queensland offer scholarships and funding to overseas students. In the UK, Cambridge offers a range of scholarships and funding for international students while Oxford has over 1,000 fully funded scholarships for new Masters and Doctoral students.
\end{itemize}
school. It is what they can give to us in changing the culture of the law school.  

Some regard these dynamics as an inevitable feature of the future landscape of legal education. Van Caenegem argues that this should be approached as a comprehensive exercise:

Students must be introduced to background differences in legal cultures and attitudes and not just to doctrinal diversity. Students should learn how the fundamental choices in structuring and administering law are made differently in various jurisdictions. Students must be supported in how to deal with all they experience about the law: what they read, see and hear online, on television, in films, radio and through personal interactions.

Many consider that the question is not whether to internationalise legal education, but the manner in which it will be implemented. Naturally, opinions vary as to the degree to which this can, and should, be attained. Vai Io Lo identifies four approaches to internationalising legal education: inclusive, integrative, experiential and preferential. An inclusive approach involves supplementing the core curriculum with international, comparative and foreign law courses. An integrative approach connotes the incorporation of international materials in domestic law papers. These are syllabus-oriented initiatives, which contrast with the final categories. An experiential approach encompasses the study of foreign or international law in summer programs, exchange programs and dual degree arrangements. Finally, the preferential approach allows students to study abroad and engage more fully in the ethos of foreign legal systems, for example, by participating in internships and running student-edited international law journals.

These models enhance LLM programs by offering insight and, in varying degrees, the opportunity to experience the international nature of law. In this sense internationalisation is a marketing tool that is ‘on trend’ in its treatment of the contemporary discipline of law. It is submitted that the first category, the inclusive approach, has in fact long been with us, as an accepted feature of most law degree syllabi. The second, the integrative approach, is also well established. In some quarters, the integration of transnational perspectives into the law curriculum is regarded as a given. In proceedings at the Association of American Law Schools annual conference in 2006, a day was devoted to the theme of

‘Integrating Transnational Perspectives into the First Year Curriculum’. One commentator noted:\(^21\)

The discussion that day was not focused on whether American law schools ought to be moving in that direction, or why doing so would be a laudable objective. Most participants accepted the fact that contemporary legal reality supports, and even compels, such a move.

Quoting the views of one delegate:\(^22\)

I doubt there is much of an issue in gaining support for internationalizing the law school from our alumni. They are practicing (sic) law in the “real world” and they understand that today, legal matters with an international aspect are growing exponentially.

The final categories (experiential and preferential) are, literally, more expansive in that they contemplate students transferring to another jurisdiction for a portion of the degree program.\(^23\) Such arrangements are usually associated with an undergraduate law degree\(^24\) rather than a taught LLM course. A theme common to both is that the attraction of a law school’s degree offerings is enhanced by its alignment with global trends. Some law academics identify ‘transnationalisation’ as the precursor to an all-embracing globalisation of legal education.\(^25\) The former gives recognition to the international dimensions of law, which is embedded in the law degree syllabus and reflected externally by initiatives such as exchange programs and recognition of overseas courses. The latter is the next, and perhaps final, phase in a continuum, and manifested by more profound integration of legal education across national boundaries:

The past century saw legal education evolve through paradigms that can be broadly described as international, transnational and now global. Internationalisation saw the world as an archipelago of jurisdictions, with a small number of lawyers involved in mediating disputes between jurisdictions or determining which jurisdiction applied; transnationalisation saw the world as a patchwork, with greater need for familiarity across jurisdictions; globalisation is now seeing the world as a web in more ways than one, with lawyers needing to be comfortable in multiple jurisdictions and dealing with new regulatory regimes that do not fall neatly into domestic or international paradigms … [t]he world may be


\(^{22}\) Ibid, 172.

\(^{23}\) This option is most likely to appeal to domestic students rather than international students for whom the host university represents a ‘foreign’ institution.

\(^{24}\) Depending on jurisdictions and institutions, a law degree may be undertaken as an undergraduate or a postgraduate degree. Commonly the former is conferred as an LLB and the latter as a JD. Reference in this paper to ‘undergraduate law degree’ denotes either of these qualifications.

\(^{25}\) The scale and dynamism of globalisation is aptly captured by van Caenegem: ‘I use the term as signifying greater social and economic integration between sovereign countries, and in a legal sense between sovereign jurisdictions. Globalisation means greater exposure to the culture, social systems and norms, legal, administrative, commercial and political systems of other countries.’ Van Caenegem, above n 18, 158.
a little smaller and flatter, but it is still complex. The challenges posed are in some senses new, but in reality legal education has always been – or should always have been – about preparing our graduates for a changing and dynamic world.  

It has been suggested that the first adaption to globalisation is the move from exchange programs to double-degree programs across jurisdictions. This is but one of a number of objectives that can be achieved, typically as a result of strategic alliances between different international institutions. The number of bilateral and multilateral educational agreements has increased dramatically in the last decade or so, encompassing a range of initiatives, including joint research projects, sharing of curricula, conference partnerships, and recognition of transfer credits. This exemplifies the growing trend of international legal education and the range of opportunities it presents. In the next section of this paper attention turns to the implications of internationalisation for the taught LLM program and some proposals for a successful positioning for such programs in a competitive global market.

III Global Trends

A Dual and Linked Degree Programs

There are now a number of established double-degree programs that provide a unique study path integrating an undergraduate law degree with a Master of Laws. The arrangement potentially enhances the marketability of both programs. The LLB-LLM scheme at the National University of Singapore (NUS) is a case in point. Students taking the LLB are able to seek early admission to the LLM at New York University (NYU) and commence the latter in their 4th year at NUS. Upon completion of the LLM requirements, the mutual recognition of credits at the two institutions enables both the NUS LLB and the NYU LLM to be conferred. The arrangement demonstrates a further development in globalisation, namely the shared delivery of courses. The NUS/NYU collaboration offers Master of Laws degrees from each of the partner institutions, but is taught entirely in Singapore, with the participation of both NUS and NYU academic staff.

Increasingly, top-tier institutions are entering into arrangements that expand the range of study options, particularly for the top percentile

26 Simon Chesterman, ‘Doctrine, Perspectives and Skills for Global Practice’ in William van Caenegem and Mary Hiscock (eds), The Internationalisation of Legal Education (Edward Elgar, 2014) 184-185.
students. The Cambridge LLM class includes a small number of JD students from Harvard Law School admitted through the Harvard-Cambridge Link. Selected students can earn both a Harvard JD and the Cambridge LLM in 3½ years. 30 Similarly, Oxford has a number of strategic collaborations. For example, high achieving students from the University of Sydney are granted early admission to the Oxford Bachelor of Civil Law (BCL) or the Masters in Law and Finance (MLF). Instead of completing the final semester of law at Sydney, selected students commence either the BCL or the MLF at Oxford. On completion of one of these degrees, the Sydney LLB or JD is conferred. 31

A feature of such arrangements is that students have two host institutions and participate directly in their respective programs. This has aptly been described as an immersion model that reflects the aspirations of global legal education. 32 There are corresponding financial advantages in that law school resources are not required to modify its own programs, nor are its academic staff required to teach foreign laws and procedure.

Different permutations are being explored and different international teaching models are evolving. 33 These undoubtedly contribute to the overall marketability of the more innovative postgraduate programs. While the immediate and long-term benefits to an institution may not be precisely quantifiable, it is possible to achieve some direct economies. For example, double degrees across two different law schools can be structured as a JD/LLM. 34 As the JD is a graduate degree, 35 this can be


32 D Bentley and J Squelch, Internationalising the Australian Law Curriculum for Enhanced Global Legal Practice (Office for Learning & Teaching, 2012).

33 See, for example, Monash University’s initiative of harmonising its programs with other institutions to facilitate wider international linkages. Monash has decided to align its degrees with the Bologna (European) degree cycle, which makes it easier to establish joint or dual-degree programs with European universities. See Monash University, Aligning Course Outcomes Educational Standards Frameworks (2016) <http://opvclt.monash.edu.au/curriculum-by-design/aligning-course-outcomes-with-aqf-bologna.html>.

34 The introduction of a JD in addition to an LLB can expand the range of possible collaborations. For example, Hong Kong University launched a JD program in 2009 as an alternative to its LLB. The JD has attracted a wide range of graduates from the UK, US, Canada, Australia and Mainland China. In addition, it has facilitated a JD/LLM student exchange program with the University of Pennsylvania Law School. See ‘Hong
conveniently meshed with an LLM syllabus. The JD/LLM combination is particularly suitable for joint study arrangements as both are graduate programs and there is a degree of parity in academic standards. This allows for a range of shared courses for students enrolled in both courses.

There are practical and pedagogical benefits to this model. As a practical consideration, it enables law schools to offer a greater number of courses in the LLM program. This flexibility and range of options enhances the overall program and makes it possible to cluster various papers into subject specialisations. In addition there is an obvious economy of scale where one course serves different programs. From an academic perspective, JD students benefit from learning alongside international LLM students and there are reciprocal benefits for international students participating in the domestic law degree. And more broadly, for both cohorts, the classroom provides unique insight as a microcosm of a globalised legal system.

The above initiatives reflect a trend towards experiential training founded on strategic alliances between partner institutions. Other law schools take a more limited syllabus-oriented approach. The Universities of Melbourne and New South Wales provide a transition course for LLM students who are not from a common law jurisdiction. Other institutions

Kong University and Penn Law to Establish Unique JD/LLM Student Exchange Programme’, Hong Kong Government News (Hong Kong), 27 August 2010.

The United Kingdom and New Zealand continue to offer a law degree as an undergraduate program, typically leading to an LLB. Canada and Australia have tended to adopt the US model. In Australia, for example, the JD has been introduced at such leading universities as Australian National University, Monash University, University of Melbourne, University of New South Wales and the University of Sydney. The University of Melbourne and University of Western Australia have phased out the LLB program. Other Australian universities offer the LLB and JD concurrently. The offering of both degrees is not without its detractors. See J Roe, ‘A School Divided: Issues with JD and LLB Split System Factsheet’ (2013) <http://www.alsa.net.au/uploads/Education2013/JD%20&%20LLB%20Factsheet%20FINAL.pdf>, and D Cooper et al, ‘The Emergence of the JD in the Australian Legal Education Marketplace and its Impact on Academic Standards’ (2011) 21 Legal Education Review 23.

There are considerable variations with respect to law credits and the prerequisites for admission to the LLM. The University of Pennsylvania-University of Hong Kong JD/LLM program enables students at each Law School to spend their 3rd year studying for an LLM at the partner institution. Admission to the program is administered by the home institution while selection is made by the host university. In contrast, applicants to the LLM program at Cambridge are required to have a JD or equivalent degree prior to enrolment. By way of exception, students at Harvard Law School seeking enrolment in the JD/LLM Joint Degree program can apply to spend their 3rd year reading for the Cambridge LLM. Application is made through the Harvard Law School and admission is decided by Cambridge. Four papers must be taken at Cambridge which will count for 11-13 credits towards the Harvard JD.

Applicants for the University of Melbourne LLM are required to complete a ‘Fundamentals of the Common Law’ paper. See University of Melbourne, Melbourne Law Masters (2016) <http://www.law.unimelb.edu.au/masters/courses-and-subjects/course-details/cid/563>. International LLM students at the University of New South Wales are generally required to take the Australian Legal System course, which is designed for students from a non-common law background. See UNSW Law, Master of
have sought to capitalise more directly on the market for international students by offering a dedicated degree for students from non-common law backgrounds. Since 1991 Oxford University has offered the Magister Juris (MJur) degree which broadly follows the course design of the BCL, except that candidates can take one of a number of courses from the undergraduate degree in lieu of a BCL course. This contrasts with the LLM in Common Law at the University of British Columbia. This is a course-based program designed to provide training in Canadian common law for foreign or non-common law trained lawyers. This can be compared with the University of Hong Kong’s Master of Common Law, which is targeted to a similar cohort of international students.

In considering the different syllabus-oriented approaches, it appears that the course content for civil/non-common law students is either derived substantially from a traditional LLM program, or hived off into a discrete Master’s program that provides foundational training in the common law. While the latter may be challenging to students unfamiliar with the common law system, it is submitted that the degree of difficulty that the course does or does not present is an insufficient basis for its place within the scheme of academic postgraduate study. To some extent it is more closely aligned with training. This is a questionable basis for academic study at postgraduate level. While an induction into common law doctrines and principles is a valid objective for introducing international students to an LLM program, it should not be the primary focus of the degree itself.

B Demographics

Any strategy for attracting international LLM students must necessarily take account of the demographics of the marketplace. Students from civil law or non-common law systems represent a significant potential market, so much so that the overall fortunes of the tertiary sector may be influenced by the degree to which it can continue to attract and retain such students. For example, in May 2013, the New Zealand Ministry of Education produced statistics indicating a decline in the number of international university students over the past decade. This was largely due to a fall in enrolments by Chinese students. Again,
according to figures recently published by the Higher Education Funding Council of England, European Union and international students made up 74% of all students who started taught masters degrees in 2012-2013. And with respect to all full-time postgraduate courses in English universities, the number of Chinese students is almost equal to the number of British students. These statistics reveal that English universities are increasingly relying on overseas students to fill its courses, and that a significant number can be identified as coming from a particular country.

Any decrease in overseas students has economic implications. As previously noted, tuition fees from international students may be appreciably higher than for domestic students. These factors suggest that the interests of overseas students warrant careful consideration. Strategic decisions are required to effectively compete for a cohort of students who are discriminating in assessing the comparative merits of different postgraduate programs. There are many facets to be considered. With respect to taught LLM programs, fundamentally, the degree should offer an attractive syllabus that is international in perspective and relevant to a global legal community. A choice of courses that is largely directed to domestic law and domestic perspectives may not attract strong interest. Where the syllabus combines domestic and international courses, overseas students tend to gravitate towards the latter because they have less emphasis on common law method. This suggests that a taught LLM should predominantly offer a range of courses that are international in focus and not confined to domestic jurisprudence or procedure. The LLM program should nevertheless include a compulsory paper on the fundamentals of the common law. Regardless of whether this is required for courses actually studied in the LLM, it is desirable that at least some insight is imparted into the ethos of the host jurisdiction.

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41 HEFCE, Decline in Global Demand for English Higher Education (2 April 2014) <http://www.hefce.ac.uk/news/newsarchive/2014/news86922.html>. According to figures published on 1 April 2014, 23 percent of students studying for masters-level degree courses are from China while 26 percent of students are from the UK.


43 The actual numbers vary across subject groups, with the highest concentration in mathematics, where Chinese students comprise 58 percent of all international entrants.

44 See, for example, n 13, above.

45 This statement is subject to qualifications. For example, some courses that could be termed ‘domestic’ are very attractive to international students. Indigenous Law in New Zealand is a case in point. While the course is domestic in the sense that it is taught in New Zealand and relies upon the New Zealand experience, it is also ‘international’ because its applications are relevant to many jurisdictions. Again, the ‘international v domestic’ dichotomy is sometimes inaccurate in the sense that some domestic courses have been rigorously re-cast to absorb comparative perspectives. See discussion of the experience at McGill University in Jukier, above n 21.
It is unlikely that this model would detract from the overall appeal of the LLM to domestic students. After all, they have already obtained an undergraduate law degree that addresses key foundation subjects, together with a number of elective courses, many of which are taught from the perspective of their own jurisdiction. The LLM would give added value to domestic students in addressing the increasing international dimension of legal practice and modern business. Moreover, it is not suggested that every subject should be taught from a jurisdiction-neutral perspective. In some cases it is appropriate to study an area of law from the perspective of one or more major legal systems, particularly where certain jurisdictions are influential in shaping the content of a body of law.

It must be borne in mind that law (or at least common law) is different from most disciplines. In the case of the ‘scientific’ disciplines like mathematics, chemistry and computer sciences, it does not matter where the students are from, providing they are conversant with English as a medium of instruction. The same cannot be said about the study of law. Legal systems are diverse, not only in their substantive and procedural aspects but also in reflecting a distinct philosophical, social and political focus. The most successful LLM programs understand that it does matter where postgraduate students come from and that the syllabus should therefore reflect an international focus. This segues into the final argument, that there is a positive case for promoting student diversity in law school.

It is perhaps not accidental that the leading law schools in the United States and the Commonwealth proclaim and enforce a policy of student diversity. This is often supported with evidence of class statistics, a sample list of national origins and individual student profiles. Admittedly, to some extent this may be circular in that a top law school’s reputation will attract intense competition for places, enabling selection from a quality field of international students. Student diversity is attainable without any dilution of academic standards. Often, this is self-sustaining because ‘the rich get richer’ in that there is a self-perpetuating synergy between institutions of similar reputation and standing. Such entities have higher leverage in negotiating academic alliances and student focused schemes, such as exchange programs and double-degree programs. Again, it is often the case that these institutions are more able to attract external funding and philanthropy.

Different dynamics are at play for universities that do not enjoy the same cachet and operate with limited resources. Nevertheless, it is suggested that even if a university lacks brand power, it is still worth

These typically include public law and private law subjects such as criminal law, constitutional law, contract, tort, land law, equity and trusts.

The implicit assumption is that collaborations between leading Law Schools produce a combined effect greater than the sum of their separate parts. The inertia of an established reputation maintains this state of affairs. Colloquially, as noted in the text, ‘the rich get richer’.
enforcing an admission policy of diversity. In addition to the positive revenue implications of attracting overseas students, this can also be justified on pedagogical grounds. This is particularly evident in the classroom setting. First, classroom discussion is facilitated where multiple perspectives are represented - especially so where there is a tutorial or seminar delivery format. In contrast, in a homogenous classroom there may be limited viewpoints and little impetus for dialogue, particularly where comparative or international material is being studied. Secondly, if diversity is not actively promoted, the presence of international students may be misunderstood and lead to social and political resentment.\(^48\) Thirdly, the dynamics of internationalisation are more credibly represented at law school if the classroom itself is international in composition and perspective. Fourthly, diversity fosters a vibrant intellectual community. It is more likely to attract high-calibre, critical-thinking domestic students. It sets the bar higher and discourages those who do not wish to engage and be challenged by students who think differently or uphold different values.

**IV COMPEITITION WITH LEADING UNIVERSITIES**

It has been argued that student diversity is a key feature of a successful postgraduate law program, both financially and pedagogically. A related consideration is that the internationalisation of legal education enhances LLM programs and reflects the modern discipline of law. Other developments have been noted, including strategic alliances to foster new study paths. It can be added that it is now commonplace for most law schools to offer a variety of subject options within an LLM. Diversity in course offerings takes different forms, ranging from an LLM with subject clusterings, to nominate Masters degrees dedicated to a specific field of law.

The proliferation of nominate Masters degrees reflects an initiative to widen market appeal by facilitating the admission of non-law graduates.\(^49\) In addition to subject specialisations, some Masters programs appeal directly to non-lawyers by exploring aspects of law or legal practice. For example, Queensland University of Technology has identified and responded to this market by means of a Master of Applied Law for professionals from non-law backgrounds who wish to gain an understanding of certain areas of law.\(^50\) Nominate Masters degrees are an attractive option for non-lawyers in that they offer specific, and

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\(^{49}\) Examples from an ever-expanding range of programs include Masters in Environmental Law, Banking, Finance, Insolvency, Energy and Resources, International Law, Tax, Health Law, Mediation, Criminology and Media Law.

sometimes practically oriented training in a vocational field\textsuperscript{51} that is of direct relevance to a student’s career. Moreover, technical familiarity with the background subject matter may ameliorate difficulties of receiving instruction in English for overseas students for whom English is not a first language.\textsuperscript{52}

These generic factors are beneficial to most postgraduate courses but they do not completely explain the performance of less well-known LLM programs that successfully compete with global brand law schools. In this regard the narrative of success is more intuitive than formulaic. Two pugilistic metaphors spring to mind: the need to ‘box clever’ and the ability to ‘punch above one’s weight’.

Whether they initiate or imitate curriculum and marketing initiatives, some non-brand law schools have proven astute in using their resources and opportunities to best advantage. Interdisciplinary and inter-jurisdictional Masters degrees are a case in point.\textsuperscript{53} With respect to the latter, a growing number of UK law schools have exploited their proximity to continental Europe by teaching study modules in both domestic and foreign centres. Nottingham Trent Law School, for instance, offers a dual Master of Laws degree tenable in Nottingham and Radboud University in The Netherlands.\textsuperscript{54} The University of Kent Law School participates in the Erasmus-Europe scheme, enabling LLM study at Canterbury and partner universities in Europe.\textsuperscript{55} City University, London, provides diverse modules across a range of LLM specialisations, including an LLM in Maritime Law, which is delivered both in London and Athens.\textsuperscript{56}

Some law schools have successfully gauged the market in establishing niche LLM programs. Subject choice and mode of delivery are often significant factors. With respect to the latter, the exponential growth of information technology has fostered a trend of online delivery of

\textsuperscript{51} See, for example, discussion below of programs offered by the University of Calgary and the University of Aberdeen.

\textsuperscript{52} See discussion above, ‘Demographics’.

\textsuperscript{53} A high profile illustration of the former is the University of Oxford’s interdisciplinary Masters in Law and Finance, taught jointly by the Faculty of Law and the Said Business School. See University of Oxford, *MSC in Law and Finance* (2016) <http://mlf.law.ox.ac.uk>.

\textsuperscript{54} This program leads to the award of an LLM at both institutions. See further Nottingham Trent University, *Nottingham Law School and Radboud University Dual LLM* <http://www.ntu.ac.uk/nls_radboud>.

\textsuperscript{55} The University of Kent Law School also offers an LLM conducted at its Canterbury campus and the University’s Brussels centre. The University of Kent’s website notes that the Law School attracts students from over 80 countries. See further University of Kent, *Erasmus-Europe LLM* <http://www.kent.ac.uk/courses/postgraduate/136/law-erasmus-europe>.

\textsuperscript{56} City University London, *Maritime Law (Greece)* <http://www.city.ac.uk/courses/postgraduate/maritime-law-greece>. The University’s website states that approximately 80 graduate students from around the world are admitted to its LLM programs: City University London, *Master of Laws* <http://www.city.ac.uk/courses/postgraduate/master-of-laws>.
academic programs. This presents an opportunity for mid-tier and smaller law schools to develop attractive study options for web-based programs. For example, Bond University’s Faculty of Law has entered into a partnership with the Swiss International Law School (SiLS) that enables students to study at both institutions and to graduate with two LLM degrees with different specialisations. The Swiss International Law School is an online university that offers a global LLM comprising modules on international commercial law, dispute resolution and cross-border issues. The Bond-SiLS partnership combines different delivery modes, with students completing one semester on campus at Bond and the other semester online through SiLS.

In developing LLM programs in an intensely competitive environment, it is advantageous to identify and cater to a target sector and specialised demands. For example, the University of Technology, Sydney was the first Australian university to offer a Master of Intellectual Property program that fulfils the educational requirements for qualification as a registered trade marks attorney and patent attorney. In other cases, the structure of LLM programs has been strongly influenced by the institution’s geographical location, local infrastructure and economic factors. Some have developed into niche specialisations of international standing. The University of Calgary is a good example. The Faculty of Law has drawn on the Province’s oil and gas industry and developed a well regarded LLM specialisation in Natural Resources, Energy and Environmental Law. The program attracts students from within Canada and around the world. In 2007 the curriculum was expanded to include a course-based LLM to better service the needs of lawyers and others who are already in the workforce. The course-based option also has appeal to international students from civil law backgrounds who are seeking an introduction to the common law while gaining expertise in the oil and gas sector.

Again, the University of Aberdeen capitalises on its proximity to major oil and gas fields by offering several LLM study options for oil and

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57 See, for example, LawStudies.com, Search 52 Online Master of Laws Degrees <http://www.lawstudies.com/LLM/Online>.
58 See, for example, the University of Law’s recent announcement of new LLM degrees specialising in conflict resolution and intellectual property, which currently are only taught online: University of Law, Master of Laws (LLM) in Legal Practice (2016) <http://www.law.ac.uk/postgraduate/llm>.
62 University of Calgary, Master of Laws <http://law.ucalgary.ca/graduate-programs/llm>.
This includes a taught LLM on Oil and Gas Law with Professional Skills, which provides students with the opportunity to develop key practical skills for the legal management of exploration and production. The course includes classes based on simulated practical exercises and the submission of a portfolio of works. The presence of a core field of study that is directly relevant to a major regional industrial sector has undoubtedly fostered the success of these LLM programs.

Although not every law school can draw on unique local conditions to bolster the focus of an LLM syllabus, the program can be enhanced by other factors, such as distinct specialisations, a strong teaching and research profile and established student support services. The Postgraduate Legal Studies Department of the University of Swansea offers an LLM in related aspects of international commercial law. The Department has professional and industrial links and offers support for graduates through its employment initiatives. These factors, in conjunction with a core of academic expertise, contribute to an LLM program that attracts a large number of international students.

In the competitive legal education market, law schools strive to add value by promoting innovative and distinctive programs. This breeds a ‘first in market’ mentality where non-brand law schools in particular have reconceptualised the LLM as a vehicle for ongoing professional training and enhancing the skill-sets of those who are in the workforce. An LLM in Legal Practice is instructive in demonstrating different formats that directly appeal to distinct sectors of the market. In the UK, Northumbria University offers an Advanced Legal Practice LLM designed for qualified lawyers seeking professional development in a specialist area of law. This is a distance learning program that offers flexible learning options centred around the individual needs and interests of each student. The sole assessment is a written project on a topic of the student’s choosing that is closely related to his or her intended or current area of practice. Similarly, the LLM in Legal Practice from Oxford Brookes University is directed to professional graduates and is designed to complement a legal career. It seeks to attract the domestic market and

63 University of Aberdeen, Oil and Gas Law with Dissertation (LLM) - Taught Programme (2016) <http://www.abdn.ac.uk/study/courses/postgraduate/taught/oil_gas_law>.
64 University of Aberdeen, Oil & Gas Law with Professional Skills (LLM) - Taught Programme (2016) <http://www.abdn.ac.uk/study/courses/postgraduate/taught/oglips>.
66 Swansea University, LLM Degrees < http://www.swansea.ac.uk/llmdegrees/ >.
67 See, for example, the University of Strathclyde’s LLM in Advocacy which was launched in 2012 as the first graduate level course of its kind in the UK. See University of Strathclyde, Law School <http://www.strath.ac.uk/humanities/lawschool>.
students from other common law jurisdictions. The School of Law’s appeal is no doubt enhanced by its location in a world renowned centre of learning.

Again, some Australian law schools have created distinct Legal Practice programs tailored to particular markets. Bond University has effectively established an outreach to Canadian students at both undergraduate and postgraduate levels. Its website records that there are currently over 150 Canadian students studying law at Bond University. The Canadian market is vigorously promoted, with information sessions held in major Canadian centres twice a year. This is reflected in the unique offering of an LLM in Canadian Legal Practice. Another distinct version of a Legal Practice LLM is available from the University of Wollongong, which offers an LLM in Criminal Practice. This specialised program attracts students from diverse backgrounds and different jurisdictions who are seeking to develop practice skills in the criminal prosecution process. This is the only Australian postgraduate qualification in law specialising in this area.

The programs discussed in this section are but a selection of offerings by law schools in different jurisdictions. Some common trends emerge. Non-brand law schools have enjoyed significant success by exploiting consumer needs or actively promoting market awareness. Usually the LLM program provides a distinct subject-driven package, including practical course content, flexible learning options, an identifiable core of teaching expertise and effective relationships with the employment sector.

At a macro level, competition for international postgraduate students may be influenced by national standards for tertiary education. In Australia, for example, the Tertiary Education Quality & Standards Agency (“TEQSA”) was established in 2011 as Australia’s regularity and quality assurance agency for higher education. TEQSA evaluates the performance of higher education providers against the Australian Qualifications Framework (“AQF”). AQF specifies benchmark standards against which higher education institutions are judged. The AQF enhances the marketability of Australian programs to international students by contributing to the worldwide recognition of Australian qualifications. For example, qualification titles are the same throughout

71 Bond University, Choose the Right Degree or Program for You – Postgraduate <bond.edu.au/future-students/study-bond/search-program#postgraduate>.
73 Qualifications are ranked by reference to 10 AQF levels.
Australia and it is immediately apparent what level of education a given qualification represents.\textsuperscript{74}

Perhaps most fundamentally, the AQF provides assurance as to the quality and consistency of Australia’s education sector.\textsuperscript{75} The AQF Specification for the Masters degree informs the design and accreditation of Masters degree qualifications.\textsuperscript{76} The AQF Specification for the Master’s degree includes the traditional LLM categories of a Masters degree by research and coursework (level 9). The AQF specifies relevant learning outcomes for level 9, encompassing knowledge, skills and the application of knowledge and skills. This scheme has positive implications for marketing an Australian LLM and provides a competitive edge to programs in jurisdictions that have not introduced transparent national standards.

**V Conclusion**

For many law schools it is commercially prudent to target international students for an LLM program. From an entirely different perspective, there are significant pedagogical benefits to diversity in the classroom. How this is achieved will depend in part on the status of the institution itself. Top tier law schools are oversubscribed and can espouse a policy of diversity without compromising academic standards. However, institutions that do not enjoy the same brand power must compete for a cohort of students who are discerning in their search for value. It has been argued that the attractiveness of an LLM program is enhanced by its alignment with global trends. In this regard it must be recognised that the international nature of legal education is a subset of the wider phenomenon of the globalisation of law itself.

There are a range of strategies which can place law schools at the forefront of these developments. This includes strategic alliances and partnerships with law schools in other jurisdictions, enabling students to undertake postgraduate studies in two countries. The degree structure of each law school may assist that process, particularly if it is possible to align an LLM in one institution with a JD in another. As students from both the host and visiting institutions are studying at postgraduate level, economies can be achieved with shared classes and an expanded offering of courses. The latter is conducive to creating subject clusters in the form of specialisations.

There are variations in the format of the LLM itself and different approaches are being adopted to raise the profile and marketability of the

\textsuperscript{74} Overseas and AQF qualifications are assessed by Overseas Qualifications Units which determine whether an overseas qualification satisfies the entry requirements for Australian courses.

\textsuperscript{75} See further the *Education Services for Overseas Students Act 2000* (Cth). See also the Commonwealth Register of Institutions & Courses for Overseas Students (CRICOS): Department of Education and Training, CRICOS <http://cricos.education.gov.au>.

\textsuperscript{76} *Australian Qualifications Framework* (Australian Qualifications Framework Council, 2\textsuperscript{nd} ed, 2013).
syllabus. It has been suggested that a taught LLM should predominantly offer courses that are international in focus. Mirroring this, an admissions policy that promotes student diversity is beneficial not only from a marketing perspective but also to enhance the learning environment. The latter reflects the common view that a diverse cohort of international students is the catalyst for a transformative educational experience.

It is apparent that less well-known law schools have made significant headway in attracting international postgraduate students. In recent years, LLM programs have assumed a protean form, meeting diverse academic and professional needs. Some have successfully expanded the student market by offering specialised LLM courses or nominate Masters degrees that appeal to non-law graduates. Others provide niche programs catering to distinct and quite narrow sectors. Initiatives have been taken to seize the market for ongoing professional training by enhancing the skill sets of those already in the workforce and providing pathways to further accreditation.

There is growing evidence that non-brand law schools are astute in using their resources to best advantage and exploiting the needs of target cohorts. For example, inter-jurisdictional Masters degrees coincide with the predilections of a generation of students who are highly mobile and receptive to different cultural experiences. An overriding theme is that current LLM programs, in different and distinct ways, strive to add value to a package that traditionally offered a limited educational experience. Some non-brand law schools are in the vanguard of these developments. Their success can be understood not only in economic and pedagogical terms, but in the wider context of re-defining the standing of their law school in a competitive global environment.
Foreword
Gabrielle Appleby, Alexander Reilly and Sean Brennan 295

Teaching Public Law: Content, Context and Coherence
Graeme Orr 299

Breadth, Depth and Form? Pitching Constitutional Law Content in the Classroom
Sarah Murray 317

Extending Public Law: Digital Engagement, Education and Academic Identity
Melissa Castan and Kate Galloway 331
I THE GOALS OF TEACHING PUBLIC LAW

In a response to what she viewed as a crisis in education, Hannah Arendt described education as requiring nothing less than ‘the renewal of our common world’:

Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token save it from that ruin which, except for renewal, except for the coming of the new and young, would be inevitable.¹

Arendt connects education to broader public goals. For some disciplines, such lofty aspirations might seem unobtainable, and even irrelevant, to the teaching enterprise. However, in law, and in public law particularly, the broader goals of education align clearly with our pedagogical mission.

In the discipline of law, it is widely accepted that we are doing more than simply training lawyers, and that our teaching reflects deeper scholarly values, as William Twining describes them, of ‘free inquiry, interest in human nature, breadth of perspective, intellectual discipline, independence of thought and judgment, and love of truth’.² In Anthony Kronman’s celebrated book, The Lost Lawyer, he responds to what he sees as a crisis affecting the legal profession and restates the important ideal of the ‘lawyer-statesman’. The lawyer is taught ‘first, love of the public good, and second, wisdom in deliberating about it.’³

Public law teaching has a special place within legal education. Only a modest proportion of law students will practice in the area of administrative law, and far fewer in constitutional law. Yet these subjects are foundational in all Australian law degrees. This reflects the fact that the core ideas of public law underpin the practice of all forms of law in Australia. Furthermore, while the number of law students in Australia continues to grow, many will not go on to practise law at all. This presents a particular challenge to public law teachers who must, if they take Arendt’s challenge to commit to renewal seriously, seek ways to make the foundational public law values relevant for life outside the law.

THE CHALLENGES OF TEACHING PUBLIC LAW

The interesting pedagogical questions in teaching public law relate to identifying the core ideas, values, institutions and doctrines of public law and how they can be conveyed through the teaching enterprise to all students. The teaching of public law must, then, connect to the broader educational aspirations of Arendt, Twining and Kronman for all students.

Teaching public law is a responsibility and an opportunity. Through teaching public law, we provide students with tools that help them engage meaningfully in public life. A robust public law education is fundamental to producing engaged citizens, responsible legal professionals, and future leaders. We need our citizens, lawyers and leaders to have a clear sense of where government power comes from, to understand the accountability framework within which it is exercised, and to engage with the relationship of the people to the state.

Public law is inherently dynamic. There continue to be contested views of its core ideas and values; new institutions are introduced and old ones modified; and its principles change and evolve through the legislative and judicial process, as well as the practice of government. Further, the teaching of public law occurs within an environment where institutional and technological pressures require us regularly to revise our curriculum and practice.

With this context in mind, this special issue of the Legal Education Review on teaching public law has a commitment to renewal of our common world at its core. It is part of a shared and ongoing endeavour to give the next generation a love of the public good, and wisdom in deliberating about it. These articles were initially presented at the inaugural Public Law in the Classroom workshop hosted by the Gilbert + Tobin Centre of Public Law, University of New South Wales and the Public Law and Policy Research Unit, University of Adelaide, on 12 February 2015.

THE SPECIAL ISSUE

The special issue commences with two articles that address curriculum challenges faced by public law teachers in Australia. Graeme Orr (University of Queensland), in his article ‘Teaching Public Law: Content, Context and Coherence’, reflects on the challenge of bringing coherence to the teaching of public law by searching for a unifying account of public law. There is, Orr argues, a normative smorgasbord at the heart of public law, replete with diverse and conflicting ideological accounts of government. Orr identifies a temptation to engage students in public law by relying heavily on a context-driven approach, and drawing on contemporary case-studies of policy and politics. Although such contextual material can stimulate interest and discussion, bringing more abstract public law questions to life, Orr warns that overuse of this material can compromise a clear understanding of the unifying concepts and values that underpin public law.
In her article ‘Breadth and Depth? Pitching Public Law Content in the Classroom’, Sarah Murray (University of Western Australia) responds to Justice Mark Leeming’s challenge to public law teachers to keep constitutional law ‘living, useful and relevant’. Murray reconceptualises this challenge, as one not necessarily about choosing what concepts and principles to teach in public law courses at any given time, but how to equip students with the skills and desire to tackle the future challenges of constitutional law.

In ‘Legal Education, Public Law and the Global Law Student: The Role of Social Media in Opening our Horizons’, Melissa Castan (Monash University) and Kate Galloway (James Cook University) explore how the practice of teaching public law through social media can engage students and the wider community. Through a series of case studies, Castan and Galloway investigate how social media has been used to enhance and encourage students to engage in debates and advocacy with a broader public law community of students, academics, professionals and the wider public.

Gabrielle Appleby, Alexander Reilly and Sean Brennan
TEACHING PUBLIC LAW: CONTENT, CONTEXT AND COHERENCE

GRAEME ORR*

I INTRODUCTION

Modern law owes its provenance and enforcement to one branch of government or another. But not all law is ‘public law’ simply because it emanates from public bodies, affects the public or serves public purposes. This paper begins by defining public law, compares its Australian, UK and US conceptions, and contrasts it with private law. It charts the conventional paradigm of public law as an umbrella sheltering constitutional and administrative law, built on the concept of government. This neat, if narrowing, idea of public law is reflected in the dominant themes in contemporary public law teaching and scholarship (such as accountability or representative democracy). Yet given the diversity of ideological and functional accounts of what government is ‘for’, public law lacks any unifying account.

A descriptive definition based on the notion of government captures the core content of public law, but a normative smorgasbord lies at its heart. This creates challenges – both positive and negative – for teachers of public law. As a result, and alongside the decline in black letter teaching in favour of case-study approaches, thematic first level courses in ‘principles’ of Australian public law have flourished. To engage commencing students who are often civics-ignorant, the pedagogical response has been to draw on contemporary policy and politics to lend context to such courses in public law. However such a ‘magazine-y’ approach poses challenges for coherence.

II DISCIPLINARY BOUNDARIES AND IDEOLOGIES: PUBLIC LAW AND PRIVATE LAW COMPARED

On its face, public law is a relatively defined field. The term ‘public law’ is classically used as an umbrella sheltering two related, if often siloed sub-fields, constitutional law and administrative law. This is so notwithstanding hazy borders and space constraints. The Oxford English Dictionary defines ‘public law’ merely as ‘the law pertaining to the relationship between the State and a person subject to it’. This is at once

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too hierarchical: what of the law governing political interactions not directly involving ‘the State’? It is also too individualized: this definition excludes the law about the very constitution of government and relations between its myriad bodies.

But dictionaries are for the public; public lawyers know that what lends ‘public law’ coherence, and offers boundaries to it as a field of study, is the concept of government. Government via the state, under and through law. ‘Government’ here, of course, embraces not just the political wings, the executive and legislature, but also the judicial branch and integrity agencies.1 In comparison, private law is less easily scoped or contained in a descriptive definition. The paradigm or heart of private law is the law of civil obligations.2 Yet ‘civil obligations’ is an amorphous jostle of often competing rules drawn from contract, equity, commercial and torts law.

Given all this, it is no surprise that courses with titles such as ‘Principles of Public Law’ are now quite common (see the Appendix). These ‘scaffolding’ courses introduce students to key concepts drawn from constitutional and administrative law, in an effort to break down the silos between those sub-disciplines. These introductory units also free up later-year courses, under the traditional titles, to focus more deeply on critically analysing legal doctrine. In comparison, it is hard to find first level courses in ‘Principles of Private Law’.3

Private law aficionados fear a colonising instinct in public law; as if the yang of public law will overwhelm the subtler yin of private law.4 The project of at least the first 80 years of the twentieth century was, after all, the erection of an expansive and enabling state, one that was not necessarily neutral in the relations between people (whether legal or natural) and which did not leave distributive justice purely to the market or family inheritance. Thus US academic Arthur Miller could write in 1960 that ‘[m]ore government means more public law, and it is the meshing of public law into a curriculum almost wholly private-law-oriented that has been a main pre-occupation of the legal educator in

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2 Eg Samuel Geoffrey, The Law of Obligations (Edward Elgar, 2010).
3 A few law schools have offered first-year courses in civil obligations (eg Griffith University’s former ‘Contacts and Civil Obligations’ course and Melbourne University’s current ‘Obligations’ course). But these are directed less at thematic principles than on breaking down black letter boundaries between torts, contract, restitution and equity. A few law schools have also attempted capstone courses bundling concepts inherent in private law. But private lawyers still squabble over whether first year students should be weaned on contract or tort to best introduce them to the joys of the common law governing individual interactions. This itself is a loaded question, given the contrasting ideologies of contract (freedom of exchange) and negligence (responsibility to others).
4 Eg Darryn Jensen, ‘Keeping Public Law in its Place’ (2014) 33 University of Queensland Law Journal 285. Of course the fear also runs the other way, at least for proponents of active and enabling forms of government, who fear that corporatization and de-regulation of government activities are eroding the role of government.
recent decades’. To stretch this idea further, the common law was once the creation of one branch of government in the form of the judiciary. But it is now overlaid increasingly with political compromises laid down in the legislature. Does this render private law as just a branch of public law, to be unpacked by jurimetrics (the study of judicial behaviour) and regulatory theory?

Outside customary and folk law, in a sense all modern law – its legitimacy as law – stems from the idea of ‘the public’, understood as embracing both the state and the demos. All law is a form of governance, working to regulate the affairs of society. ‘Public law’ however does not therefore cover all law. Consumer protection may be an important everyday matter, rooted in policy compromises made by legislatures and judges, but we do not therefore label it a branch of public law. Human rights law, in contrast, is usually labelled public law because it embraces, amongst other things, civil and political rights and is rooted in obligations assumed by states in international law. Yet anti-discrimination law, also an aspect of human rights law, is not structurally different from consumer protection law. Both regulate power imbalances between private parties. The point is not to resolve these boundary disputes but to understand that the concept of ‘public law’ has both limits and hazy borders.

To contain the discipline of public law, then, its paradigm has been limited to law dealing with government through political processes associated with the state. It is centred, therefore, on law about state power, not necessarily everything emanating from state power. As Adam Tomkins concedes, the modern state ‘is a variable and changing commodity’ challenged by regionalism and globalism, and, we might add, by the waxing of corporate muscle. Nonetheless, this triad of the state, politics and government lends the field its central focus, hence its limits.

Many private lawyers have sought to discern a moral principle fertilising their field. Thus Darryn Jensen, in his recent essay ‘Keeping Public Law in Place’, draws on Lon Fuller and Friedrich Hayek to argue that private law is ‘a distinct form of social ordering’, namely ‘organization by reciprocity’. Duties of care and good faith, rules of exchange, property rights and familial obligations are all bound together

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6 Discrimination law, admittedly, has more obvious dignitarian aims.
7 ‘[T]he primary concern of public law is how the institutions of states operate to govern the people residing in their territories’: Gabriele Appleby, Alexander Reilly and Laura Grenfell, Australian Public Law (Oxford University Press, 2nd ed, 2014) 4.
8 ‘The state’ here must be understood broadly, encompassing not just the nation-state, but the city-state, monarchical fiefdoms and tribal rule. Public law does not begin sometime in Europe in the 16th century, but is an ancient field.
10 Jensen, above n 4, 288, citing Fuller. There is resonance here with the claims of an inner morality to private law that precedes and is even unconcerned with its wider social impacts. Compare Charles Fried, Contract as Promise: A Theory of Contractual Obligation (Harvard University Press, 1981).
in an ideal of mutual autonomy. The ideal is freedom, but freedom subject to assumed obligations.

Public law in contrast is ‘organization by common aims’;\(^\text{11}\) in Kit Barker’s phrase it is the expression of the state’s role as ‘mediator of the public good’.\(^\text{12}\) Put crudely, private law is an expression of individual choices and freedoms, evolving purposely; in contrast public law is potentially coercive, is certainly ‘imposed on the community’,\(^\text{13}\) and attempts to divine, balance and achieve collective aims.

Obviously this is a simplification of a more complex truth. Norms of reciprocity and citizen equality, forms of agreement and deal-making, concerns for liberty and participation, and arational, evolutionary forces all work within constitutional and administrative law. By the same token, private law is also shaped by utility considerations, judicial and legislative fiat, and collective, purposeful forces (including highly directed, powerful corporate groups and associations). But the simplification – private law with an internal metric of autonomy and directionless mutual obligation, and public law as a political endeavour, ideally democratic but ultimately inescapable and at times coercive – has some explanatory power, and is widely shared by scholars in each field. The desire to find an internal morality in a discipline or endeavour is a normal human state (and legal academics are human, if not always normal!).

Public lawyers are not guilty of harbouring colonising instincts. (If nothing else, there are not enough hours in the academic day.) But public lawyers usually have a passion for their field and a sense of its worthiness. Most of them see government and the questions it faces as being at the heart of the rule of law and the legitimacy of legal institutions, as well as a proxy for the demos. Despite cynicism about government amongst the wider public, it remains the umpire people look to and blame for all manner of unfairnesses, perceived and real. With apologies to the poet Kenneth Slessor, public law flows on a tide, with a grander timescale than the ‘little fidget wheels’ of contracts and commercial transactions.\(^\text{14}\)

The nutshell just given is sketched at a high level of abstraction. Many types of nutmeat, however, grow inside nutshells. Public lawyers embrace various ideological visions for the purposes and role of government and the state. On the whole they are less likely than private lawyers to agree that their branch of law should, let alone does, embrace some concept such as ‘freedom’ or ‘autonomy’. Public law is about building a ‘public’, yet that ‘public’ may be economically anarchic (in Robert Nozick’s conception), welfare liberalist (in John Rawls’ conception) or ruthlessly

\(^{11}\) Ibid (Jensen).

\(^{12}\) Ibid 285.

\(^{13}\) Ibid 297.

\(^{14}\) Kenneth Slessor, ‘Five Bells’ in Poems (Angus & Robertson, 1957) 103: ‘Time that is moved by little fidget wheels / Is not my time, the flood that does not flow’.
egalitarian (in some brands of socialism).\textsuperscript{15} There is no agreed metric of the ‘common good’ to steer public law’s inherent direction.

Even if internal morality and a functional account of public law were sought, a consensus would be no nearer. Tomkins offered a quasi-functional definition of public law as providing ‘the institutions that exercise political power, and … the mechanisms of holding the exercise of such power to some form of account’.\textsuperscript{16} Accountability of public power is thus a key and overarching theme woven through many courses on the principles of public law.

However accountability is hardly the only function of public law, let alone a timeless one. It is a contemporary, liberal ideal. But it is different from the neo-liberal approach that stresses individual liberties as a bulwark against a powerful state. In other times and places, a conservative might insist on the reverse, appealing to a Hobbesian state’s role in ordering and keeping order. In a more positive vision of public law, the accent might be more pragmatic, on good governance. Or it might be a questing account, of the state as enabler and empowerer of goals such as communal welfare and equal opportunity for all citizens.

In short, public law has a relatively simple definition, in terms of coverage. It is law about government about the roles, powers, obligations, relationships and workings of the various branches of the state. That, in turn, is often focused, via constitutional and administrative law, on a core of political processes. However, once we peel away the definition of scope, we find a field alive with ideological disagreement about purpose and function.

\textbf{III CONTENT: THEMES, PRINCIPLES AND VALUES}

At the outset, I gave the usage-based definition of public law as an umbrella for constitutional and administrative law. In Australia there is explicit agreement around this. David Clark’s text states upfront: ‘In practice, public law may be divided into constitutional and administrative law.’\textsuperscript{17} Tony Blackshield, Roger Douglas and George Williams’ compendium of materials does not even need to acknowledge it: it simply splices together sections from their respective books on constitutional and administrative law.\textsuperscript{18}

Every academic and teaching discipline presents hazy borders, and faces space constraints. There is no doubt that topics in media law, electoral law and anti-corruption law could and probably should form part of the broader public law curriculum, if space permits. Yet what of taxation law (revenue raising through economic and social policy

\textsuperscript{15} Compare Robert Nozick,\textit{ Anarchy, State and Utopia} (Blackwell, 1974) arguing for a limited, night-watchman state with John Rawls,\textit{ A Theory of Justice} (Belknap Press, 1971) arguing for distributive justice through a welfare state.

\textsuperscript{16} Tomkins, above n 9, vii-viii. Emphasis added.

\textsuperscript{17} David Clark,\textit{ Introduction to Australian Public Law} (LexisNexis Butterworths, 4th ed, 2013) 4.

\textsuperscript{18} See Publisher’s Note to Tony Blackshield et al,\textit{ Public Law in Australia: Commentary and Materials} (Federation Press, 2010).
choices), workplace law and corporate law (non-state sources of power and regulation) or criminal law (the state’s monopoly on force)? It is far less clear if the essential elements of these areas are pre-requisites for, or need to be woven into, any overview of public law.\(^19\)

Miller offered a compendious definition of public law:

Public law is that law which regulates the character and the structure of the state (constitutional law), the legal relations with other states (international law), the organisation and position of the agencies of the state (administrative law), and the relations between the state and the individual law (criminal law, sovereign immunity, and legal procedure).\(^20\)

Whatever view one takes of whether criminal law or legal procedure belong in that definition, it is clear that they differ in quality from the core of constitutional, administrative and international law, which define state power and governmental process.

Content however is not immutable. The law evolves, and what is of present-day relevance shifts. Further, as we have just noted, public law is alive with fundamental ideological contentions about its purpose. Nonetheless we can distil a set of themes and general principles that enjoy a contemporary consensus in the teaching of public law, especially at introductory levels. These are:

- democratic principles,
- executive accountability,
- good governance (ethics and integrity),
- institutional inheritances and history,
- judicial review,
- liberty, equality and rights,
- responsible and representative government,
- rule of law (constitutionalism and government under law),
- separation of powers (both amongst branches, and federally),
- sovereignty and Indigenous peoples, and
- unitarism, federalism and regionalism.

These are listed alphabetically rather than in order of priority. They are not canonical. While they are not passing either, they wax and wane in practical and intellectual importance depending on the times. While some are interlinked, there is no lexical ordering of them. So as teachers there is enormous leeway in when, how and to what degree we might stress them. Then, of course, there is a spectrum of ideological positions we might take on the subject matter.

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\(^{19}\) Given each of these areas straddles the divide between public (collective power, distributive justice) and private (individuals, corrective justice). For a nuanced account of this hoary boundary see Kit Barker, ‘Private Law: Key Encounters with Public Law’ in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) ch 1.

\(^{20}\) Miller, above n 5, 483.
A leading Australian textbook on public law opens with discussion of a core set of ‘values underpinning public law’: freedom, equality, community.\textsuperscript{21} Lest this sound like nothing more than a verbalisation of the French revolutionary motto, it is prefaced by detailed elaborations of the rule of law ideal (which can be thick or thin),\textsuperscript{22} and of the dichotomy of ‘empowerment and constraint’.\textsuperscript{23} The empowerment and constraint dichotomy deserves to be stressed. There is a tendency, in common law countries at least, to exhaust the value of public law in appeals to liberalist constraints on governmental power. This is born of a focus on the rule of law, rights and accountability, through the eyes of a negative liberalism, antagonistic to state power. This approach ignores the positive vision of public law as a source of both the common good or weal, and government’s obligation to empower citizens. But to say this is to put my social democratic biases on display.

While we may lay out a smorgasbord of values informing public law, there is a vast and distinct array of palates or cuisines we can serve up from it.

\textbf{A Porousness and Britishness}

Returning to the traditional and neutral idea of public law as a place-marker for and overview of the twin sub-disciplines of constitutional and administrative law, it is worth remembering that in the Westminster inheritance there was no strict separation of these domains. In Westminster there was no constitutional law per se; there was certainly not a ‘Constitution’ in the Australian, US or continental European sense. Nor, especially to followers of Dicey, was there any clear British tradition of administrative law, especially compared to the French. Big-ticket constitutional issues and finer-grained administrative regulation and practice were not carved in distinct channels, but formed porous categories.

British public law thus came to be seen as a moving feast. Some of this open-ended quality is peculiar to its history and politics: Crown prerogatives and essentials of revenue collection, for instance, have more prominence in British public law than elsewhere. Until recently, the role of Empire and colonial relationships also featured heavily. The bleeding boundaries of public law are apparent when one opens staple, English student texts from the 20th century. Collections of \textit{Leading Cases in Constitutional Law} for instance, in both the 1920s and 1960s, included numerous tort and statutory cases on trade union law.\textsuperscript{24} A similar

\textsuperscript{21} Appleby, Reilly and Grenfell, above n 7, 25-9.
\textsuperscript{23} Appleby, Reilly and Grenfell, above n 7, 11-18.
collection from the late 1970s included almost 80 pages on military and martial law, yet nothing on electoral law.\textsuperscript{25}

Some of this may be explained as the flotsam of history. For example, incorporating trade union law in the canon in the 1920s and 1960s reflected more radical and turbulent times. But it also reflects different value-landed emphases about what is ‘political’ (unions were understood once as essentially political entities and not merely workplace bargaining agents). The porousness of the British idea of ‘public law’ also means that the tort law of public liability is less likely to be overlooked as a public law issue than it is elsewhere.\textsuperscript{26}

British academic HW Clarke, in seeking to open ‘New Fields in Public Law Teaching’ in 1972, noted first that ‘criminal law … is generally reckoned as part of public law’.\textsuperscript{27} He then argued that the older focus on constitutional and administrative law, with local government law thrown in as an elective, had to give way to regarding planning law, public health and housing, environmental and immigration law as part of the public law curriculum.\textsuperscript{28} To this we would now add social security law, civil rights law and probably anti-discrimination law. All these areas in the Australian approach are accepted as part of the wider public law curriculum in the sense of important areas of research and potential elective study. But aside from some headline aspects of human rights law, they have not permeated the core of the idea of ‘public law’, understood as the key principles of government embedded in constitutional and administrative law.

The British tradition has been critiqued as having a flaw, or at least as involving a difference that diminishes it, in the absence of a written, let alone entrenched, constitution. The Westminster model lacked prominent edifices – there was no bill of rights, no separation of powers and no formally entrenched parliamentary or monarchical institutions. Devotees of political constitutionalism saw this as liberating.\textsuperscript{29} In the traditional British public law model there was no Mosaic constitutional moment on Mt Sinai, just a sea of evolving political and pragmatic practices. To navigate this sea, one needed the sextant of a good sense of political history. Pity the poor British undergraduate student looking for anchor points. However the British tradition is a useful tonic to the siloing effect of distinctions both between ‘constitutional’ and ‘administrative’ law, and between those two areas of law and the broader terrain of ‘public law’.

\begin{footnotes}
\item[26] Ibid 315-90 includes a long section on ‘Liability for Civil Wrongs’ under a broader rubric of ‘Judicial Control of Public Authorities’.
\item[27] HW Clarke, ‘New Fields in Public Law Teaching’ (1972) 6(1) \textit{The Law Teacher} 28, 28.
\item[28] Ibid 28-9. Similarly, from the US perspective, see Miller, above n 5, 484-5.
\end{footnotes}
B Writtenness, Siloing and Australianess

Westminster may have been the model for public law in the Australian colonies. However two ruptures ensured Westminster would not be the model for Australian public law over the past century. Each involved a shift to a ‘writtenness’, that is, a preference for a legislated and even codified approach to public law rather than one resting primarily on judicial inheritance. The first rupture was the fact of federation and the text of the Australian Constitution of 1901. The second has been the evolution, statutory codification and explosion of administrative law since the dawn of the ‘new’ administrative law in the 1970s (which brought FOI, merits review of administration decisions and ombudsmen). Each of these ruptures was then deepened by judicial review, both of legislation and of administrative action.

These ruptures ensured, if it were not already in place analytically, a fairly solid distinction between the twin pillars of ‘constitutional’ and ‘administrative’ law. In Australia, as in the US, constitutional law is the more glamorous sub-discipline, administrative law the more intricate. One could think of the difference between air force pilots and foot soldiers, but the analogy is inexact since constitutional law is more general and fundamental and hence tends to be more newsworthy. Siloing, implicit in the sub-disciplinary distinction between constitutional and administrative law, has strengthened over time. This is partly a self-fulfilling prophecy, and partly the product of the simple weight of developments. Notable amongst those developments has been the flourishing of administrative law remedies and avenues of review, and the punctuated evolution of basic constitutional principles and methods (in key areas such as implied rights and federalism).

In the meantime, legal education itself evolved across the twentieth century, from an apprentice model reliant on part-time practitioner-lecturers into a fully-fledged academic discipline. While Australia for a long-time hewed to British influences in everything from legal taxonomy to judicial and jurisprudential philosophy, the Australian pedagogical approach has been more influenced by US developments and fashions. First, Charles Langdell’s ‘scientific’ approach to law emerged. It was rightly described as ‘an intellectual Model T, a wholly complete and unified conceptual universe to fill the mind of the standard student’.

This case-based method was in time overlaid with two further developments. One was legal ‘realism’, with its accent on the social embeddedness and empirical aspects of law. Leading Australian public law teachers, such as Geoffrey Sawer, channelled socio-political and
realist approaches into Australian constitutional law. Later came critical legal studies, which opened law to a dizzying variety of theoretical and economic analyses. As a result, the case-method, centred on the parsing of judicial pronouncements and statutory texts, was augmented and increasingly even displaced by case-studies and theory-based critique.

Another, more particular, educational development, specific to addressing the siloing problem, has been the emergence of first-level ‘introduction to public law’ courses in Australian law schools. These are explained and listed in the Appendix. While they are not all cut from the same cloth, what unites these courses is a curriculum aiming to expose early-year law students to key principles and themes in public law, distilled from both constitutional and administrative law (and occasionally public international law). They differ, therefore, from the kind of ‘Administrative and Regulatory State’ courses championed by professor Elizabeth Garrett in the first level US curriculum, which are designed to steep US freshers in consideration of law’s fit with political processes. Australian ‘introduction to public law’ courses are principles-oriented rather than practical or political, pitched at introductory level and barely concerned with regulatory theory.

IV CONTEXT AND CRITIQUE

While public lawyers may have a sense (at times overweening) of the worthiness of their field, not all students share this. First of all, Australian law students – at least Bachelor of Laws (LLB) rather than Juris Doctor (JD) students – enter law school very young, typically in their 18th year. UK university students tend to be at least a year older, while in the US and Canada, law is usually a graduate-entry degree, the inaptly named JD. North American students thus enter law school at a much later age than most Australian students, and study a shorter law degree than in Australia, where the LLB is four to five years long and more staged. A first level public law course in Australia thus must be generalist. The difference in age of admission also affects the background knowledge, interest and motivations law students bring to their studies.

This is not to say that law students in Australia lack enthusiasm and motivation. But there is a disjunction between enthusiasm and intellectual interest amongst many school-leavers enrolling directly in an LLB. This disjunction is partly aspirational and partly generational. It is ‘aspirational’ because many law students are motivated not by intrinsic interest in law or justice, but by a desire for a professional qualification. And it is ‘generational’ in that the ‘public sphere’ is changing. Traditional news outlets are shrivelling and faith in organised politics and government in nation-states is waning. Rising in their stead are more

35 ‘Inaptly named’ as a short, graduate entry, first degree in law is hardly at ‘doctor’ level.
fragmented social media and political practices drawn from the market place. Infotainment and partisan branding dominate over policy discourse. Even within policy debates, attention to single issue groups and the transactional approach of political deal-making dominate over any collective discussion or political philosophy. To top this off, increasing numbers of law students come from overseas or from immigrant families, and have to adjust to Australian public affairs, even if they bring a good knowledge of another political culture.36

So, shocking as it is to those steeped in public law – interested in the politics, power-plays and philosophical aims that animate it – the typical law student is not by birth a public law ‘junkie’. They are, however, inquisitive and argumentative by nature. Since public law is inherently political, in all senses of the word, it need not be a dry subject. It manifests itself daily in current affairs discussions and controversies of governance. At any point in time, there is a vast selection of issues and sources one can draw on to stimulate class discussions, concretise tutorial questions or illustrate key concepts.

Introducing such contextual examples and case-studies is not, alas, a simple matter, for a variety of reasons. First and most obvious are constraints of space and time. Second is the inescapable question of ideology. It is possible in a ‘liberal’ education to offer students alternative viewpoints but, in the case studies we choose and the emphases we put on issues, we cannot help but risk indoctrinating the less attentive students and alienating many of the more attentive students.

Third is the problem of carts and horses. The ‘republican’ question, for example, was a staple of Australian public law courses and texts. Yet is has too often presented as an issue in isolation (unsurprisingly, given that is how it has been treated politically in Australia). Republicanism is a fairly symbolic sideshow when it is not linked to deeper questions of constitutional continuity and identity, popular sovereignty, or rights and powers.

Fourth is the problem of focus. Marriage equality is currently the perfect topic to bring to life questions of natural rights, judicial review of legislation, and state versus national powers. But spend a tutorial discussing that topic and you realise how hard it is for new law students in particular to separate form from substance, and the question of the proprieties of power from its individual uses. Sometimes the ‘sexiest’ case-studies distract attention from the underlying themes we want to develop as legal educators.

There are also differences in sub-disciplines. While constitutional issues tend to be big picture, administrative issues often are not. As Michael Head notes, many students have particular difficulty conceptualising the scope and character of administrative law, so that infusing its teaching with ‘topical issues’ may improve and deepen

The trick here is to avoid students grasping the colour and contemporary relevance of public law but not the underlying principles. There is always the risk of students being fascinated by the different trees but not grasping the shape of the forest.

Finally there is the challenge of keeping genuine contemporary relevance. It is one thing to have to find space for the latest big Supreme or High Court judgment, or the latest key administrative report. It is another thing to have to winnow a cherished case study or confront one’s own prejudices. Republicanism may be the focus of the last referendum put to the Australian people, but it is fairly stale given that it has been 15 years since that referendum. In contrast federalism – not so much Commonwealth legislative powers compared to those of the States, but the practical questions of fiscal imbalance, horizontal or interstate equalisation, and co-operative versus competitive federalism – is a less sexy and discrete topic, but a more lasting one.

V COHERENCE

Excessive context, in either quantity or complexity, can pose risks for coherence. This will especially be so with students new to law, for whom the continuum of policy–principle–law is yet to be grasped. The discipline of law can appear to be unbounded and uncontained. As was just noted, a ‘magazine-y’ course can be more interesting to study, but harder to draw together. Students are inherently likely to struggle to find a ‘structure’ to public law, and fret about how to apply their learning to inherently discursive assessment items.

In contrast, the black-letter method is coherent, if narrow. The method is sometimes described as ‘traditional’, with positive connotations of ‘sound’ and negative connotations of ‘passé’. Either way it keeps returning, at least for those who see their discipline as having a canon of core topics, since the amount of significant case law (especially in constitutional law) and statute law (especially in administrative law) builds over time.

A simple comparison of two radically different textbooks may illustrate. The Constitution of the Commonwealth of Australia Annotated by Darrell Lumb and Kevin Ryan of the University of Queensland was a popular text first offered by Butterworths in 1974. It continued into a 7th edition under Gabriel Moëns and John Trone. Its average edition ran to just under 400 pages, with detailed discussion of each section of the Australian Constitution, in series. The work is not acontextual – it has an originalist tint – but its clear purpose was to explain each provision of the Constitution and the key case law elucidating it. Its worldview was not expansive. Rather, it avoided imposing any thematic overlay on the field, and concentrated on leading students through the evolution of the law.

37 Ibid.
38 For a predominantly black-letter account of Australian public law and its evolution, see the early editions of David Clark, Introduction to Australian Public Law (Lexis-Nexis, 1st-3rd editions).
In contrast, *Australian Constitutional Law and Theory: Commentary and Materials*, pioneered by Tony Blackshield and George Williams, then at Macquarie University and ANU respectively, was first offered by The Federation Press in 1996. Its latest edition (the 6th) contains almost 1400 pages and is popular with teachers, if not chiropractors. The work is thematically ordered, dense with curated case extracts and commentary, and littered with secondary writings from Agamben to Zines. It would be misleading to characterise how different it is to the annotated Constitution by noting that the earlier text is a highly ordered reference work and the later one a multi-dimensional teaching resource. After all, each is both a student text and a work of legal reference. Nor are these books just products of different eras; in fact their editions overlap for nearly a generation. Rather they are products of entirely distinct approaches, both academic and publishing.

The coherence of ‘black-letter’ as both a method distinct to law and as a narrowing of focus is offset, however, by its brittleness and aridity. Even those areas of law that are reducible to formulaic rules need to be understood in either their real world effects or their philosophical rationales (and preferably both). Without those insights, no student is likely to remember the underlying principles that inform the law. Nor will they, on graduation, be ready to make sense of the law to their clients, as practitioners, or engage in reform debates, as citizens. In short, the black letter approach integrates neatly, but only within its own terms: a form of coherence is achieved through a self-contained boundedness.

In this lies an old story. Classical first year courses such as contract law, tort law and criminal law threw students into the deep end of doctrine and analysis of judgments. This narrower approach lent a neat focus (case method skills, and learning and applying elements of black-letter law in a relatively contained field). It also offered a contained focus for new students, who naturally struggle with the novel demands of legal language, reading and argumentation. But it came at the expense of any broader sense of what the law ‘is’, of the law as a set of principles connected to a social and political dimension. Public law by its nature is inextricably intertwined with questions of politics, governance, power, regional and national identity and so on. First year courses in principles of public law, therefore, are more than just a springboard to constitutional and administrative law, they present students with a broader way of thinking about law.

**VI CONCLUSION**

Public law has a coherent, descriptive definition as the law of government, understood as a set of political processes centred on the idea and power of the state. It is not the law affecting everything ‘public’, nor a catch-all for any form of regulation emanating from any branch of
government. Those would be unruly and limitless categories. Its core is constitutional and administrative law and, to limit siloing, increasing numbers of Australian law schools offer introductory level ‘principles of public law’ courses.

This definition of public law, however, is beguilingly simple. Australia’s written constitutional tradition has a centripetal pull on the idea of public law, especially when contrasted to the more expansive idea in the UK. But public law is much broader than constitutional, administrative and even international law, as elective offerings in everything from immigration and social security law demonstrate.

A definition of public law centred on the powers of the state and governmental processes offers a focus for the kind of content that should be covered in courses on ‘public law’. There is also, in any era, a set of contemporary themes to inform the teaching of that content (such as accountability, representation, etc). But no definition can mandate a sense of purpose or approach to public law. There are simply too many ideologies about the proper role and function of government, and no appeal to ‘mediating the common good’ can alleviate that.

Any coherent map of the terrain of public law will be a static, and partial one. We may know the landscape, but we also know there are many ways to traverse it. The black-letter scholars predominate, burrowing tunnels through the topography, with a bias for using judicial determinations as their lodestone. They predominate, but there are also those informed by political and social science perspectives, who are more like meteorologists and seismologists. And then there are those looking down from the clouds, of which there as many vantage points as there are philosophical approaches (eg liberal, communitarian, structuralist or Hobbesian).

At a high level of abstraction, public law enjoys a relatively simple descriptive definition as the study of the law of government through political processes associated with the state. Introductory public law courses are now a staple of 14 out of 34 Australian law curricula (see Appendix), offering overviews of key themes, principles and institutions drawn from traditional constitutional and administrative law. But while public law has a more coherent set of topics and themes than private law, public law is riddled with deep ideological and philosophical disputes. These are not just infusions, needed to understand particular topics (eg the liberal conception of representative democracy) but intractable disputes about what public law and governance as a ‘mediator of the common good’ might mean.

This is a challenge, especially to the liberal model of legal education. But it is a challenge in both the negative and positive sense. Public law can seem abstract to the lives or understandings of most commencing law students. The only way to meet that challenge is to teach contextually and critically. (To avoid it is to treat public law as an engineering exercise: a set of mechanisms of state power and a set of safeguards against risks of its excesses). But in doing so, the philosophical biases of the teacher cannot be disguised, least of all when using contemporary case-studies
and material implicating sometimes raw social and political cleavages. In turn, while contextual teaching lends spice to a course, it also carries risks of students focusing on a few trees rather than the broader forest, and to the coherence of a curriculum squashed into 13 weeks and juggling depth and breadth.
APPENDIX: AUSTRALIAN LAW SCHOOLS AND ‘PUBLIC LAW’ COURSES

For professional accreditation, all Australian law courses must cover certain core academic issues in Australian public law.41 Most LLB programmes require students to study semester long stand-alone courses in constitutional law and in administrative law. Constitutional law is usually treated as a second level course and administrative law as a later level course.

For a majority of law schools (20 of 34), that is all. Typically first level students do one or two generalist courses with titles such as ‘Introduction to Legal Systems’, ‘Foundations of Law’ or ‘Law in Context’. These mix information about legal systems, basic skills in legal research and comprehension, and introductory questions in law and justice. A few of these courses expose students, in a single week or so, to the written Australian Constitution or to an introduction to the history and place of the parliament and executive in government. More often however the overwhelming emphasis is on courts as a distinctive symbol and source of law.

For a significant minority of law schools (14 of 34), a dedicated first level course introducing students to key concepts in public law is mandated.42 Occasionally these courses contain a component to develop the skill of statutory interpretation.43 But the essential aim of these courses is to provide a foundation of principles relating to the modern state by exploring the three branches of government, constitutionalism and executive power and accountability.

This has been a trend in the past decade or so. It echoes the older British model where ‘public law’ was a first-year course,44 but differs in that those courses combined constitutional and administrative black-letter law. In the longer Australian LLB there is room both for an introductory ‘public law’ course and, later, dedicated constitutional and administrative law courses.

These 14 law schools include all the older and more elite (‘Group of Eight’) law schools. Often seen as ‘traditional’, these schools are perhaps better resourced to engage in curriculum reform. Nonetheless, several of the newer law schools have adopted this model.

In alphabetical order, the universities concerned are:

Adelaide University – Principles of Public Law

41 These are known as the ‘Priestley 11’, and were first set by the national Law Admissions Consultative Committee in 1992.
42 Bond Law School will be introducing an Introduction to Public Law course following its recent curriculum review. Bond Law School already offers Australian Government and Politics, a first level elective which it encourages its large international cohort and any civics-naive local students to take. Australia’s only privately owned law school is thus the only one to offer its new students a course whose title, at least, acknowledges that law and ‘polities’ are symbiotic.
43 This is made explicit in the title of Monash University’s course.
44 Clarke, above n 27, 28.
ANU – Australian Public Law
Australian Catholic University – Public Law
Flinders University – Introduction to Public Law
Charles Darwin University – Introduction to Public Law
La Trobe University – Principles of Public Law
Monash University – Public Law and Statutory Interpretation
Sydney University – Public Law
University of Melbourne – Principles of Public Law
University of NSW – Principles of Public Law
University of Queensland – Principles of Public Law
University of Tasmania – Foundations of Public Law
University of Western Australia – Foundations of Public Law
Victoria University – Introduction to Public Law.
BREADTH, DEPTH AND FORM?
PITCHING CONSTITUTIONAL LAW CONTENT 
IN THE CLASSROOM

SARAH MURRAY*

I INTRODUCTION

Chief Justice French has described legal ‘curriculum design’ as nothing less than ‘a battlefield’. Inevitably, a number of obstacles face law schools in seeking to rethink legal courses and the units they contain. With public law subjects the challenges are no less confronting. As Kauper has explained in relation to the teaching of constitutional law:

Our real problem as teachers is to marshall effectively for our own use the large body of materials pertinent to the subject and to work constantly at the task of improving our teaching techniques so that we excite the student’s interest and incite him [or her] to the extra mile of his [or her] own reading and reflection.

At the 2014 Gilbert + Tobin Constitutional Law Conference, Justice Mark Leeming of the New South Wales Court of Appeal identified that teachers of constitutional law in Australia must continually rise to this curriculum challenge. His Honour said:

If we want to explain or teach constitutional law as a living, useful and relevant subject, there is a deal to be said for shifting its focus towards the areas which continue to yield new learning and reducing the focus on areas where principles are settled and well understood.

This article seeks to respond to Justice Leeming’s challenge in the context of the teaching of constitutional law within Australian law.

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schools. Law schools are increasingly focused on skills development and this needs to feature in constitutional law curriculum planning and redesign along with more content focused questions, including how both ‘breadth’ and ‘depth’ ⁴ can feature in constitutional law units. Fundamentally, the article explores what students need to know, what skills constitutional law can teach and ways to facilitate the learning process in constitutional law teaching settings. It concludes that how we answer many of these teaching challenges turns on how we define what ‘constitutional law’ means for us.

II RECONSIDERING THE CONSTITUTIONAL CURRICULUM?

It is first necessary to address the catalyst(s) for this focus on what should be taught in Australian Constitutional Law units. Justice Leeming explained:

[T]he overwhelming majority of the [constitutional law] litigation concerns implied limitations on federal and state legislative power ... or the interaction between federal and state laws and the exercise of judicial power. This may have consequences for how we think about, and teach, constitutional law. I suspect there is no one in this room more enthusiastic than me for the teaching of so-called “dead” languages at school and university. Although reading and teaching the decisions on the trade and commerce power, or the industrial relations power, is an excellent introduction to the social and economic history of 20th century Australia, it is far removed from the practice of constitutional law as it now occurs, in a relatively mature constitutional setting in the 21st century.⁵

His Honour’s observation concerns the fact that constitutional challenges are rarely about whether a Commonwealth law is with respect to the subject matter of a constitutional head of power – previously what Justice Leeming describes as the ‘mainstay of the constitutional law course’ that he studied under Professor Crawford.⁶ Instead, express and implied constitutional limits, s 109 and intergovernmental immunities have begun to take precedence, over and above questions of whether a law is in fact with respect to the external affairs power (s 51(xxix)), the corporations power (s 51(xx)) or the taxation power (s 51(iii)). In the last few years, with some obvious exceptions focused on heads of power,⁷

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⁵ Leeming, above n 3, 3

⁶ Ibid. See also George Williams, Sean Brennan and Andrew Lynch, Blackshield & Williams Australian Constitutional Law & Theory: Commentary & Materials (Federation Press, 6th ed, 2014), Preface.

cases such as Commonwealth v Australian Capital Territory, Monis v The Queen, Assistant Commissioner Condon v Pompano Pty Ltd, Magaming v The Queen, Momcilovic v The Queen and Rowe v Electoral Commissioner, have highlighted the shifting focus of the High Court. This explains Justice Leeming’s concern as to whether our unit outlines are beginning to bear less and less resemblance to the Court’s constitutional preoccupations and the need to ‘focus towards the areas which continue to yield new learning and reducing the focus on areas where principles are settled and well understood’.

Before addressing these issues in the constitutional law context, there have been a number of paradigm shifts in legal education that feed into questions over how to structure law school units. As Huggins explains, there is a clear emphasis on active and student-centred learning, facilitating learning rather than transmitting knowledge, making learning objectives transparent, and aligning outcomes, assessment and teaching.

The importance of a heightened focus on legal skills emerged out of the Australian Law Reform Commission’s (ALRC) Managing Justice inquiry, particularly the fact that much Australian legal pedagogy was more focused on ‘what lawyers need to know’ than ‘what lawyers need to be able to do’. This lesson has been reinforced in much teaching scholarship.

Skills represent a central part of the new Threshold Learning Outcomes for Law (TLOs), which emerged from an initiative of the Australian Learning and Teaching Council. The TLOs highlight the importance of a range of skills, including ‘Thinking Skills’ (TLO 3), ‘Research Skills’ (TLO 4); and ‘Communication and Collaboration’ (TLO 5).

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8 (2013) 250 CLR 441.
9 (2013) 249 CLR 92.
10 (2013) 87 ALJR 458.
11 (2013) 87 ALJR 1060.
14 Leeming, above n 3, 3.
16 See, eg, Kift, above n 1, 10; Huggins, above n 15; Byron D Cooper, ‘The Integration of Theory, Doctrine and Practice in Legal Education’ (2002) 1 Journal of the Association of Legal Writing Directors 50.
In addition, the Law Admissions Consultative Committee (LACC) Uniform Admission Requirement\(^{19}\) include certain content requirements, typically referred to as the ‘Priestley 11’ (for which there is currently discussion of some revision).\(^{20}\) However, for Federal and State constitutional law the requirements are very general and not very prescriptive:

State constitutions and constitutional systems.

1. The Commonwealth Constitution and constitutional system.
2. The constitution and operation of the legislature, executive and judiciary.
3. The relationship between the different institutions of government and the separation of power.
4. The relationship between the different levels of government.

OR

Topics of such breadth and depth as to satisfy the following guidelines.

The topics should include knowledge of the major principles of both the relevant State or Territory Constitution and the Commonwealth Constitution, including the relations between the different Commonwealth and State or Territory laws. A general knowledge of the scope of both State or Territory and Commonwealth Constitutions is required, although the topics will differ in the depth of treatment of specific heads of power, particularly in the Commonwealth sphere.

The ALRC acknowledged that skills and legal content go hand in hand, that law students need ‘a basic grounding in the major areas of substantive law’ and that there are real difficulties with imparting skills training in ‘a substantive vacuum’.\(^{21}\) This means that skills development in the classroom needs to be considered alongside content-based decisions.

III MAKING CHOICES IN THE CONSTITUTIONAL LAW CLASSROOM

Professor Kauper, from the University of Michigan, argued in 1968 that constitutional law training in law schools in the United States should encompass

- core constitutional principles and institutions and how these have developed historically;
- constitutional interpretative approaches (both past and present);
- the position and influence of policy on the Supreme Court;
- current constitutional dilemmas; and

\(^{19}\) Law Admissions Consultative Committee, above n 4.


\(^{21}\) ALRC, above n 16, [3.24].
• critical analytical problem solving abilities.\textsuperscript{22}

Any such list is likely to prove controversial, but its merits lie in showcasing the need for not only content but also wider real-world context and the development of analytical skills. And Kauper, along with Justice Leeming, can ease us from complacency with our constitutional law teaching.

This article addresses three related issues in responding to this challenge: (1) the need for ‘breadth’ and ‘depth’ as well as ‘form’ and how to reconcile these within semester long units; (2) building on (1), how to keep our units ‘living, useful and relevant’; and (3) how we define ‘constitutional law’ and ultimately help in narrowing down the complex teaching choices to be made in (1) and (2).

A Breadth and Depth but also Form

How should the typical 12 or 13 week semester constitutional law unit be shaped? Breadth, depth and form all need to be part of the constitutional law teaching picture, but what do these denote in this article? ‘Breadth’ refers to the content or topics selected as units of study, ‘depth’ refers to the level of detail engaged with by particular content or a set topic, and ‘form’ refers to the shape of the learning and teaching methods used or the process by which learning takes place. All three present a range of challenges to those designing and teaching constitutional law.

In the constitutional law space, how can these various aspects of what to teach and how to teach be juggled and conceived to bring about better teaching outcomes, and what lessons can we take from Kauper and Justice Leeming?

B Form in Constitutional Law Teaching

While breadth and depth of content are important curriculum considerations set by the Priestley 11, it is also necessary to think about a third dimension: the ‘form’ of the learning and teaching that takes place. There is increasing concern about teachers over-focusing on material – what McNeil calls the ‘fallacy of content’,\textsuperscript{23} where instructors over-concentrate on ‘what students study rather than how they study’.\textsuperscript{24} McNeil emphasises that ‘the process of learning is more important than the content’.\textsuperscript{25}

Teaching ‘form’ focuses on how learning occurs and the role students play in that process. The benefits of ensuring that ‘deep learning’\textsuperscript{26} is happening in classrooms and tutorials is also well accepted so that students question, critically engage with and tease out the material in

\textsuperscript{22} Kauper, above n 2, 489-493.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
\textsuperscript{26} Paul Ramsden, \textit{Learning to Teach in Higher Education} (Taylor and Francis, 2nd ed, 2003) Ch 4 generally and at 60 where he notes that this ‘allows students to use academic knowledge to control and clarify the world outside academic knowledge’.
ways that allow for greater comprehension and retention of material. This needs to be prioritized over a superficial or surface learning approach, which is about ‘quantity without quality’.\(^{27}\) Such shallow learning sees students transferring notes into their examination booklets, often quickly forgetting the content once it has been ‘parroted off’. Aspiring to deeper learning is also consistent with the Threshold Learning Outcomes, which particularly emphasise critical thinking skills and advanced cognitive processing abilities (‘Thinking Skills’ (TLO 3)).

Skills development is also a vital part of law teaching. While overlapping with questions of breadth and depth, it also relates to ‘form’ and the teaching methods that are used to impart and allow students to practice legal skills. While skills-mapping\(^{28}\) needs to be integrated across the curriculum rather than purely within a single unit, there is considerable scope to think about the skills that are most amenable to instruction through constitutional law and how these can lead to more meaningful learning experiences. There are many skills that can be explored in this setting and there is much teaching scholarship to assist in focusing on Thinking Skills (TLO 3), Communication and Collaboration (TLO 5)\(^{30}\) and Self-Management (TLO 6),\(^{31}\) whether through problem-solving activities (as advocated by Kauper), peer-to-peer feedback or active learning activities. These activities can impart content while providing students with a practical context for their learning and allowing for a more dynamic and collaborative classroom experience.\(^{32}\)

At the University of Western Australia (UWA), as part of a Juris Doctor (JD) course-wide mapping exercise,\(^{33}\) the unit Foundations of Public Law specifically focuses on TLO 5 (Communication and Collaboration) through a tutorial based advocacy assessment that requires students to run a constitutional law moot with a partner acting as junior/senior counsel. This allows the unit to integrate Kauper’s currency, policy and problem-solving recommendations. In the follow-up unit Constitutional Law, the focus is upon TLO 4 (Research Skills) through both a point-in-time legislative library exercise integrated into the tutorial program (and which contemporaneously teaches characterisation,

\(^{27}\) Ibid 45.

\(^{28}\) Normann Witzleb and Natalie Skead, ‘Mapping and Embedding Graduate Attributes Across the Curriculum’ in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), Excellence and Innovation in Legal Education (LexisNexis Butterworths, 2011) 31.

\(^{29}\) For an excellent discussion of the role of critical thinking in legal education see: Gabrielle Appleby, Peter Burdon and Alexander Reilly, ‘Critical Thinking in Legal Education: Our Journey’ (2013) 23(2) Legal Education Review 345, 367-374, where Appleby focuses on strengthening critical thinking in the teaching of constitutional law.

\(^{30}\) See, eg, Mark Israel, Elizabeth Handsley and Gary Davis, “‘It’s the Vibe’; Fostering Student Collaborative Learning in Constitutional Law in Australia’ (2004) 38 The Law Teacher 1.


\(^{33}\) See Skead, Murray and Carruthers, above n 18.
severance and reading down) and through a case note research assignment. However, courses need to tap into these skills in a broader range of ways. Classes need to make time for problem solving, discussion and workshop-style sessions. This means shifting from lectures being all about the teacher to being as much about our students.\(^\text{34}\)

As Bunjevac explains, this transformation involves the classroom entailing ‘a process of constructing rather than acquiring knowledge, in which teachers are involved as co-creators of knowledge’.\(^\text{35}\) This prepares students not only for a future as constitutional lawyers, but also as practitioners who may only encounter constitutional law tangentially but who still have the training to know when a constitutional issue has raised its head.

Many constitutional law topics are arguably amenable to such learning techniques and their utilization can make a difference to how students conceptualize a topic. Take the judicial technique of severance in a constitutional law setting. Teaching this in a problem-based environment has the potential to not only demonstrate to students the limits of constitutional heads of power but also judicial technique and how reading down or red-lining can be a very powerful constitutional tool. Alternatively, take the difference between transformation and incorporation theories of international law (with a basic introduction to international law becoming part of many foundational public law units). One means that can be used to try to convey this difference is to adopt a moot-style communication class exercise (TLO 5) to allow students to see a practical example of how the transformation theory severely limits the legal arguments available to an advocate. Through this exercise, students, in groups of three, undertake either the role of plaintiff, defendant or judge in Minogue v Williams\(^\text{36}\) to explore whether a prisoner’s rights under the International Covenant on Civil and Political Rights are being violated by the small array of vegetarian meal options from a prison cafeteria. Classroom experiences such as these not only actively engage students in the learning process, but also allow them to absorb the distinction between these important public law theoretical approaches in a more profound way, while also having the currency advocated by Kauper and Justice Leeming.

Tutorials provide even greater flexibility to explore more diverse teaching forms. As noted above, mooting skills at UWA are actively taught and assessed in Foundations of Public Law, which allows for knowledge to be acquired and assessed (TLO 1) alongside TLO 3 (Thinking Skills), TLO 4 (Research), TLO 5 (Communication and Collaboration) and TLO 6 (Self-management). Students have to

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35 Tin Bunjevac, ‘Critical Reflection and the Practice of Teaching Law’ (2013) 5(1&2) Journal of the Australasian Law Teachers Association 1, 5. See also Strong, above n 44, 228-229 discussing a ‘student-oriented learning environment’ with an emphasis on ‘[[[learning-by-doing]].

determine the relevant constitutional law issues, divide them between junior and senior counsel, prepare written submissions, and engage in a moot with a tutor-judge. For many students this is their first experience of this form of legal communication and provides an excellent introduction into the range of skills lawyering can require, within the constitutional knowledge setting, while also exposing students to the nature of constitutional law litigation, in the form Justice Leeming describes.

These represent only a few examples of the potential for more interactive constitutional law classes.

IV CONSTITUTIONAL LAW CONTENT – BREADTH AND DEPTH?

To arm students with constitutional law knowledge, both ‘breadth’ and ‘depth’ need to be incorporated into our curricula. However, as identified by Justice Leeming, there are also real questions as to what we choose to focus upon. Addressing this is particularly challenging in light of the restructuring of many courses with one introductory public law unit, followed by more advanced constitutional law and administrative law units? In this context, unit design needs to be meticulous to ensure that content is presented at the right point and at the appropriate level so that learning can be suitably scaffolded.

Breadth of content does not mean that every case, head of power and constitutional provision needs to be taught. Similarly to Justice Leeming, Kauper has observed that:

Coverage is not the most important objective. There is no point in trying to teach students everything. We have to choose, and we choose to emphasise the Constitutional Law subjects we deem important and probably in some cases the subjects in which we are most knowledgeable.

It is clear that units need to be constructed with much more than just content in mind, as this is insufficient to prepare students for the legal coalface that awaits them. However, content questions still play an important role. Courses need to be structured to provide a reasonable working knowledge of the core aspects of constitutional law study. But it is difficult, and even unwise, to draw definitive bright lines around what such ‘core aspects’ might entail. We might conclude that a unit ‘shopping list’ includes the three arms of government, constitutional law principles (eg. representative government, federalism, separation of powers), the processes of constitutional amendment, state constitutions, the process of characterisation, the mechanics of heads of power and the constitutional limitations which curb these legislative heads of power. However, any

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38 For example, the JD at the University of Western Australia, Sydney University, University of New South Wales, Australian National University, University of Queensland and Melbourne University, and the LLB at the University of Adelaide.

39 Kauper, above n 2, 494.

40 Ibid.
such ‘list’ must be ambulatory and unit outlines need to be constantly revisited in light of current constitutional preoccupations.

Following Justice Leeming’s advice, there is frequently cause for a fine-tuning of courses to ensure that topics are not there because ‘they were what we learnt’ or have always been on the curriculum but because they continue to be necessary. The question becomes: what breadth we can omit? While topics such as the corporations power (s 51(xx)), the external affairs power (s 51(xxix)), the defence power (s 51(vi)) and the finance powers (ss 51(ii), 61, 81-83, 96) might seem ‘essential’ learning, we need to make sure that we are flexible enough to see that this is not necessarily always going to be the case. The focus must be on giving students a working understanding of the Commonwealth Constitution, however that might best be achieved at a particular point in time. The trap is the tradition that Justice Leeming alludes to of cramming a course with the ‘old’ without room for the ‘new’ (or with all of the ‘old’ and all of the ‘new’). What is vital is that, as Justice Leeming advocates, units are structured to make space for current cases and constitutional preoccupations, which at this point necessitates a discussion of constitutional limitations, and particularly, the implied freedom of political communication, s 109 and Chapter III.

One question that often causes a headache is how much constitutional history to incorporate. Many students undertake the study of constitutional law with little, if any, knowledge of federation and the historical circumstances in which the state and federal constitutions were formed. Additionally, with clear exceptions, there is a paucity of basic ‘civics’ understanding, which can make it essential to outline, and set reading on, the basic parliamentary structure and the electoral system before embarking on the nuts and bolts of the Territorial Senators cases, Roach v Electoral Commissioner or Rowe v Electoral Commissioner.

While a range of methods can address this, including classroom quizzes, optional extra classes and Parliament House tours, it is inevitable that some coverage of this introductory material is necessary as adjusted to suit the knowledge of the particular cohort being taught.

Besides content, the other practical consideration is how to deal with the dilemma of depth. How can a unit provide sufficient breadth while still leaving room for deep exploration of contemporary issues such as the implied freedom of political communication or Chapter III? There is no

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41 Ibid 490.
43 Western Australia v Commonwealth (First Territorial Senators Case) (1975) 134 CLR 201; Queensland v Commonwealth (Second Territorial Senators Case) (1977) 139 CLR 585.
44 (2007) 233 CLR 162.
46 Leeming, above n 3, 3. Pollman sees the Gary Larson cartoon where a pupil puts up his hand and asks to leave the classroom, announcing ‘my brain is full’ as describing many law school teaching environments: Terrill Pollmann, ‘The Sincerest Form of Flattery: Examples and Model-Based Learning in the Classroom’ (2014) 64(2) Journal of Legal Education 198, 301.
point going into inordinate detail on a few ‘classic’ heads of power and having no time for a thorough discussion of pressing constitutional questions. As Kauper warns ‘[o]ften the material sacrificed to … scanty treatment is the most interesting current material’.47 Inevitably, choices must be made as to where depth is required. This might mean, for example, that a detailed study of the sprinkling of rights in the Commonwealth Constitution is not always going to be possible, but an awareness of these or even detailed analysis of some provides a great platform for studying Bills of Rights (whether Charters are desirable or even constitutionally possible) and why s 128 is a difficult provision through which to achieve this.

Decisions about the ‘depth of treatment of specific heads of power’ (as the Priestley 11 sets down) may be influenced by areas of particular interest or topicality. For example, the defence power in s 51(vi) often only received cursory treatment in many law school courses prior to Thomas v Mowbray.48 However, post-September 11 and in the current climate of terrorism, the defence power is a head of power which justifies dedicated class time. It also provides an excellent platform through which to integrate international context into our law teaching as set down by TLO 1 (‘Knowledge’).49 Shifting many of the fundamental constitutional law concepts (such as federalism, representative government and the separation of powers) and a workable understanding of the Commonwealth Constitution to an introductory public law course provides one mechanism to tackle questions of depth, so that students start the more advanced constitutional law unit already well versed in the basics and ready (and with class-time) for a thorough digging into the ‘new’. In the revised course structure at UWA following introduction of the JD, and similar to that found in many JD courses, students undertake Foundations of Public Law in first year and Constitutional Law in second year, which has (even alongside the inclusion of additional material on International Law and Administrative Law) allowed a scaffolding of learning as well as a nesting the learning within a broader ‘public law’ setting.50 Admittedly, the ability to do this is influenced by the course structure and the extent of the time that has elapsed between students taking related public law units.51

Another tool that can be used very successfully is distinguishing between material that is best undertaken in class, and material that can be digested by students in their own time, whether facilitated by tools such as structured study questions or the possibilities of a ‘flipped

47 Kauper, above n 2, 494, commenting that ‘[o]ften the material sacrificed to this scanty treatment is the most interesting current material’.
50 While the JD structure can provide additional class time, it can also require the inclusion of additional broader public law course material (such as on the fourth arm of government or the concept of judicial review).
51 The author wishes to thank Professor Rosalind Dixon for her thoughts in relation to this.
classroom’. This might mean, for example, that selected case law on readily accessible powers selected for the unit can be looked at outside of class followed by an interactive workshop with students to explore the intricacies of the relevant powers in more detail or explore questions that are yet to be answered by the courts.

V KEEPING UNITS ‘LIVING, USEFUL AND RELEVANT’ (OR ‘WHERE IS THE FUN?’)

Justice Leeming is entirely accurate in his call for constitutional law teaching to remain ‘living, useful and relevant’, and his insistence that this requires that space be made for ‘new learning’. This focus is inevitably entangled with the questions of breadth, depth and form discussed above. What we choose to teach and how our students learn will be influenced by what we identify as the pressing constitutional issues of the day. However, it merits a separate discussion to thoroughly explore the potential for ‘fun’ in constitutional law teaching. Ultimately, constitutional law units should strive to create learning environments that spark students’ ‘curiosity’ to dig in deeper on their own.

Topics such as the Commonwealth’s executive power, and particularly the ‘power to contract and spend’, or the scope of non-statutory executive power have been injected with considerable interest of late. Bringing this into the classroom offers a myriad of benefits. It allows lectures to be fresh, research-driven and full of practical context. It facilitates current topics that are being aired in the news, such as the detention of asylum seekers and the constitutionality of executive funding programs (such as the funding of chaplains in schools), to be debated in lecture theatres and seminars. There is also substantial research suggesting that students learn better through examples, and varied ones at that, and that classes need to provide diverse platforms for these. As Michael Head has argued in the administrative law context, this allows students to see the legal significance and the ‘fun’ of core material and what it means for the functioning of Australian governmental life. It also encourages students to be active participants and contribute to their own and others’ learning in the classroom. This means that how and what we teach might also be influenced by the interests of the student cohort, as well as topicality. Presenting students with options, where possible, provides an excellent means to engage students in the learning process. It


53 Leeming, above n 3, 3.


56 See, eg, Pollman, above n 60, 315, 321-322.


58 McNeil, above n 35, 75; Ramsden, above n 38. Cf discussion of traditional ‘passive’ learning in Bunjevac, above n 47, 4.
might for example, entail a class on the constitutional challenges presented by Julian Assange running for the Australian Senate, with this allowing a practical exploration of the importance of s 44(i) of the Constitution. Alternatively, recent cases provide a great way to bring constitutional law action, and the spectrum of constitutional law issues a matter can present to a court, into the curriculum. Kuczbarski v Queensland\footnote{[2014] HCA 46 (14 November 2014).} or Monis v The Queen,\footnote{(2013) 249 CLR 92.} are excellent examples of cases that can be used for such class workshops as they both allow explorations of key concepts (Chapter III and the implied freedom of political communication, respectively) as well as broader discussion of issues such as standing, judicial dissent and the current role of the High Court. Hands-on case exploration sessions using party submissions and High Court transcripts can be particularly successful if students can see the practical relevance of the decision. The High Court decision in Pape\footnote{Pape v Commissioner of Taxation (2009) 239 CLR 1.} provides an excellent example of this. As it concerned the constitutionality of the Commonwealth’s fiscal stimulus campaign during the Global Financial Crisis, students can see the real-world relevance of the decision, not to mention its potential impact on their own ability to receive the fiscal stimulus payment.

One of the best practitioners of this ‘hot topic’ technique in the classroom was Professor Peter Johnston, who taught at the UWA Law School for many years. What was evident after his tragic passing and recent funeral was the degree to which he had inspired his students to see, and truly appreciate, the ‘buzzing’ dimensions of constitutional law. He combined practice with teaching and would frequently delve into cases reserved or recently handed down by the Courts. For instance, he would present electric classes on the case of Kable,\footnote{Kable v Director of Public Prosecutions (1996) 189 CLR 51.} the current direction that the post-Kable case law was taking, and what this might mean for future State legislative agendas. The long-running case of Zentai,\footnote{Minister for Home Affairs of the Commonwealth v Zentai (2012) 246 CLR 213; Zentai v Republic of Hungary (2009) 180 FCR 225.} in which he was involved as pro bono counsel for many years, provided a further smorgasbord of constitutional law issues that he would tease out with his classes.

Ultimately, the merits of injecting lectures and tutorials with contemporary constitutional law conundrums are numerous. Through ‘hot topics’ – or as Head suggests, issues that students themselves bring to the class\footnote{Head, above n 72, 165.} – students not only begin to relate to the content but they are also prepared for the kinds of issues that the High Court is grappling with at the coalface.
VI WHAT IS ‘CONSTITUTIONAL LAW’? CONCLUDING THOUGHTS

As Justice Leeming puts it, it ‘may be constructive to step back and re-evaluate what we understand “constitutional law” to mean’. 65

It would seem that part of addressing the issue of how and what to teach is entangled in Justice Leeming’s insight (made in his paper in a separate context) regarding the need to properly define or re-define what we conceive as the bounds of ‘constitutional law’. Exploring this with our students as well as for ourselves is crucial and central to answering questions of breadth, depth and form in unit and teaching design. Our answers to what constitutes ‘constitutional law’ will shape what we fill our courses with, how we teach them and what it means to master ‘constitutional law’. As Professor Michael Paulsen of the United States has claimed:

What we think the point is of teaching Constitutional Law should, of course, greatly affect both how we teach Constitutional Law and what we teach as “Constitutional Law.” … More than that: thinking about these questions can inform what “students” of all ages – including informed citizens of all ages – should be studying, and what questions they should be thinking about, when they set out to learn about the Constitution. What is the point? What is the proper object of study? Why is it important? … If Constitutional Law is to be rescued from utter uselessness, the course needs to be demolished, redesigned, and rebuilt almost entirely, from the ground up. And the first step is to think about what we’re trying to build and why. 66

How do teachers and students go about determining the scope and meaning of constitutional law and where its fundamental importance lies for them? Different answers abound. Harris has contended that we need to train our students to one day become ‘not only practitioners of the law but, to a significant extent, gate-keepers of it’ and, for this reason, Harris sees it as vital that the discipline of constitutional law imparts ‘critical thinking’ to ensure that law graduates are able to be ‘agents for social change’. 67 He makes it clear that this is not just about being able to solve complex multi-issue hypotheticals in the class-room and exam room but also being able to bring an inquiring mind to the ‘institutions’ of government. 68 Kauper contended that the significance of constitutional law instruction is that it imparts a fundamental understanding of ‘our [the United States] constitutional system’ in terms of the ‘allocation of political power and the rights of the person in a democratic society’, and that our future lawyers are key to ‘maintaining the integrity and continued vitality of this constitutional order’. 69

The author is of the view that in teaching constitutional law we are teaching about power and the ways this can be wielded. How best to

65 Leeming, above n 3, 3.
convey this should be guided by currency, as Kauper and Justice Leeming recommend, the skills that we want to focus on, as well as students’ interests. In taking these into account, questions of breadth, depth and form become much easier to answer. Further, we need to ensure that the ‘living’ element of constitutional law is conveyed: the scope of the exercise of power is not only what is argued before the High Court. Much constitutional law happens outside of this and is the appropriate subject of ‘hot topic’ class discussion\(^{70}\) – we do not need to go back to the 1975 Whitlam dismissal to find examples of this. There has, for instance, been much excitement and discussion prompted by the recent proposals to amend the *Commonwealth Constitution* to recognize Aboriginal and Torres Strait Islander Peoples.\(^{71}\) Students of constitutional law need to have a working knowledge of the *Commonwealth Constitution*, an understanding of current constitutional problems and the skills and inclination to begin to be able to solve these. To achieve this the teaching of constitutional law faces a momentous challenge: it must be ambulatory, real and inspiring. The topics we teach need to be constantly revisited in terms of their breadth, the depth in which we impart them and the form in which learning and teaching takes. What is core for one group of students will not necessarily be core for the next, and we need to allow for change in content, focus and learning styles. In continually asking ourselves what ‘constitutional law’ and the teaching of it means, we are identifying precisely the question that will allow us to begin to face the challenge of learning and teaching Australian constitutional law.


\(^{71}\) Such important and topical issues provide excellent material for class discussion and exploration of constitutional law issues including constitutional reform, the scope of s 128 of the Constitution and the Race Power in s 51(xxvi).
EXTENDING PUBLIC LAW: DIGITAL ENGAGEMENT, EDUCATION AND ACADEMIC IDENTITY

MELISSA CASTAN* AND KATE GALLOWAY**

I INTRODUCTION

In Australian legal education, ‘public law’ is understood as an umbrella concept, covering both constitutional and administrative law subjects. More expansively, public law is understood as the analysis and evaluation of the state structures of power and control between governments and their people, and between governments, at both the formal and substantive levels. Thus ‘public law’ readily accommodates topics such as statutory construction, human rights, state sovereignty, electoral law, legal philosophy, and the rule of law. While increasingly observation is made of the weakening of the traditional distinction between public and private law, that is probably a discussion best ventilated elsewhere. For current purposes, the traditional distinction is a useful point of departure for a more expansive view of public law and public law teaching – an idea that we seek to develop here.

The expansive view aligns with the broader conceptualisation of the law curriculum ushered in by the Discipline Standards for Law, while retaining the law’s doctrinal integrity. The practice of public law education in this mold requires a more critical and authentic approach, giving scope for student engagement in the broader contexts of law. Together these approaches represent a more contemporary and potentially enlivened public law curriculum. The question is how this might be achieved in a way that cohesively invokes the elements of academic practice.

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4 Sally Kift, Mark Israel and Rachael Field, ‘Bachelor of Laws Learning and Teaching Academic Standards Statement’ (Australian Learning and Teaching Council, 2010).
5 Ibid, Threshold Learning Outcome (“TLO”) 1.
In this article we explore the dimensions of digitally-mediated, collaborative, academic practice in public law. We are interested in the way in which the pursuit of education in public law reflects the domains of academic practice. Notably, integral to our understanding of teaching is broader community engagement and promotion of an ‘educated citizenry’,6 conscious of the operation of power within the structures of the state. We therefore focus on the extent to which we engage diverse audiences: colleagues in the academy and the profession, our students and the general public.7 As communicators of law we reflect on our methods of communication through the prism of digital literacies as a means both of modelling effective use of digital media and exploring its meaning and potential in learning public law. This article is part of a wider series that aims to advance discussion about the utility of social media as a democratizing form of communication of scholarly work.8 Accordingly, this article offers a collaborative auto-ethnographic account,9 explicitly exposing how the authors have embraced social media as an extension of scholarly work in the public law domain.10


9 Auto-ethnography is ‘a qualitative research method that utilizes data about self and its context to gain an understanding of the connectivity between self and others within the same context.’ F Ngunjiri, K Hernandez, and H Chang, ‘Living Autoethnography: Connecting Life and Research’ (2010) 6(1) Journal of Research Practice [editorial].

10 This discussion of the role of the legal academic is based upon research earlier published in Galloway, Greaves and Castan, ‘Gatecrashing the Research Paradigm’, above n 8.
II THE EXPANDED CONTEXT OF PUBLIC LAW

As the concept or category of ‘public law’ encompasses legal principles and practices that govern the exercise of power by public bodies, including parliaments and the executive, we can now expect that in legal education we encounter public law and public law principles in a much-expanded context. Wherever we describe, evaluate or criticise the exercise of public power, we are engaging public law concepts such as sovereignty, rights and liberties, participatory democracy, the rule of law and separation of power. Public law anticipates judicial review of the rules of governance, but it is not fixed in its approaches or expressions. In that context we witness renewed enthusiasm for the mythology of Magna Carta. It represents the keystone of public law precepts of transparency, accountability and due process, and renewed expression of the rule of law. Further, its contemporary iteration has renewed engagement in common law principles such as the doctrine of legality as the basis for judicial review.

The contemporary iteration of other concepts such as globalisation, civil society and political community are also part of the expanded context of public law. Consequently, we undertake public law analysis when we evaluate issues of participatory democracy such as electoral laws, the scope of ‘move on’ protest laws, or the validity of ‘law and order’ developments. Justice Spigelman says that

[p]ublic law is, or should be, primarily concerned with the way the institutionalised governance system generates power, rather than focussing, as is often done, on the way in which power is constrained. Constraints are an inextricable component of the conferral of governmental power.

He goes on to endorse Loughlin’s observation that ‘in this sphere, constraints on power generate power.’ Power is central to public law.

This brings us to the aspects of public law that often seem to motivate law students (and perhaps some members of the general public): human rights, civil liberties and the use of law to pursue social justice. All of these involve the evaluation of constraints on government power, and the expression of legal rights of the individual or a community. They often also centre on issues of political debate. Recent contemporary public

11 For instance, see Orr, above n 1, 4-5.
17 Spigelman, above n 12.
debates have focused on the proper role of the President of the Australian Human Rights Commission,\(^\text{19}\) the scope of powers of anti-corruption bodies,\(^\text{20}\) the role of Legal Aid funding for community legal centre advocacy for law reform,\(^\text{21}\) and the various models for recognition of Aboriginal and Torres Strait Islander Australians in the Constitution.\(^\text{22}\) These issues go to the heart of our system of democracy. To the extent that the citizen does not understand them, their participation in public debate is limited. They are only a few examples of public law issues in mainstream and online media and public debate, but all have recently called on the contribution of public law educators to fill in the deficit in community legal comprehension.

The apparent call for community legal education is, in a way, a call for support of participatory democracy. It represents an opportunity for us as public law academics to engage with a constituency beyond our own student bodies. We have taken up this task as a component of what we see as an expanded academic role. Moreover, we participate in community legal education as an expression of public law lawyering, which includes a strong tradition of public service.\(^\text{23}\) We suggest that the role of community legal education and public service is integral to an expanded idea of public law teaching.

### III The Expanded Context of Teaching

To begin to explain an expanded role for the public law teacher, we reflect on our own roles as legal educators. We situate our work with reference to Boyer’s examination of the academic’s role. To better

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understand the scope and diversity of the academic’s role Boyer articulated four layers of scholarship: ‘the scholarship of discovery … of integration … of application and … of teaching.’ Thus academic work provides a flexible and varied career path for the individual academic, while meeting the university’s obligation to serve society.

Boyer’s work is a useful articulation of the domains of the academic’s role, and he suggested strategies for recognising each of these domains as scholarly endeavour. Importantly, his recognition of the ‘mosaic of talent’ involved in scholarship implicitly acknowledges there will be differently-skilled individuals within the institution. This implies perhaps variation in the relative emphasis for a single academic as between, say, teaching and research activity. But for this discussion, we see this also as contemplating differential skills in or attitudes towards the uptake of social media as an integral part of academic practice.

Boyer also acknowledges the development and changes in academic interests and focus over time as a necessary part of promoting faculty renewal and, ultimately, creativity within the educational institution. Boyer argued for reformulating notions of what constitutes and is valued in terms of academic life. This process of reformulation is ongoing, and evolves with the changing modes and tools of communication. As we reflect on our own practice, we see Boyer’s articulation of academic practice as sufficiently flexible to accommodate our own expanding notion of teaching. Additionally, we consider that our expanded activities as public law educators fall within his contemplated reformulation of what is involved in academic life. Our engagement of new audiences and our use of new communication technologies are examples of how we are exploring the boundaries of existing concepts of academic work.

Applying this to teaching in particular, we suggest here that within Boyer’s ‘mosaic of talent’, scholarship of teaching need not be limited to the classroom of enrolled students. While universities themselves tend to identify teaching, research and engagement as three domains of academic practice, increasingly there need be little differentiation between them. Thus the role of the academic can – and we argue, should – involve educating an audience far wider than their own class. The ‘qualitative variations’ will exist from one academic to the next in terms of their own

24 Ernest Boyer, Scholarship Reconsidered: Priorities of the Professoriate (Carnegie Foundation for the Advancement of Teaching, 1990) 16.
26 Boyer, above n 24, 61.
27 Ibid, 27.
28 Ibid, 43.
29 Ibid, 43, 77.
interpretation of the bounds of any particular sphere of academic practice. Aligned with our own reflection on the role of the public law academic, there are reasons particular to the subject matter of the discipline that demand that we consider an expanded notion of the role of teacher. That is the premise of this article.

Our own perceptions of the evolution of academic work are informed also by reformulation of academic work that is taking place through the disruption caused by digital technologies. Technology is permitting research – or the building blocks of research – to be fully integrated with teaching and engagement, generating a seamless academic persona in the online environment. For those fearful of the erasure of the embodied academic, the digital footprint can be understood as enhancing and expanding the academic’s live presence beyond the bounds of the bricks and mortar institution.

As academics, we are interested in advancing a discussion about the utility of social media as a democratising form of communication of scholarly work – in this case, in public law. In our experience digital technology affords a means by which to synthesise Boyer’s dimensions of academic work. Social media allows us, as educators in public law, to serve the public through a blend of discovery, interaction, application and teaching. In the university’s more prosaic interpretation, in our experience using social media has enhanced our armoury of tools for publication and external scrutiny of our work. It also enables us to engage diverse audiences in our academic work, furthering an educative purpose.

Engagement – or in our framework, public law education as an aspect of participatory democracy – involves our own direct involvement in a public law network, or community, which exists far beyond our geographical location and whose horizon includes our own students and the public at large. To do this requires understanding what is the right (digital) tool for the job, and how to use it. This lies at the heart of digital literacies.

IV DIGITAL LITERACY AND THE RIGHT TOOL FOR THE JOB

Digital literacy is known to be a ‘complex and contested term’ that is difficult to pinpoint. It is regarded however as a ‘condition, not a threshold’. That means that digital literacy is an enabler of knowing and doing, rather than an end in itself. For our purposes, digital literacy is competency in ‘professional, social, cultural and personal communication

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practices appropriately utilising a variety of digital media.’ 33 In the context of academic work, the digitally literate legal educator meets the conditions enabling communication practices through selection of appropriate digital media. In our case, we use these professional communication practices to serve the educational purpose of broad engagement in public law. These practices enable us to meld ostensibly separate domains of teaching, research and engagement. Importantly, through digital media, we are able to give form to our conception of the public purpose of public law, which we consider to be a pre-condition of an educated and therefore empowered citizenry.

For the academic seeking to expand their horizon beyond the classroom, academic digital literacy facilitates the expanded role beyond traditional means of scholarly communications, namely teaching (to a room of present people) and peer-reviewed research. As will be argued here, through the use of blogs and supported by Twitter and Slideshare, the academic has at their disposal a range of tools that enable effective and indeed global scholarly communication. Importantly, however, these are just some of the digital tools available to mediate contemporary scholarly communication.

Part of the challenge for many academics in building digital literacy is resistance to digitally mediated scholarship. Within the academy, despite a growing acceptance of some forms of social media as a scholarly endeavour, there remains scepticism of digital ‘outputs’ that principally centre on quality. This largely occurs because social media genres, such as blogging, are not ‘peer reviewed’ in the way it has been historically understood. 34 The scholarly quality of an online post is, however, as with any other resource, largely to be determined through the application of information literacy. By this we mean ‘the ability to search for, select, critically evaluate and use information for solving problems in various contexts.’ 35 The first hurdle for the academic encountering non-traditional scholarly work is to accept the genre as at least potentially viable – and the potential of digital genres is discussed below.

A Blogging

A blog is an online discussion or information site consisting of individual articles or ‘posts’; the most recent appears at the front page. Nearly a decade ago, Australian public law academic and early social media adopter, Peter Black, provided a comprehensive description of the evolution and nature of the blog:

34 For a discussion of online, public commenting as review, see Sabine Hossenfelder, ‘Open Peer Review and its Discontents: Criticism is an Integral Part of Science – Essential for Progress and Cohesion’ on LSE Impact Blog (23 February 2015) <http://blogs.lse.ac.uk/impactofsocialsciences/2015/02/23/open-peer-review-and-its-discontents/>.
A blog is a website where regular entries are made (such as in a journal or diary) and presented in reverse chronological order. They often comment on the news or on a particular subject, such as food, politics, or music. Some are personal online diaries.\textsuperscript{36}

With free blogging platforms available to be personalised, blogs now require little technical expertise; a new one can be established in a couple of hours.\textsuperscript{37} Blogs differ from regular static websites as they allow public feedback, through ‘comments’, which give authors the ability to build relations with their readers and with other bloggers. The use of microblogging (such as Twitter) assists in integrating blogs within social news streams. Blogs are therefore regarded as \textit{social} media.\textsuperscript{38}

The ‘social’ element of social media and the blog’s history of use for non-scholarly pursuits have probably damaged its reputation as a legitimate form of scholarly expression.\textsuperscript{39} However, despite the contested worth of blogging, there is a wealth of examples that suggest it to be a legitimate mode of scholarly communication. The well-regarded \textit{LSE Social Science Impact Blog} maintains that

\[\text{[a] new paradigm of research communications has grown up - one that de-}\]
\[\text{emphasizes the traditional journals route, and re-prioritizes faster, real-}\]
\[\text{time academic communication. Blogs play a critical intermediate role.}\]
\[\text{They link to research reports and articles on the one hand, and they are}\]
\[\text{linked to from Twitter, Facebook, Pinterest, Tumblr and Google+ news-}\]
\[\text{streams and communities. So \textit{in research terms} blogging is quite simply,}\]
\[\text{one of the most important things that an academic should be doing right now.}\]

Of interest here is the law blog. Peoples points out that (in the United States context), ‘[b]logs are used by lawyers, scholars, and others who want to have an impact in judicial decision making.’\textsuperscript{41} Both he and Volokh cite the reach of legal blogging, though in different ways. Volokh examines the broad intellectual engagement he experiences via his own posts (the \textit{social} element of social media),\textsuperscript{42} while Peoples has

\textsuperscript{36} Peter Black, ‘Uses of Blogs in Legal Education’ (2006) 13 \textit{JCU Law Review} 8. Our focus here is on public law blogs. There is an online compendium of Australian legal blogs on \textit{Amicae Curiae: Girlfriends of the Court} <http://amicaecuriae.com>.

\textsuperscript{37} See, for example, \textit{Wordpress} <wordpress.com>. More lately, \textit{Medium} <www.medium.com> provides a simplified publishing interface, though not on a unique web page.

\textsuperscript{38} For a detailed explanation of blogging and microblogging, see, for example, Galloway, Greaves and Castan, ‘Interconnectedness, Multiplexity and the Global Student’, above n 8.


\textsuperscript{40} See eg ‘Shorter, Better, Faster, Free’ on \textit{Writing for Research} (11 September 2014) <https://medium.com/advice-and-help-in-authoring-a-phd-or-non-fiction/shorter-better-faster-free-b74bdde03>. This is part of the \textit{LSE Impact of Social Science Blog}.


'exhaustively' examined the extent to which legal blogs are cited in the United States courts as one facet of the scholarly element. According to Peoples, law blogs 'have been heralded as a replacement for law review case commentary, as a vast amicus brief, and have even been compared with the Federalist Papers.'

In support of Peoples’ contention, Justice Kennedy of the United States Supreme Court has praised the legal blog, contrasting its utility to that of law reviews (or journals):

Professors are back in the act with the blogs… The professors within 72 hours have a comment on the court opinion, which is helpful, and they are beginning to comment on when the certs are granted. And I like that.

Apart from a recent overview by Blackham and Williams of Australian courts’ use of social media, there is little (if any) systematic review of judicial use of blogs in Australia. The predictions made in the United States context that law blogs will have a ‘growing influence with the courts’ is not yet apparent in the Australian context. Perhaps the experience in Australia reflects Justice Posner’s observation that ‘the web is an incredible compendium of data and a potentially invaluable resource for lawyers and judges that is underutilised by them.’ Importantly for this discussion, the potential for the blog – just one aspect of Posner’s ‘incredible compendium’ – lies in the genre itself.

The first observation for the public law academic is that scholarly public law blogs are written by known experts in this field. The genre

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44 Peoples, above n 41. References omitted.


allows for immediate publication, capturing the zeitgeist of any current issue. For an example of this, see *Opinions on High*, a multi-author blog published by the Melbourne Law School.\(^{49}\) The blog features summaries of High Court decisions, often on the day they are published, in posts written by leading scholars in the field. More recently, *AusPubLaw* has joined the field, with the aim of providing ‘expert commentary and analysis on recent cases and legislative change as well as updates on the latest research and scholarship in Australian public law’.\(^{50}\)

These resources are not necessarily longer, more considered or targeted analyses, but they do represent an immediate expert source of information about what must be the key issues in weighty judgments. In this respect, the genre is a new one that complements the traditional armoury of journal articles, conferences and books.

Blog posts allow scholars to work through contemporary issues or ideas as short-form writing. In this sense too, the blog post is a different genre from the refereed journal. Thinking of the law blog in this way opens the possibility for its use as a scholarly work, recognizing the boundaries of the genre itself.

For the educator, free and fast access to scholarly views is a valuable resource that can effectively be put to educational use – or in Peoples’ analysis, put to work before the court.\(^{51}\) In this sense, blogs are a democratic approach to scholarship. The scholarship is not locked in subscription databases or tied up in lengthy reviewing and publishing processes, but can instead become immediately accessible to the general public. O’Keeffe observes that ‘legal commentary has been democratized with open publishing available to practicing (sic) lawyers. Blogs don’t have the gatekeepers law reviews do that limit commentary to primarily law professors and law students.’\(^{52}\) Additionally, and relevant to the public law scholar, ‘public legal information is part of the common heritage … and its access promotes justice and the rule of law.’\(^{53}\)

Thirdly, while not peer reviewed in the generally understood sense, blogs are in the public domain and therefore subject to considerable scrutiny, including by one’s peers. When supported by a Twitter account, the discussion with a broad spectrum of experts and the general public can be extensive – more so than a journal article. Recent analysis has identified that some 50 per cent of journal articles are likely to be read only by the author, editor and reviewer.\(^{54}\) In contrast, the ‘social’ aspect

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51 Peoples, above n 41.

52 O’Keeffe, above n 45.


54 Lokman I Meho, ‘The Rise and Rise of Citation Analysis’ (2007) *Physics World* <arXiv:physics/0701012>. Furthermore, only 20 per cent of citers are likely to have
of the online medium is the capacity for comment and further exchange of ideas. Ideas expressed on a blog are available for discussion, feedback and instruction with any reader.

Finally, blogs involve direct involvement in a network or community that exists far beyond any geographical location, but one that also includes our own students. The genre is a source of law, analysis and critique for students, modelling discipline thinking on topics that might be a long way from reaching the journal or the textbook. They break down the barrier between student (or member of the public) and the academic, through the ‘comment’ function, further rendering academic expertise available to the public. In the German constitutional law blog Verfassungsblog, American academic Jack Balkin writes that ‘blogging is a way of changing the relations of authority in the public sphere’. In other words, the medium itself moves beyond simply a mode of communication, to an act emblematic of the democratising purpose implicit in the expanded notion of the practice and teaching of public law.

Through the features particular to this medium, blogging integrates the domains of academic scholarship into a seamless scholarly work. Volokh calls this ‘discovering, disseminating and doing’ – another version of Boyer’s domains and representative again of the ‘triad of work on which academics are evaluated.’ Blogs can embody the text of the academic’s research and reach globally to educate and engage an interested public.

As each blog post is published, the author or the institution publishing the blog can integrate the post with other social media – for example, by sending a link out via Twitter. This promotes ‘traffic’ to the blog post and discussion both on Twitter and via comments on the blog itself, thus enhancing engagement in the ideas presented, and expanding the geographic and demographic reach.

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55 In this respect it is useful to consider the range of ‘thinking skills’ articulated in the Discipline Standards for Law. See Kift, Israel and Field, above n 4; Nick James, Good Practice Guide (Bachelor of Laws) Thinking Skills (ALTC, 2011).


Twitter is a form of microblogging: by subscribing to Twitter, the subscriber can send information in the form of a 140-character message known as a ‘tweet’. The subscriber can elect to ‘follow’ other accounts, and others can follow the subscriber.58 Through following accounts, or searching the platform on a particular topic, the user can view a ‘stream’ of tweets. Importantly, the user can embed a link in a tweet. The academic might wish to provide links to published articles either direct or via a repository,59 to Amazon to purchase a book, to blogs, or to other scholarly resources.

There is an active public law community on Twitter, tweeting under #auslaw, #auscon, #auspublaw and #humanrights. These ‘hashtags’ allow readers to follow this topic exclusively in addition to (or instead of) selecting their own list of tweeters. Using hashtags enables a targeted discussion on public law topics within an interested community, capitalising on the ‘social’ aspects of social media. In the Australian public law context, this community includes public law professors such as Cheryl Saunders, George Williams, Megan Davis, Sarah Joseph and Graeme Orr,60 all of whose expertise is readily available via the medium.

We have written previously on the use of Twitter to develop a community – of scholars, academics, professionals and members of the public.61 This community is receptive to reading work published in blogs and in journal articles. Twitter – whether the academic’s own account or a Faculty or University account – is an ideal medium for communicating ideas and research. While Twitter has been described derogatively as an ‘echo chamber’62 and ‘electronic graffiti’,63 the medium can be used to

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58 For a comprehensive overview of subscribing and functions, see Amy Mollett, Danielle Moran and Patrick Dunleavy, Using Twitter in University Research, Teaching and Impact Activities: A Guide for Academics and Researchers (London School of Economics Public Policy Group, 2011).
60 See @CherylSaunders1, @ProfGWilliams, @Mdavisqlder, @ProfSarahJ, @Graeme_Orr respectively. There are of course many more.
the advantage of an academic wishing to engage in scholarly thinking and grassroots engagement in contemporary issues, with a broad and interested audience: in other words, for teaching and research to have impact beyond the scholarly community of the academic’s institution. That is, after all, the goal of engagement. For the public law academic, this includes the educative process and a commitment to broad educational aims.

To illustrate the way in which social media can be used to engage a broad audience in learning about public law issues, we use two case studies based on our own experience. In each case, we used our presence on social media platforms to enter into conversation with a diverse audience on topical issues. We harnessed our knowledge of legal issues, disseminated via social media, to promote public understanding of pressing issues of social justice. These case studies represent an activist approach to public legal education that serves our broader conceptualisation of teaching and public engagement. In short, they showcase an aspect of contemporary scholarly activity.

C ‘Hacking’ the Queensland Election: Case Study

By way of background, the Queensland Electoral Act 1992 was amended in 2014 to require voters to present identification before voting. The rationale was stated to be preventing voter fraud, despite an apparent paucity of evidence as to voter fraud in Queensland.

As public lawyers would appreciate, voter identification laws are known to disenfranchise particular groups, notably the elderly and the young, people in remote and rural Australia, people with disabilities,
Aboriginal and Torres Strait Islander Australians and the homeless.\textsuperscript{67} The laws were criticised by human rights groups, and there was an active grassroots public education campaign in the lead up to the 2015 Queensland election to ensure voters were informed about their rights.\textsuperscript{68} On Twitter, this ran under the hashtags #QldEnroll and #Qldvotes. Twitter proved to be a useful vehicle for the dissemination of information about enrolment and voting, through both the grassroots campaign and blogs such as those of Antony Green, the ABC’s psephologist.\textsuperscript{69}

The new ID requirements were operational for the Stafford by-election in 2014, and no problems were reported. However social media reports on the day of the Queensland election, on 31 January 2015, indicated state-wide issues with the implementation of the requirements. By mid-morning on election day, Twitter and Facebook users (including the authors) were reporting that voters were being turned away for want of identification: voters were being told to go home and return with ID before being eligible to vote. However s121 of the \textit{Electoral Act 1992} provides for voting by declaration: it is sufficient that the voter declare their identity to be eligible to vote. According to reports, it appears that at many booths, electoral workers failed to offer the voter the opportunity to make a declaration vote.

Not only was Twitter used to report these alleged breaches, but the platform was used to broadcast the correct legal information. The issue had become sufficiently widespread that some tweeters started to ‘trend’ nationally towards the close of the polls. (‘Trending’ means that either a person’s tweets or a hashtag have been so widely shared that they were among the most shared topics for that time period, nationwide.)

In contrast to the information being shared online, the Queensland Electoral Commission representative on the evening’s election coverage


\textsuperscript{68} See eg Queensland Association of Independent Legal Services and Aboriginal and Torres Strait Islander Legal Service, ‘Submission to the Queensland Parliament Legal Affairs and Community Safety Committee on the Electoral Reform Amendment Bill 2013’ (21 January 2013); Queensland Association of Independent Legal Services, \textit{Factsheet: You Need to Show ID to Vote at this Election} (7 January 2015). For a history of dissemination of the information, see Kate Galloway, ‘Grassroots Public Law: The Queensland Election 2015’ on @katgallow \textit{Storify} <https://storify.com/katgallow/grassroots-public-law-the-qld-election-2015>.

\textsuperscript{69} \textit{Antony Green’s Election Blog} <http://blogs.abc.net.au/antonygreen/>. 
indicated that there were ‘no reports’ of any problems. Subsequently, on an interview on Brisbane’s 4BC Radio, a representative of the Queensland Electoral Commission admitted that there had been ‘some reports’ and that the Commission was investigating.

The accounts of voting collected on Twitter have been borne out by subsequent analysis. Orr, observing a drop in voter turnout at the 2015 Queensland election, has since identified a correlation between electorates with higher ‘ID-less votes’ and their community demographics – places remote from metropolitan areas, with a less bureaucratic culture and high numbers of Indigenous voters.

This case study demonstrates that the medium of Twitter can facilitate grassroots public law engagement. It is a participatory medium that exemplifies the democratic aims of an expanded public law practice. Through participation in online networks, the public law academic can reach out to members of the public, to non-government organisations, to media and to other experts to share expertise and enact public law consciousness in the form of community legal education.

This account also shows how the public law academic can reach out to their students. Not only are students able to engage in the same public discussion facilitated by the academic, but the academic models for students one means of public engagement on behalf of the vulnerable. Through additional social media such as Storify, which enable the collection of tweets into a story, the academic can provide students with an authentic account of public law practice.

For the authors, broad engagement with the public on contemporary public law issues was further demonstrated in the days following the Prime Minister’s comments about the plans for the forced closure of remote Aboriginal communities in Western Australia.

D ‘Lifestyle’ Comments: Case Study

For the academic seeking to engage in public debate, the journal article (and certainly the book) is a slow vehicle. As Liptak quipped, the journal publication process ‘feel[s] as ancient as telegrams, but slower.’ Online media, on the other hand, facilitate nimble engagement in the public sphere. For example, on more than one occasion, Prime Minister Abbott has made reference to Australia being ‘unsettled … barely settled’. A key finding of the leading High Court decision in Mabo v Queensland was that Australia was a territory that was settled (by the English), but inhabited. A factually and legally incorrect statement, too much to bear for the academic lawyer, can be almost instantly corrected through a blog.

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70 ABC Television, Election Coverage, 31 January 2015.
71 Orr, above n 67, 2-4.
74 Mabo v Queensland (No 2) (1992) 175 CLR 1.
post\textsuperscript{76} and via Twitter.\textsuperscript{77} The blog post and Twitter conversations can thus become useful contextual teaching tools for an audience broader than enrolled students – in this case, on issues surrounding sovereignty and land law.

Early in 2015, the Prime Minister again stepped into Indigenous affairs, endorsing the West Australian government’s proposal to exercise its power to close remote Aboriginal communities. The Prime Minister said: ‘What we can’t do is endlessly subsidise lifestyle choices if those lifestyle choices are not conducive to the kind of full participation in Australian society that everyone should have.’ \textsuperscript{78} Interest on Twitter was intense, and the comment spawned a significant number of opinion pieces in the mainstream and online media – including internationally. More particularly, for the public law academic, the statement became a teaching moment, and the conduit for that, at a grassroots level, was social media.

For those encouraging critical thinking and including Indigenous perspectives in their teaching, the Prime Minister’s comment is a useful way of framing a discussion about issues of sovereignty and citizenship – key elements of public law discourse. The question arises, however, how best to express the complex history of colonisation that resulted in the ‘lifestyle choices’ comment. Blogs – and their close relation, online opinion pieces – are one source, but the history is a long one to retell.

In this case, for one of us, the comments were made in the week of teaching about colonisation in a foundation law subject introducing public law. Reframing the lecture through the ‘lifestyle choices’ comments aligned with the zeitgeist in the online environment. The PowerPoint presentation was updated and shared using the Slideshare tool.\textsuperscript{79} By signing up to Slideshare, an author can share PowerPoint presentations, including embedding them in learning management systems and blogs, and by tweeting a link. Slideshare is a medium that lends itself to both scholarly and populist audiences. In this case, not only did first year public law students view the presentation, but the Slideshare attracted over 500 views in the first 24 hours. It was the ‘most talked about Slideshare on Twitter’ during that time.\textsuperscript{80} Since that week, a public campaign against exclusions of Aboriginal people from their lands has


\textsuperscript{77} See eg @mdavisqlder (Megan Davis) ‘@PPDaley is right. This is an opportunity for those confused about unsettled/um scarcely-settled to read Bill Gammage’, 3 July 2014, 9:58pm <https://twitter.com/mdavisunsw/status/484924209466855424>.


\textsuperscript{79} Email from Slideshare to the author, ‘Hot on Twitter’ (16 March 2015).
evolved, a number of public rallies have occurred, and widespread public political debate has ensued.

The public law academic in their practice – in the extended sense – critiques power and the dominant discourse. This example illustrates a critique of the dominant paradigm of sovereignty and the distribution of power in a constitutional system. Closely aligned with teaching, and reflective of ongoing research in the field, the critique in this instance was more than simply dissemination of scholarly information – although this did occur. A simple feeding of information to one’s students in the traditional lecture format is not unlike the ‘banking’ model of education described (and criticised) by Freire. Instead, the choice of media in this case allowed for a greatly expanded conceptualisation of education and scholarship. It was active engagement in public debate, giving immediacy and authenticity to the educational context. That it spoke to a broad audience to promote justice and equality through the lens of the law again models for students the ethical and critical practice of the socially aware lawyer. Additionally and importantly, it is the democratising medium of digital technologies that itself destabilises the discourse of power embedded in our political processes and also often in our academic practice.

In these two case studies, we have illustrated aspects of our scholarly engagement of a broad community, extended and enhanced through a variety of social digital tools, to serve the purpose of grassroots public law practice.

V CONCLUSION

Despite the division of contemporary academic practice into ostensibly discrete areas of teaching, research and engagement, Boyer’s framework recognises the possibility of shifting boundaries and scope for creative interpretation of the academic’s work. For the authors, the advent of digital technologies has facilitated a means of mediating these domains, to draw together elements of academic work into a cohesive and expanded vision of academic practice.

For the public law academic, this expanded practice comes at the right time. Far from existing in an ivory tower, our mission as public law academics exists now in its own expanded context. Not only does this exist beyond the perceived boundaries of constitutional and administrative law but also extends to citizen-government relations as a


representation of power. For us, the expanded role of the public law academic, aligning with contemporary iterations of academic work, is to engage the public imagination promoting understanding of contemporary legal issues. In doing so, the public law academic not only enacts the democratising contexts of public law, but carries out scholarly work within its broadest construction.

Relevantly here, broad public law engagement can be mediated through the use of digital technologies – in particular through various social media. Diverse media can streamline what might be considered different domains of scholarship, providing access to an existing scholarly community while simultaneously reaching far beyond. The digitally literate public law scholar thus has at their disposal a variety of tools with which to undertake their scholarly tasks, functioning to open the academic’s horizons while engaging with the global community.