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JOURNAL OF THE AUSTRALASIAN LAW TEACHERS ASSOCIATION

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FOREWORD

It is my great pleasure to welcome readers to the 2012 issue of the *Journal of the Australasian Law Teachers Association* (JALTA).

JALTA is a double-blind refereed journal that publishes scholarly works on all aspects of law. JALTA was established by the Australasian Law Teachers Association (ALTA) in 2008 and represents an important initiative which supports the research endeavours of its members, in addition to ALTA’s highly regarded *Legal Education Review* (LER) and the Centre for Legal Education’s *Legal Education Digest* (LED), which is included in ALTA membership. The journal also appropriately reflects the prestige, maturity and development of ALTA as an organisation which now represents well over 1000 members.

Following the publication of our inaugural issue in 2008, the response to subsequent issues of JALTA continued to be very strong. This issue of JALTA includes 20 published articles out of 23 submissions that we received. All submissions undergo a rigorous double-blind peer review before being published.

In closing, and most importantly, I need to extend my sincere thanks to a number of people whose collective efforts have made this journal possible. First, in addition to all members of the ALTA Executive, I would like to thank my Editorial Board colleagues for their counsel and support. Second, I must thank ALTA Interest Group Convenors and all referees who assisted us with the double-blind refereeing process. I would also like to offer my thanks to David Brennan for his efforts in typesetting, and to CCH Australia Ltd for their generous sponsorship and continued support of the journal. Lastly, I need to record a special thanks to Nathalie (‘Nat’) Poludniewski who is tireless in her work on all aspects dealing with JALTA and is always supremely organised and efficient. I can safely say that, without Nat’s contributions JALTA, would not be produced in a timely and professional manner. Well done, Nat!

I commend this issue of JALTA to all readers and ALTA looks forward to continuing to contribute to the legal profession through this journal.

Professor Dale Pinto
Editor-in-Chief
JALTA
LEARNING LEADERSHIP IS IN YOUR HANDS: TOWARD A SCHOLARSHIP OF TEACHING IN PRACTICAL LEGAL TRAINING

KRISTOFFER GREAVES*

ABSTRACT

This article seeks to promote discussion about scholarship of teaching in Australian post-graduate pre-admission practical legal training (PLT). This is germane to perceptions of the quality of accreditation of young Australian lawyers practicing in a globalised profession. The article gives a definition and outlines the prerequisites for scholarship of teaching. The present position of teacher engagement with scholarship of teaching in Australian PLT is considered, together with the historical and organisational epistemological approaches to professional practical training. Problems of validity, measurement, performativity, and engagement in teaching scholarship are discussed. Possible methodological approaches, including Schön’s conception of action research, together with other methodologies, technologies, and practical considerations, are considered. These discussion points are directed toward future exploration of PLT teachers’ engagement with, and leadership in, the scholarship of teaching in PLT.

I. INTRODUCTION

The aim of this article is to introduce the notion of the scholarship of teaching lawyers’ skills,1 in post-graduate pre-admission practical legal training (PLT) that can be further developed in Australia.2 In the context of globalised conceptions of legal professional practice, a scholarship of teaching in PLT is a necessary contribution to the value of Australian legal professional qualifications in a globalised profession. This article introduces discussion points concerning scholarship of teaching in PLT, and identifies possible historical issues arising in connection with scholarship of teaching in PLT. Potential avenues for the pursuit of practitioner scholarship

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2 Practical legal training is a mandatory post-graduate pre-admission competency-based training requirement for law graduates seeking admission to the legal profession in Australia: Legal Practitioners Act 1981 (SA) s 14C; Legal Practitioners Education and Admission Council Rules 2004 (SA) r 2; Legal Profession Act 2004 (NSW) s 24(b)(i); Legal Profession Act 2004 (Vic) s 2.3.2(1)(c); Legal Profession Act (Vic) 2004; Supreme Court Admission Rules 2004 (QLD) ss 7-7A; Legal Profession Act 2006 (ACT) s 21(b)(i); Legal Profession Act 2007 (QLD) s 30(1)(c); Legal Profession Act 2007 (TAS) s 25(b)(i); Legal Profession (Admission) Rules (Vic) 2008; Legal Profession Act 2008 (NT) s 29(1)(c)(i); Legal Profession Act 2008 (WA) s 21(2)(c).
3 Australian practical legal training involves coursework and work experience components. In some jurisdictions PLT can be undertaken internally within a law firm, such as supervised workplace training in Victoria. External PLT providers can be stand-alone organisations, or operate as an extension of law school. PLT coursework involves competency-based training in ‘skills’, ‘practice areas’, and ‘values’ in accordance with the national Competency Standards for Entry-Level Lawyers specified by the Australasian Professional Legal Education Council and the Law Admissions Consultative Committee. Above n 1. These standards are incorporated by reference into the legislation for admission of lawyers. Above n 2.
of teaching in PLT, with reference to social media, emergent methodologies, and other resources are identified. Notions of validity and performativity connected to scholarship are also discussed. The article concludes by arguing for an invigorated research and scholarship of teaching under the leadership of practitioner teachers.

II. Scholarship of Teaching

For present purposes, scholarship of teaching in PLT is not confined to the academics’ production of peer reviewed journal articles, although this is important method for the external scrutiny and dissemination of scholarly work. Modern global scholarship, may be expressed through writing, exegesis, and other forms of expression (including live and recorded performances). That said, Boyer’s criteria provides a framework for defining work that genuinely qualifies as scholarship of teaching in PLT: there should be clear goals, adequate preparation, appropriate methods, significant results, effective presentation, and reflective critique with analysis, criticism, syntheses and comparison.5

For Boyer, scholarship of teaching requires teaching academics to be ‘well-informed’ in their field. It it a ‘dynamic endeavour’6 between the teachers’ understanding and the students’ learning, the planning and design of pedagogical procedures, creativity, innovation, and transforming, extending, and providing continuity of knowledge.7 Or, as Healey expresses it, teaching is to ‘make learning possible’; scholarship of teaching is ‘to make transparent how learning is made possible’.8 This includes learning goals, teaching methods, assessment of learning, and the evaluation of teaching.9 For Healey, scholarship of teaching can involve all four forms of scholarship enumerated by Boyer: (1) discovery research into the nature of learning and teaching; (2) integration of material from several disciplines to understand what is going on in the classroom; (3) application of what is known about how students learn to the learning and teaching process; and (4) teaching, not only transmitting knowledge, but transforming it and extending it as well.10

Scholarship of teaching need not be confined to the ‘academy’. Practitioner teachers can produce scholarship of teaching through: face-to-face and blended online programs, including academic, skills based, practice-oriented, and experiential schools of study. Scholarship of teaching can be interdisciplinary work, drawing on the research and scholarship of education, psychology, sociology, anthropology, economics, legal education, critical legal studies, and the natural sciences. Adopting this definition, the next section describes a contemporary context for scholarship of teaching in PLT.

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6 Here, “dynamic endeavour” is interpreted to mean a reflexive approach involving monitoring, reflection, evaluation, feedback, discussion, and incremental changes aimed at improvements.
7 Boyer above n 5, 23-4.
9 Ibid 169, 171.
10 Ibid.
III. SCHOLARSHIP OF TEACHING IN PLT

This section aims to contextualise and justify teaching scholarship in Australian PLT. It refers to PLT teacher teaching qualifications and scholarly works. It identifies potential conceptual differences concerning teaching scholarship between academic legal education and PLT. In Australia, teachers in PLT are usually experienced legal practitioners drawn from the profession.11 A survey of the relevant legislation does not disclose any express requirement that PLT teachers (or supervised workplace training supervisors) possess qualifications or equivalent experience in teaching and learning theory and practice,12 nor do they explicitly stipulate any eligibility requirements for PLT teachers. In most cases, PLT course providers for the Australian Graduate Diploma of Legal Practice (GDLP) are Higher Education Providers (HEPs) and subject to regulation by the Tertiary Education Quality and Standards Agency (TEQSA),13 within the Higher Education Standards Framework (“the standards”).14 The standards require HEPS to promote and protect ‘free intellectual inquiry’ and expression in learning, teaching, and research activities, with academic staff ‘active in scholarship that inform their teaching’.15

In July 2012, the author conducted an informal survey of website data for 15 Australian PLT providers and 125 PLT teachers. A comparison of state jurisdictions disclosed that 60% of the Victorian PLT teachers identified in the sample held some form of formal teaching qualification, followed by New South Wales: 23.5%; Queensland: 15%; Western Australia: 12.5%; and the Australian Capital Territory: 11.8%. The proportion of teachers holding a formal teaching qualification ranged from 0% to 69%. The form of teaching qualification ranged through graduate certificate, graduate diploma, bachelor degree and master degree.16 In August 2012 the author conducted another informal survey to learn what outputs Australian PLT teachers have published concerning scholarship of teaching. The author searched databases,17 and journals,18 and found that of 135 Australian PLT teachers, 16% had published an item that touched on scholarship of teaching. The proportion of teachers at each PLT provider who had published a scholarship of teaching item ranged from 0% (at 5 sites) to 56% (at 1 site).19 These results should be treated cautiously because the website information may be out of date or inaccurate. It is not suggested that formal qualifications or publications determine the existence or quality of teaching scholarship at a site. However, the fact that proportions of teachers do acquire such teaching qualifications and produce written scholarship of teaching suggests that this may be thought worthwhile. The fact that there is a substantial variability between the concentration of

11 In Victoria, for example, *Legal Profession (Admission) Rules 2008* (Vic), r 3.05, requires that a ‘supervised workplace training’ supervisor for in-firm practical legal training must have at least 5 years post-admission experience in legal practice. Anecdotally, it seems to be assumed that external practical legal training providers should recruit legal practitioners with practice experience.
13 Tertiary Education Quality and Standards Agency Act 2011 (Cth) s 134.
15 Higher Education Standards Framework (Threshold Standards) 2011 Act (Cth); ‘Provider Category Standards’, regs 1.2-1.4. (Note the standards apply where a higher education provider’s practical legal training course results in a post-graduate academic award such as the Graduate Diploma of Legal Practice, or a graduate certificate. The standards do not apply to PLT in the form of supervised workplace training, provided internally at law firms.)
17 Scopus, LegalTrac, and Web of Science.
qualifications and publications, between providers and between jurisdictions, warrants further research.

These exploratory findings suggest there is room to expand an Australian research and scholarship of teaching in PLT. This kind of scholarship might be further advanced in jurisdictions comparable to Australia. In time, any disparity might have substantial implications for the perceived quality of the Australian graduate diploma of legal practice accreditation, nationally and globally.

In relation to published scholarship, an Australian journal, *The Journal for Professional Legal Education* was published from 1983 to 1998, but no similar Australian journal seems to exist at present. A full text search of the Australian ‘Legal Education Review’ from 1994 to 2011 produces 12 ‘hits’ on the terms, “practical legal training” or “PLT”, of which four were published in the last 5 years. The *Journal of the Australian Law Teachers Association* commenced publication in 2008; perusal of the issues published from 2008 to 2011 inclusive, disclosed one article specifically dealing with PLT. Overseas, however, the *International Journal of Clinical Legal Education* is published by the University of Northumbria in Newcastle, United Kingdom; *The Law Teacher* is published by the UK-based Association of Law Teachers; and the US-based *Clinical Law Review*, a ‘journal of lawyering and legal education’ sponsored by Clinical Legal Education Association and others, are each specifically dedicated to areas that overlap with the field covered by Australian practical legal education. Journals are not the only means to provide a forum for scholarship of teaching in PLT; however there does seem to be a lacuna for Australian practitioners interested in this area.

While one view holds that ‘good teaching’ that draws on teachers’ professional skills and knowledge, and based on pedagogical principles, has been successfully ‘propagated’ in Australian law schools, ‘academic’ legal education is usually treated as conceptually separate from the ‘vocational’ lawyering skills taught in PLT, the teaching of which has been identified as ‘challenging work’ that requires ‘additional teaching skills and commitment’. It is not clear from the literature reviewed so far, that the majority of legal practitioners involved as teaching-practitioners in PLT, are caught by the ‘successful propagation’ of pedagogical principles, or


have embraced, or have the opportunity to embrace, educational theory and practices relevant to teaching lawyering skills in PLT. Anecdotally, where PLT teachers are employed on a sessional basis, or where the business model of the training provider does not incorporate actual resources and support for pursuit of scholarly work, there is little opportunity to embrace scholarship of teaching.

Educational theories and practices may have consequences beyond measures of successful achievement of learning outcomes. For example, certain attributes of legal education and legal practice have been linked to rates of mental health issues reported by law students and legal practitioners that are significantly higher than any other profession, in recent Australian and international research. Seligman et al observe that the ‘Socratic teaching method’ used as the primary pedagogy in legal education, emphasises adversarial thinking in ‘zero-sum’ situations, in contrast to collaborative approaches taken in other disciplines, and that this contributes to ‘inherent’ pessimism amongst law students and lawyers. Recently, Maharg and Maughan have argued against the dominance of the Socratic tradition, and for new engagement with the affective domain of teaching and learning in law, based in part on new scientific knowledge about cognitive processing and the physiology of learning. In the context of scholarship of teaching in PLT, it would be relevant to investigate whether PLT teachers reproduce the primary pedagogy inculcated at law school. Bourdieu and Passeron, for example, describe a sociological theory of education systems in which pedagogical work inculcates dispositions in institutions, teachers, and students, to reproduce practices that preserve a status quo. A scholarship of teaching in PLT might test the proposition that a particular pedagogy is reproduced throughout law school and PLT, and the implications for innovations in teaching. This line of inquiry also relates to the organisational epistemology of PLT providers (discussed below). In this context, and assuming pursuit of scholarship of teaching in PLT is justified, the next section identifies critical questions for research concerning PLT teacher practitioners’ engagement with scholarship of teaching.

IV CONSIDERATIONS FOR RESEARCH ON SCHOLARSHIP OF TEACHING

In this section, certain critical questions are identified regarding PLT teachers’ engagement with scholarship of teaching. These involve what counts as knowledge PLT providers, research methodologies for teacher research, and problems of validity and performativity. Research concerning the scholarship of teaching in PLT could uncover information concerning the current state of Australian scholarship in the area, how it might compare to scholarship of teaching in legal education, and the policies and practices that shape the scholarship of teaching in PLT. Research could also investigate the forms in which scholarship of teaching in PLT might be undertaken and expressed and, from the teachers’ perspective, the theories and practices that influence their engagement with scholarship of teaching.

25 Seligman, Verkuil and Kang above n 24, 54.
28 Ibid.
Lynch et al., identified ‘four critical’ questions that might illuminate the ‘conduciveness (or otherwise)’ of certain teaching contexts to ‘the pursuit of scholarly activities around teaching practice’:

1. Are individuals motivated to pursue scholarly activities in relation to their own teaching work?
2. Do individuals have the capabilities required to pursue scholarly activities in relation to their own teaching work?
3. Does the organisation’s symbolic representation of teaching support the pursuit of scholarly activities around teaching work?
4. Does the organisation’s allocation of resources support the pursuit of scholarly activities around teaching work?

These four critical questions provide focus for further research in relation to PLT teachers’ engagement with the scholarship of teaching. Additional avenues of inquiry include:

- To what extent do practitioner-teachers capture, or are caught by, scholarship of teaching in PLT?
- If the teachers’ own education and professional experience of scholarship is shaped by legal positivism and ‘techno-centrism’, how might that affect their perceptions of a cross-disciplinary scholarship of teaching that involves non-legal knowledge?
- Are teachers affected by ‘counterintuitive impulses’ of ‘performativity’ and ‘passion’, of ‘being seen to be good’ and ‘doing good’? Is this particularly so if the ‘delivery’ of PLT is a ‘business’ and scholarly activities are framed by the college’s business and performance expectations?
- What opportunities, if any, do teacher-practitioners have to engage with the research and scholarship?
- What goods (improvement in teaching quality and teacher self-actualisation, for example) might result from the pursuit of scholarship of teaching?

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30 Ibid 232.
31 Margaret Thornton, ‘Technocentrism in the law school: Why the gender and colour of law remain the same’ (2010) 36(2) Osgoode Hall Law Journal 369, 388. Thornton defines “technocentrism” as ‘the way in which rules rationality exercises a centripetal pull within legality so as to disqualify other forms of knowledge.’
33 Ibid. Blackmore above describes education reforms ‘premised upon twin strategies of “managerialism” and “marketisation”’, so that teaching organisations run on business principles. This might have implications for scholarship of teaching difficult to justify for purely business purposes.
34 Paul Ramsden, ‘Managing the Effective University’ (1998) 17(3) Higher Education Research & Development 347, 362-8. Ramsden makes the point that management processes are important for improvement and accountability in higher education. However, he observes that managerialism alone will not help academics to ‘deliver the goods.’ It is also relevant to consider what qualifies as a ‘good’. For example, scholarship that produces new insights about teaching in PLT ought to qualify.
From the four ‘critical questions’ outlined above, the next section relates to the question of how PLT providers symbolically represent and allocate resources to the pursuit of teaching scholarship.35

**A. Organisational Knowledge**

In considering how PLT providers symbolically represent the pursuit of teaching scholarship, it is relevant to consider the epistemology of the school that delivers PLT.36 Organisational epistemology goes to what the school counts as ‘knowledge’, and how the school symbolically represents a model of teaching.37 Does the school see itself as simply a ‘finishing school’ for graduates to enter the profession? Does it accordingly constrain its ways of knowing, or does the school’s epistemology encompass a vision of research and scholarship that contributes to expansive ways of knowing? As Schön records, this question is not confined to the legal profession. Historically the ‘normative professional curriculum’ has come to involve the teaching of the basic subject,38 followed by the applied subject and then a ‘practicum’ in which to apply classroom knowledge to professional practice.39 This design evolved out of a position that held professional practice knowledge was not ‘fundamental’ intellectual knowledge, and that practitioners were not scholars.40 Consequently, it was appropriate to separate academia as a place of higher learning from preparation for professional practice.41 This separation, however, risks excluding research and scholarship from practice. As Schön argues: ‘research finds little place to stand in the turbulent world of practice’.42 There is also the ‘dilemma’ of rigor versus relevance - many interesting technical or intellectual problems can be managed through rigorous research-based theory and techniques; however, these solutions are often not relevant to the ‘messier’ problems that arise in practice.43

The risk of separating scholarship from practice can be relevant to both PLT and the teaching of PLT. It is a challenge to transform professional know-how into something teachable – a ‘knowing-in-action’ that relies on non-logical practices, and involves a kind of tacit-knowing.44 When professionals strive to transfer this kind of knowledge through teaching, it is not unusual for them to be misunderstood.45 Partly, this is because professionals teaching this kind of knowledge can ‘mis-state’ what they know how to do, because they lack the clarity that pedagogical reflection and planning provides.46 It is in context of that challenge, that the next section considers methodological issues concerning teaching scholarship in PLT.

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35 Lynch, above n 29, 225. “Symbolic representation” refers to the support and resources an organisation commits to scholarship of teaching, including ‘organisational values and priorities reflected in institutionalised systems and processes.’

36 Donald A Schön, ‘The New Scholarship Requires a New Epistemology’ (1995) 27(6) Change 26, 27. “Epistemology” is used here in the sense of one’s theory of knowledge, what is construed as valid knowledge, and how something is known.

37 Ibid.

38 Ibid 29. Schön cites Schein’s “normative professional curriculum”, as describing the basic-applied-practicum process of teaching professional knowledge.

39 Ibid.

40 Ibid.

41 Ibid 27-28.

42 Ibid 29.

43 Ibid, 28.

44 Ibid, 29.

45 From experience, the process of teaching professional practice can involve struggles (or omissions) to make explicit tacit professional knowledge. Sometimes this involves the instructor’s assumption that the learner already knows a fact. To use a simple example, from the writer’s own experience two years ago, it emerged during a review session for the trust and office accounting subject that most of the graduates in the class did not know what a ‘bank cheque’ is. Less tangible items of professional knowledge might be more challenging to identify and teach.

46 Ibid 30.
B. ‘New’ Methodologies for PLT Scholarship

If PLT teacher practitioners are going to lead research into the scholarship of teaching in PLT, it is important to consider appropriate methodologies. This section outlines potentially appropriate research methodologies, and points to social media (such as Twitter), and qualitative research software, as useful tools for research and scholarship of teaching.

Schön argues that ‘if we want to teach about our “doing”, then we need to observe ourselves in the doing, reflect on what we observe, describe it, and reflect on our description’. 47 This process of ‘reflection-in-action’ and ‘reflection-on-action’ offers opportunities for scholarship in PLT by applying the reflective approach to actions comprising professional legal practices, and actions that comprise teaching of professional legal practices.48 By ‘playing back’ the action, and thinking about the strategies and ‘knowing-in-action’, as theories that inform the performance of the action, it is possible to subject those theories to analysis and critique, and then develop repertoires of professional practices for further performance and testing.49 Schön’s version of action research provides to teacher practitioners a methodology well adapted to the pursuit of scholarship of teaching in PLT, in which teacher practitioners can reflect on their own practice as teachers and as lawyers.50

There are other emergent methodologies, such as narrative inquiry, and auto-ethnography which are well adapted to complement the kind of reflective approach that Schön describes. Narrative inquiry is described as a methodology for ‘studying lived experience’ that can involve a both a ‘mode of knowing’ and a ‘way of thinking about experience’.51 Auto-ethnography can take different forms including, ‘evocative auto-ethnography’ and ‘analytic auto-ethnography’. The latter involves the researcher as a ‘full member’ in the research setting, ‘visible’ through publication, and ‘committed to developing theoretical understandings of broader social phenomena’.52 Anecdotally, those experienced in teaching legal skills learn the value of story-

49 Above n 37, 30.
telling (or “war stories”) as a way of providing real life narratives of ‘how things work’ in practice. By adopting narrative inquiry as a qualitative methodology it is possible to develop scholarship of teaching in a way that is rigorous and accountable, and directed to achieving learning goals.53

Today, academics and practitioners can conduct research, express and exchange ideas, and make cross-disciplinary and cross-jurisdictional connections with others by harnessing social media.54 This can involve discussions that move quickly between, and sometimes blend, professional, scholarly, and personal discourses. Social media is now recognised by qualitative researchers as a fertile source of data for research. Computer-assisted qualitative data analysis software tools (CAQDAS), such as QSR-NVivo10, have been developed to include social media, such as Twitter streams, as sources for research.55 It is now possible to use a range of analytical tools, to transcribe and analyse online discussions between practicing lawyers, teacher practitioners, and academics, toward scholarship of legal practice and scholarship of teaching legal practice skills.56 The opportunity to experiment with emergent methodologies and technologies in PLT teaching scholarship is exciting. However, it is important to remember that our definition of scholarship implies regularity and accountability, as necessary qualities. This leads to a discussion of the ‘problem’ of validity, and performativity, in practitioner research.

C. Problem of ‘Validity’ and ‘Performativity’ in Scholarship

The notions of ‘validity’ and ‘performativity’ are two realities that confront the practitioner. It is unlikely that others will accept the fruit of a teacher’s research if it is not arguably valid. It is also time consuming to initiate, and carry out, practitioner research. The teacher’s employer might not accept that the work should count toward the teacher’s performance of her or his employment obligations, or might be unsupportive if the research does not align with the employer’s notion of validity. Employers may reject exploratory research, if the purpose does not include a ‘business case’ approach. Practitioner research and scholarship is difficult and challenging work by itself, and without organisational support, many opportunities for discovery may be lost.

Schön observes there is a problem with having his type of action research accepted as valid where technical rationality is the primary epistemology underlying institutional arrangements and norms.57 Healy summarises some of the tension underlying the notion of validity:

In common with the other quantitative rational sciences, we need theories of measurement of human variables which satisfy the requirements for scientific measurement. On the other

53 For a recent example of narrative inquiry as a methodology in legal education research, see Peter Jones and Kate Galloway, ‘Professional Transitions in the Academy: A Conversation’ (2012) 10(2) Journal of Transformative Education 90.
54 For example, see Melissa Castan, 64 (and more) Australian legal tweeters (2011) <http://amicaecuriae.com/2011/08/14/64-or-more-australian-legal-tweeters> at 14 December 2012.
56 Such research should comply with ethical and research integrity standards such as the National Statement on Ethical Conduct in Human Research (March 2007), and the Australian Code for the Responsible Conduct of Research (2006), developed by the National Health and Medical Research Council pursuant to National Health and Medical Research Council Act 1992 (Cth) s 13.
57 Ibid 31.
hand, we need substantive theories about the human condition that allow us to examine how the responses that candidates make … are connected with the human attribute under investigation. 58

Healey argues that the ‘improvement of teaching and learning’ [and the development of the ‘status of teaching’] depends on the development of scholarship of teaching; 59 that means exposing teaching to the scrutiny of theoretical perspectives, methods, evidence and results. At least two controversies emerge here: firstly, there are the usual dichotomies of objectivism/subjectivism and qualitative/quantitative methods, and there are arguments about measurement, validity, positivism, and empiricism. 60 These would emerge in a research and scholarship of teaching in PLT, as they do elsewhere in education research. For example, a dilemma arising from these debates concerns the use of randomised controlled trials (RCTs) and systematic reviews in connection with evidence-based approaches to education research. 61 These methods are worth exploring, as part of a quantitative ‘rational’ methodology; however they require significant resources and they are controversial. 62

Secondly, the issue of measurement also attaches to the notion of performativity. As Blackmore has observed ‘policies around standards and best practice now link the social practices of leadership and teaching to indicators of learning outcomes in tighter circles of performativity’ and that the ways in teachers’ effectiveness is measured within a performativa culture are ‘not reflected in their own evaluations of their experiences as practitioners’. 63 It would be unfortunate if individual teachers’ scholarship of teaching is dominated by performance review processes, so that teachers focus their scholarship only on those areas deemed to prove compliance, at the expense of more innovative or problematic problems needing research. 64 For example, in a study by Lynch et al, some respondents described colleagues that pursued scholarship of teaching as having ‘intrinsic or altruistic motives’ that resist ‘organisational agendas’, whilst others chose to concentrate ‘on other more highly rewarded areas of scholarship’. 65 There is a risk if teacher-practitioners do not choose to lead scholarship of teaching, that the exploratory, creative, and innovative approaches to teaching scholarship could be submerged by performative processes, in which teachers satisfy performance indicators by obtaining minimal teaching qualifications, or by only adopting ‘approved’ methodologies. 66

58 Above n 9, 171.
59 Ibid 182.
64 Ibid 108.
65 Lynch et al, above n 29, 226.
66 It may be that state and federal legal professional organisations could encourage innovation, by contributing funding and support to independent practitioner research and scholarship of teaching.
V. Conclusion

This article seeks to encourage discussion around teacher engagement and leadership in scholarship of teaching in PLT, particularly in relation to teacher-practitioner research, and to promote the view that there is scope to expand Australian scholarship of teaching in PLT. It is hoped that by introducing some framing concepts concerning scholarship of teaching, historical issues affecting perceptions of scholarship of teaching in PLT, together with a notion of an organisational epistemology in PLT, future discussions will develop the critical approach to traditional paradigms of teaching scholarship and research. Emergent methodologies and technologies (including social media), adapted for the pursuit of scholarship of teaching in PLT, provide new opportunities for teacher practitioners to lead creative and innovative research and scholarship. Debate regarding organisational epistemologies of teaching scholarship, the validity of varieties of scholarship, and the potential threat to innovative scholarship posed by a performative approach to scholarly work, should be vigorously pursued by PLT teachers, with a view to leading teaching scholarship. The teaching of PLT involves practitioners teaching vocational legal skills used in practice. PLT teachers must lead an Australian research and scholarship of teaching in PLT, because learning leadership is in their hands.
I. INTRODUCTION

Section 138 of the Companies Act 1993 (NZ) provides a defence to an accusation that a company director has breached one or more directors’ duties if certain conditions are met. This provision is set to take on greater significance with the New Zealand government announcing its intention to introduce public enforcement of directors’ duties and to criminalise ‘intentional egregious’ breaches of these duties in line with the approach taken in Australia.3

It has recently been held that s 138 may also provide a defence (or at least ‘afford protection’) in both civil cases and criminal proceedings under such legislation as s 36A of the Financial Reporting Act 1993 (NZ) and s 58 of the Securities Act 1978 (NZ). In the wake of the global financial crisis (‘GFC’), and the resulting spate of corporate collapses since about 2007, this application of s 138 – and indeed the very existence of the provision – have been criticised as allowing directors to avoid thinking for themselves or having to critically analyse advice obtained from outside sources.

This paper examines the defence provided to company directors by s 138 and considers whether it strikes the right balance, places too onerous a burden on directors, or allows the ‘empty-headed’ to inappropriately rely on their ‘pure hearts’.5

II. SECTION 138 OF THE COMPANIES ACT 1993 (NZ) – ‘USE OF INFORMATION AND ADVICE’

Section 138 allows a company director, in certain circumstances, to rely on others who have skills or knowledge that the director does not have. The section reads as follows:

(1) Subject to subsection (2) of this section, a director of a company, when exercising powers or performing duties as a director, may rely on reports, statements, and financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons:

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1 See ss 131-137 of the Companies Act 1993 (NZ).
2 See ‘III Greater Significance?’ below.
6 The equivalent Australian provision is s 189 of the Corporations Act 2001 (Cth). Detailed consideration of the Australian law is beyond the scope of this article. The issue of directors’ reliance on information and advice provided by others has recently been prominent in Australia, following the ‘Centro’ decision, Australian Securities and Investments Commission v Healey (2011) 196 FCR 291. See Philip Crutchfield and Catherine Button, ‘Men Over Board: The Burden of Directors’ Duties in the Wake of the Centro Case’ (2012) 30 Company and Securities Law Journal 83; and Tim Leung and Jon Webster, ‘Directors’ Duties, Financial Literacy and Financial Reporting After Centro’ (2012) 30 Company and Securities Law Journal 100.
(a) An employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned:

(b) A professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person’s professional or expert competence:

(c) Any other director or committee of directors upon which the director did not serve in relation to matters within the director’s or committee’s designated authority.

(2) Subsection (1) of this section applies to a director only if the director –

(a) Acts in good faith; and

(b) Makes proper inquiry where the need for inquiry is indicated by the circumstances; and

(c) Has no knowledge that such reliance is unwarranted.

A. A Defence, Not A Core Duty

Though it appears under the heading ‘Directors’ Duties’, it is clear that s 138 does not constitute one of the core duties of a director. Rather, reliance on information and advice under s 138 may provide a defence to a breach of such duties:

There is no provision in the Act for the consequences of relying on information or advice provided by others. Therefore, rather than constituting one of the core duties of a director, reliance in terms of s 138 might instead be seen as a defence to a breach of a core duty. Prudent directors who are aware that they lack expertise in a particular area may avoid potential liability (for example under s 137) by obtaining the advice of an expert.7

This reflects the way the section has been treated by the New Zealand courts: see Mason v Lewis8 and FXHT Fund Managers Ltd v Oberholster,9 noted below, for example.

B. To Whom Does It Apply?

The duties of directors apply to all those who fit the very broad statutory definition of ‘director’ in s 126 of the Companies Act 1993 (NZ). Section 138, which is stated to be available to ‘a director of a company’ is therefore of interest beyond those persons who are validly appointed to the office of director by a majority vote of shareholders.10

The definition includes any person ‘occupying the position of director … by whatever name called’.11 This has been held to include both a ‘de jure’ director – a person validly appointed; and a ‘de facto’ director – someone who, although not validly appointed, ‘assumes to act as a director. He is held out as a director by the company and claims and purports to be a director’.12


8 [2006] 3 NZLR 225, 237.

9 (2009) 10 NZCLC 264,562, [111].

10 See Susan Watson and Chris Noonan, ‘Defining Directorship’ (2010) 25 Australian Journal of Corporate Law 5, 6, where it is noted that ‘appointment with consent to the position of director is not in fact the defining characteristic of directorship’.

11 Companies Act 1993 (NZ) s 126(1)(a).

The New Zealand Court of Appeal in *Clark v Libra Developments Ltd*\(^{13}\) considered the case of the sole director of a company who had become bankrupt (and thus disqualified from validly acting as a director),\(^{14}\) yet continued to do so in every respect. The court held that, “[d]espite his disqualification and the prohibitions statutorily imposed on him, he was still “occupying” the position”.\(^{15}\)

In *HLH Equity Trading Ltd v White*,\(^{16}\) the court held that the former wife of the sole appointed director of the company in question was not herself a de facto director. Although she played a part in promoting the offer of securities that was the subject of the action, she did not take part in the ‘corporate governance’ of the company, which the court interpreted to mean the undertaking of ‘functions in relation to the company which could properly be discharged only by a director’. She did not make decisions on the company’s behalf, but rather acted ‘as a conduit to pass messages on to’ the appointed director.\(^{17}\)

As well as those ‘occupying the position’, the definition of ‘director’ also includes those known as ‘shadow directors’ and those delegated directors’ powers by the board.\(^{18}\) ‘Shadow directors’ are persons in accordance with whose directions or instructions a person occupying the position of director, or the board of a company as a whole, may be required, or is accustomed, to act. According to Watson and Noonan:

> A shadow director is not like a de facto or de jure director who acts on an equal footing with the directors on the board. Instead, a shadow director is like a superior who instructs or directs the directors. Liability as shadow directors is imposed on persons who will usually not be identified by the company to outsiders as directors and who will usually not assent to the company holding them out as directors.\(^{19}\)

An example of a person being deemed a director by delegation is *Fatupaito v Bates*,\(^{20}\) where a director purportedly appointed the defendant as a receiver but, due to a misunderstanding of the law, no legal appointment occurred. The appointment had the effect of handing over the powers that had previously resided in the board to the purported receiver, which was enough to make him a deemed director and liable as such.

### III. Greater Significance?

Reliance on information and advice as a defence available to directors has not been utilised often in the New Zealand courts to date and, perhaps as a reflection of that lack of use, is not generally discussed in much detail in leading New Zealand company law texts.\(^{21}\)

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13 [2007] 2 NZLR 709.
14 *Companies Act 1993* (NZ) s 151(2)(b).
15 *Clark v Libra Developments Ltd* [2007] 2 NZLR 709, [179].
16 (Unreported, High Court Tauranga, Lang J, 24 May 2010). The case considered the definition of ‘director’ in s 2(1) of the *Securities Act 1978* (NZ), paragraph (a) of which is identical to s 126(1)(a) of the *Companies Act 1993* (NZ). The plaintiff sought to hold the directors personally liable for breaches of the securities legislation.
17 *HLH Equity Trading Ltd v White* (Unreported, High Court Tauranga, Lang J, 24 May 2010), [62], [80], citing *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 183.
18 *Companies Act 1993* (NZ) s 126(1)(b)–(c).
19 Watson and Noonan, above n 10, 22.
20 [2001] 3 NZLR 386.
This could, however, be set to change. The defence is potentially of much more interest to directors following the GFC and resulting recession. In New Zealand, the finance sector has been particularly hard-hit, with an ‘almost complete demise of property finance companies’ in the last three years.\(^22\) As well as more insolvencies almost certainly leading to more directors being held to account, directors also face the prospect of reforms to New Zealand’s securities laws that may increase their exposure to liability.

In February 2011 the Minister of Commerce released a Cabinet Paper recommending reforms to a number of aspects of securities law.\(^23\) Tucked into this set of proposals was a plan to introduce for the first time in New Zealand, public enforcement of company directors’ duties and to criminalise certain breaches of the duties. The paper notes that there are disincentives for companies and shareholders to bring private actions against directors. Companies must balance the expected returns of a successful action against its likely costs; individual shareholders may be dissuaded from bringing a derivative action by the fact that any remedies awarded will go to the company unless the court orders otherwise, and coordination of a group of shareholders to take legal action is difficult.\(^24\)

The paper concludes that the answer is public enforcement and acknowledges that this may discourage some people from becoming directors or, once appointed as directors, discourage them from taking legitimate business risks. It also concludes, however, that:

> [T]here is the potential for substantial harm to individual and public interests from directors breaching their duties, in particular where they are directors of companies that hold substantial assets in a fiduciary capacity for broad groups of outsiders, as in finance companies. Many investors lost much or all of their savings and endured a significant fall in their standard of living as a result of finance company failures.\(^25\)

The Cabinet Paper further opines that criminal liability is appropriate where conduct causes substantial harm to individual or public interests.\(^26\) At present, breaches of directors’ duties in New Zealand may result in civil proceedings only,\(^27\) a situation that has (according to the paper) led to concern about the lack of power available to any regulator to take action against directors for intentional or reckless breaches of their duties.\(^28\) In order to ‘provide a comprehensive range of offences to punish serious offending by directors’,\(^29\) the paper proposes that intentional contraventions of the following duties be criminalised:

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\(^{23}\) See Securities Law Reform, above n 3. The content of the paper is summarised by Peter Fitzsimons above n 22.

\(^{24}\) Securities Law Reform, above n 3, [202]–[203].

\(^{25}\) Ibid, [205].

\(^{26}\) Ibid, [206].

\(^{27}\) There is an offence of being ‘knowingly a party to a company carrying on business with intent to defraud creditors of the company or any other person or for a fraudulent purpose’ in s 380 of the Companies Act 1993 (NZ). This appears to be seldom enforced, perhaps because of the high standard set by the courts for the requisite ‘intent to defraud’: ‘Mere bad faith or immorality or dubious business practices are not sufficient in themselves to sustain the element of criminality required for a conviction’, according to R v Holland-Kearins [1999] DCR 535, 539. See also Re Nimbus Trawling Co. Ltd [1986] 2 NZLR 308, 320, where the equivalent provision in the Companies Act 1955 (NZ) was stated to be ‘not aimed at persons who are blameworthy, irresponsible or even hopelessly optimistic. It is directed against persons who deliberately and knowingly set out to cheat or defraud creditors’.

\(^{28}\) Securities Law Reform, above n 3, [209].

\(^{29}\) Ibid, [210].
The duty to act in good faith and in what a director believes to be the best interests of the company;  
• The duty to avoid carrying on a company’s business in a manner likely to create a substantial risk of serious loss to the company’s creditors;  
• The duty to not incur obligation unless the director believes, on reasonable grounds, that the company will be able to perform them when required to do so.

Intentional breaches of these duties, which are most commonly enforced after a company collapses, amount to ‘intentional egregious behaviour’ in the Minister’s view. He considers that imposing criminal liability in such cases will ensure ‘an appropriate balance between not deterring competent people from becoming directors, but providing a deterrent to dishonest conduct’.  

These proposals bring New Zealand’s corporate enforcement regime closer to that of Australia, where public enforcement is already widely undertaken by the Australian Securities and Investments Commission (‘ASIC’) and criminal sanctions apply to reckless or intentionally dishonest breaches of the directors’ duties to exercise powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose, to not improperly use their position to gain an advantage for themselves or someone else or to cause detriment to the corporation and to not improperly use corporate information to gain such an advantage or cause such detriment. The Australian director’s duty to prevent insolvent trading – broadly similar to ss 135 and 136 of the New Zealand Act – also attracts criminal liability if dishonestly breached. Surprisingly perhaps, the Australian provision allowing directors to rely on information and advice (s 189 of the Corporations Act 2001 (Cth)) appears to have been seldom used. This may be because of the overly rigorous wording of s 189 which requires (in contrast to New Zealand’s ‘proper inquiry where the need for inquiry is indicated by the circumstances’), the arguably more stringent test of ‘independent assessment of the information or advice, having regard to the director’s knowledge of the corporation and the complexity of the structure and operations of the corporation’. In the view of one commentator, this: ‘actually requires directors in every instance to make an independent assessment of the information or advice on which they want to rely’. It is, he continues, more in keeping with the ‘practicalities of corporate governance’ if:

30 Companies Act 1993 (NZ) s 131.  
31 Ibid s 135, entitled ‘Reckless Trading’.  
32 Ibid s 136.  
33 Securities Law Reform, above n 3, [210].  
35 The criminal sanctions are imposed by s 184 of the Corporations Act 2001 (Cth).  
36 Corporations Act 2001 (Cth) s 181.  
37 Ibid s 182.  
38 Ibid s 183.  
39 Ibid s 588G(3). A defence similar to the general defence in s 189 applies to proceedings brought for a contravention of s 588G; see s 588H(3).  
40 The ‘Tables of Statutes Judicially Considered’ in the Australian Corporations and Securities Reports volumes since s 189 was enacted in 1999 (volumes 30 to 81, covering the years 1999 to 2011) show only two cases that refer to the provision – MacDonald v ASIC (2007) 65 ACSR 299 and Re AWB Ltd (2008) 68 ACSR 374. Both cases were procedural in nature and refer to s 189 in passing only. The ‘Section Finding Lists’ for volumes 17 to 29 of the Australian Company Law Cases (1999 to 2011) show no cases at all referring to s 189.  
41 Companies Act 1993 (NZ) s 138(2)(b).  
42 Corporations Act 2001 (Cth) s 189(b)(ii).  
44 Ibid, 253.
[p]rovided one meets the minimum expectations in terms of keeping oneself informed there is scope for appropriate delegation and reliance on that delegation without the constant need for the independent assessment of the received information or advice unless of course matters arose which put you on enquiry.45

IV. SECTION 138 IN THE NEW ZEALAND COURTS

A. Nippon Express

One of the first cases to apply s 138 was Nippon Express (New Zealand) Ltd v Woodward.46 In the course of a company’s liquidation, a creditor sought a contribution towards payment of the company’s debts by its directors on the grounds of a breach of the ‘reckless trading’ duty in s 135 of the Companies Act 1993 (NZ). The defendants played little part in the company’s day-to-day operations, and no part in satisfying the business’s accounting requirements as they had only rudimentary accounting knowledge. Those roles were satisfied by another director, a Mr Harrington.

Mr Harrington falsely represented to the defendants that the company was making a profit and concealed significant company debts from them. Upon becoming aware of these deceptions, the defendants considered shutting down the business but, fearing the loss of funds they had advanced to the company, elected to continue trading. Mr Harrington assured them that there were no other outstanding liabilities when, in fact, the company owed around $170,000 to the plaintiff and over $1 million in total. It appeared that large sums of money were embezzled by Mr Harrington (who, ‘when the game was up … took off for a Caribbean cruise on a luxury liner’).47

The defendants did not actually invoke s 138, but the court noted that it was relevant to the assessment of their conduct for the purposes of s 135.48 It held that they were not derelict until such time as they had ‘manifest indications of Mr Harrington’s dishonesty’. From that point, ‘the most ingenuous of directors must have realised that Mr Harrington simply could not be trusted’:

There is no suggestion that they ever acted otherwise than in good faith. Plainly, however, … the defendants failed to make proper inquiry where the need for it was indicated by the circumstances and they did in fact have knowledge that reliance on Mr Harrington was unwarranted. They may not have wished to recognise that they had been deceived but they must have known that they had been.49

This suggests that directors are entitled to rely upon advice from advisors or fellow-directors until they have reason not to.

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45 Ibid. See also Crutchfield and Button, above n 6, 93. Crutchfield and Button note that s 189 did not assist the defendant directors in the recent ‘Centro’ case, Australian Securities and Investments Commission v Healey (2011) 196 FCR 291, both because they did not meet the ‘independent assessment’ standard, and because the case involved breaches of the duties imposed by Part 5C.1 of the Corporations Act 2001 (Cth). Part 5C.1 deals with the registration of managed investment schemes and imposes duties upon directors of entities that operate such schemes. Section 189 applies only to the general directors’ duties imposed by Part 2D.1 of the Act and by the general law.
48 Ibid, 261,768.
49 Ibid, 261,773-261,774
Mason v Lewis involved a similar set of facts to the Nippon case. It was again claimed (this time by the company’s liquidators) that the defendant directors had breached s 135. The company was formed in 1999 and the defendants (amongst others) were appointed directors. A Mr Grant was appointed ‘manager’, but not director of the company. Early in 2000 a major contract was terminated, thus removing ‘the economic heart of the new venture’. The company was in serious financial trouble from this point.

Mr Grant told the Lewises of the loss of the contract around six weeks later, assuring them that things were ‘under control’ and showed them documents suggesting an ‘upward trend’ in income. However, an accountant (Mrs Rowe), employed to keep the company’s books, prepared a draft set of accounts that indicated a state of trading insolvency.

In late 2000, Mr Grant suggested factoring at last some of debts owing to the company. Mr Lewis, on his personal accountant’s advice, refused to agree. The factoring agreement went ahead however, with Mrs Grant (Mr Grant’s wife) signing as director. The business then ‘simply drifted on until January 2002 … The Lewises simply allowed the affairs of the company to repose in the hands of Mr Grant’. It later became apparent that Mr Grant was dishonest; he had been providing false invoices under the factoring agreement and was convicted of around $1 million worth of fraud.

As in the Nippon case, the defendants did not specifically plead s 138 as a defence, but they did claim that their reliance on Mr Grant and Mrs Rowe should excuse them from liability. Salomon J in the High Court agreed, but the Court of Appeal did not. It held that, ‘as directors the Lewises paid no or no proper attention to the financial affairs of the company’. The fact that they were not made aware of the loss of the company’s biggest client for at least six weeks after the event ‘should have caused the Lewises to be on guard with respect to Mr Grant and his assurances’. However, while that fact – and the entering of the factoring agreement without their agreement – concerned them, they continued to accept Mr Grant’s assertions. The alleged reliance on Mrs Rowe was, according to the court, too limited to provide a defence:

The discussions between Mrs Rowe and Mr Lewis were limited, and there appears to be no conflict that … the company was insolvent – but whether it could trade through that or not was a different issue. Nothing in that evidence precluded the necessity for the Lewises to reach their own informed view on precisely that issue.

The court thus emphasised again that it is not enough for directors to honestly rely on information and advice from others – the reliance must also be reasonable. When there is cause to be ‘on guard’ with respect to the credibility of the advice given, that credibility must be verified by the director. The Mason case also gives some insight into the type of information that may be relied upon under s 138. Bare factual information or opinions, such as that supplied by the accountant Mrs Rowe, cannot be relied upon to defend a decision that requires analysis of such information to ‘reach [the director’s] own informed view’.

C. Goatlands Ltd v Borrell

The latter point was also made in Goatlands Ltd v Borrell. The defendants made an unconditional agreement for the company to purchase a new property. To fund the purchase they needed to sell some of the business’s existing landholdings. They received advice from a real estate agent.
that the rural property market was ‘reasonably buoyant’, and from a solicitor that the risk of the proposed transactions was ‘manageable’. Ultimately, sufficient property was not sold to complete the purchase and the agreement had to be cancelled. The company was later placed into liquidation and the liquidator brought proceedings against the directors alleging breaches of ss 135 and 136 of the *Companies Act 1993* (NZ).

The directors claimed that the advice they had received from the real estate agent and the solicitor was sufficient to give them a complete defence to the liquidator’s claim. The court, however, held that the advice obtained from both was not ‘within the category of advice that might provide a defence’ under s 138. With respect to the real estate agent, the court said:

> In the end … he could only say that the market at that time was ‘reasonably buoyant’ and that, in his opinion, it should be possible to sell the subdivided blocks within three or four months … I do not consider that any reasonable person in the position of Mr and Mrs Borrell would have relied upon [that] opinion as providing any guarantee or assurance that the blocks would sell within three or four months or, for that matter, that they would sell within any given period … [T]he ability to find a buyer for the blocks was subject to many variables, virtually all of which were beyond the control of [the agent] and Mr and Mrs Borrell.69

The same conclusion was reached in relation to the solicitor. He was not the defendants’ regular solicitor and knew very little about their overall financial position. It appears he was not aware that they were committing themselves to a purchase in circumstances where they did not have the present ability to complete it, and therefore did not address alternative strategies.60

**D. FXHT Fund Managers**

The case of *FXHT Fund Managers Ltd v Oberholster*61 confirms that reliance on general, informal and unsubstantiated advice will not satisfy s 138. Directors cannot simply believe without question what they are told by their advisors or fellow-directors. The defendant was a medical practitioner who became a director of a funds management company, although this was outside his area of expertise. He left the company’s management to another director, Mr Hitchinson, who allegedly defrauded the company of several hundred thousand dollars and was being prosecuted for fraud when this case was heard. The company became insolvent and investors lost large amounts of money. The Court of Appeal held that Dr Oberholster had breached both the reckless trading duty in s 135 and the duty of care, diligence and skill in s 137. He claimed that he was entitled to rely on s 138, as he had relied on Mr Hitchinson who appeared to him to be trustworthy.

The court held, however, that Mr Hitchinson’s ‘very informal oral advice’ could not be relied on in Dr Oberholster’s defence:

> [F]or the protection of s 138 to attach, the information the director relies on must be prepared and provided more formally than the very informal oral advice Dr Oberholster was prepared to accept in this case. The section speaks of reliance on reports, statements, financial data and other information. That contemplates proper written documentation … The information passed on to Dr Oberholster by Mr Hitchinson was no more than general and unsubstantiated advice that the investors’ funds were secure, and that the company was operating okay.62

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58 Ibid, [56], [58].
59 Ibid, [92]–[93].
60 Ibid, [102].
62 Ibid, [104].
It is probably fair to say that, until recently, it was assumed that s 138 could only be invoked in relation to the directors’ duties under the *Companies Act 1993* (NZ) and not as a defence to breaches of other legislation such as the *Financial Reporting Act 1993* (NZ). The District Court, however, rejected this argument, as well as the assumption that s 138 is available as a defence only to civil claims and not to criminal prosecutions, in *Ministry of Economic Development v Feeney.*

The defendants were the directors of Feltex Carpets Ltd, a listed company that had recently adopted the New Zealand equivalent to the International Financial Reporting Standards (‘NZIFRS’). In recognition of the complexity of the new standards, the board set up comprehensive processes and procedures to ensure that they were applied correctly. This included the engagement of a financial management team that was, in the words of the company’s principal external accounts advisor:

> both competent and sufficiently well-resourced to generate the sort of management financial information required for a company the size of Feltex … [T]he directors … had every reason to consider that the financial management team that were reporting to them were a competent operation.64

The board also engaged a highly respected accounting firm, Ernst and Young, to provide ongoing advice and assistance with the transition to the new standards. This included a review of the first set of financial statements prepared under those standards. Despite these attempts to ensure compliance, those statements – approved by the board in February 2006 – did not comply with the applicable standards. The directors were charged with breaching s 36A of the *Financial Reporting Act 1993* (NZ), which states that every director of a reporting entity under that Act commits an offence if any financial statement prepared by, or on behalf of, that entity does not comply with any applicable financial reporting standard. The directors did not dispute that the statement in question was faulty, but they claimed that they had, under s 40 of the Act, taken ‘all reasonable and proper steps to ensure that the applicable requirements … would be complied with’, which provides a defence to a charge under s 36A.

The directors submitted that, in assessing whether they had met s 40, they were entitled to rely on s 138 of the *Companies Act*. The court agreed, holding that the two Acts are ‘tied together’:

> There is no suggestion in CA 93 [that is, the *Companies Act 1993* (NZ)] or the FRA [*Financial Reporting Act 1993* (NZ)] that the powers and duties specified in Part 8 are inapplicable to the exercise of powers and the performance of duties under the FRA. On the contrary, as vital requirements concerning corporate financial reporting had been moved from the companies legislation to the FRA, CA 93 and the FRA must be read together to achieve seamless integration of the requirements in CA 93 relating to the management of companies with the specific requirements in the FRA in relation to financial reporting and accounting standards … Section 138 applies ‘when [a director] is exercising powers or performing duties as a director’. Undoubtedly when dealing...
with a statement as referred to in FRA s 36A, the director is exercising powers or performing duties as a director.66

The court’s response to the proposition that the directors ‘should have done it themselves’67 was that it was ‘utterly unrealistic’.68 The directors were not personally required to each have:

[T]he requisite qualifications, expertise and experience to analyse the financial statement from the perspective of the accounting standards and to have reached a conclusion about compliance based on their own judgment … When the proposition … is tested by analysing the way in which the directors would need to have equipped themselves and what they would need to have done it can be seen why the common law developed the principle codified by s 138, that directors are entitled to rely on advice where appropriate conditions are satisfied.69

Thus, the court held that, though Ernst and Young’s IFRS assessment report was ‘completely wrong’,70 the board was entitled to rely upon it under s 138 because their reliance was reasonable in the circumstances.

F. The Finance Company Cases

Davidson v Registrar of Companies71 did not deal with a breach of directors’ duties as such, but an order from the Registrar of Companies to ban a director from being involved in the management of companies under s 385 of the Companies Act 1993 (NZ).72 Mr Davidson, the director in question, appealed against the order on the grounds that it would not be just nor equitable for him to be banned.

The case concerned the Bridgecorp group of finance companies that collapsed in mid-2007. Mr Davidson was chairman of the group’s parent company. The group’s directors were charged under the Securities Act 1978 (NZ) for approving two prospectuses that included untrue statements73 (including failing to disclose that the company had already missed several interest and principal payments that were due to investors and failing to properly account for several related-party transactions, which obscured the fact that the group was ‘in survival mode’).74

Mr Davidson did not raise s 138 in his defence but both the Registrar and the court considered it. He claimed that he relied on the other directors and lower level managers when it came to accounting and financial issues. As a commercial lawyer rather than an accountant, he thought

66 Ibid, [37]–[38]. Support for this interpretation appears in the report of the New Zealand Law Commission that preceded the enactment of the 1993 company law reform package, including both the Companies Act 1993 (NZ) and the Financial Reporting Act 1993 (NZ). That report recommended that ‘[t]he new Companies Act should be concerned with the formation, operation and termination of all companies. It should contain the basic law applicable by reason of shared principle to all companies. Legal requirements not derived from those shared principles or applicable only to some companies (for example to listed companies) should be imposed through specific legislation and rules superimposed upon the general company law base’; The Law Commission (NZ), Report No. 9: Company Law Reform and Restatement, NZLC R9 (1989), [67].
68 Ibid.
69 Ibid, [142]–[143].
70 Ibid, [180].
72 That section applies when a company has (inter alia) been put into liquidation because of inability to pay its debts, and the Registrar is satisfied that the manner in which the company’s affairs were managed was wholly or partly responsible for the company being in that state of insolvency. In such a case, the Registrar may, by notice in writing to a person who was, within the preceding five years, a director or manager of the company, prohibit that person from taking part in the management of a company for a period not exceeding five years.
74 Davidson v Registrar of Companies [2011] 1 NZLR 542, 551.
it best to rely on others ‘who were better qualified’. It stated that, as the group’s financial position worsened, the board relied on assurances ‘that performance was in line with budgets, suggesting either that the board did not receive orthodox monthly management accounts or that he did not read them’.

Counsel for the Registrar summarised Mr Davidson’s case as follows: he said, ‘I didn’t know, I didn’t know, I didn’t know’ … Mr Davidson did not say this company was not mismanaged. He said that it was mismanaged ‘but I am not personally responsible for the mismanagement’. The court’s rather damning conclusion was that:

Mr Davidson was not fully qualified for the office that he held … A director must understand the fundamentals of the business, monitor performance and review financial statements regularly. It follows that a degree of financial literacy is required of any director of a finance company. Without it, Mr Davidson could scarcely understand the business, let alone contribute to policy decisions affecting risk management and monitor the company’s performance, yet his presence and reputation might encourage investors to believe that the group was well managed.

The approach taken in the Davidson case has been upheld in other cases dealing with breaches of securities law by finance company directors. In R v Moses, the court held that:

[I]t is axiomatic that a director of a finance company will be assumed to have the ability to read and understand financial statements and the way in which assets and liabilities are classified … That approach is consistent with the terms of … s 138 of the Companies Act 1993. [Section 138] envisage[s] the possibility of the need for further inquiry by a director on the basis of information already held or incomplete information on which further explanation is required. The protection afforded by … s 138 will be forfeited if appropriate inquiry is not made.

It was later argued in R v Graham – a case widely discussed in the media due to the fact that two of the defendant directors were former New Zealand Ministers of Justice – that the standard applied in the earlier cases was too restrictive, in that it required directors to carry out detailed analyses that was more appropriately left to lower-level managers. The court rejected that argument:

Whilst each situation is fact-specific, any circumstances that would lead a reasonable finance company director to question the reliability of what he or she is told triggers an obligation to make further inquiry and therefore brings to an end the entitlement of a director to rely on the information provided to him or her on a particular topic. [Section 138 cannot] be read in a way that would relieve a director of the obligation to check on the competence of a delegate, in any circumstances where a signal occurs that would put a reasonable director on notice of the need to do so.

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75 Ibid, 569.
76 Ibid, 569–570.
78 Australian Securities and Investments Commission v Adler (2002) 41 ACSR 72, [372].
79 Davidson v Registrar of Companies [2011] 1 NZLR 542, 570.
81 Ibid, [83], [86].
83 The Rt Hon Sir Douglas Graham, Minister of Justice 1990 to 1999, Attorney General 1997 to 1999; and the Hon William Jeffries, Minister of Justice 1989 to 1990. Sir Douglas was the minister responsible for the major company law and financial reporting reforms of 1993.
84 R v Graham [2012] NZCCLR 6, [33]–[35].
G. Reaction To The Cases

As noted above, until recently the defence provided by s 138 has provoked little comment from academics and other commentators. However, recent corporate collapses have provoked some criticism of the provision, particularly in the aftermath of cases like the ‘Feltex decision’, *Ministry of Economic Development v Feeney*.85 

Burrowes and Karayan,86 accounting professors at Woodbury University, California, compare the decision to the infamous *Enron* case in the United States.87 They claim that the application of s 138 in *MED v Feeney* allows directors to avoid thinking for themselves or having to critically analyse advice obtained from outside experts. They characterise s 138 as representing an ‘empty head, pure heart’ doctrine:

This rule excused both boards [Enron and Feltex] for their putative failures to fulfill their corporate governance responsibilities relating to the sufficiency of the firms’ financial statements … As in *Enron*, the Feltex board was shielded from liability for failing critically to examine Feltex’s inconsistent and imprecise financial reports by virtue of having relied on a large international firm of accountants to do the thinking for them.88

In a similar vein are comments of New Zealand Shareholders’ Association Chairman John Hawkins:

If directors can rely entirely on outside advisors then that begs the question of why directors have to be paid so well for exercising their judgment.89

Though not referring to the *Feeney* case or s 138 in particular, Mark Thomas of Chartered Secretaries New Zealand Inc. notes that the boards of large companies such as Feltex ‘often tend to be large and unwieldy’90 which can lead to:

[S]ocial loafing and a sense of ‘Oh well, It’s not my responsibility’ … to the point that you wonder how and why directors are appointed … It is a given that board members need to be able to ask the hard questions and rigorously examine and interpret the information on hand [and] pose the questions around vital information that is not being presented – either by omission or commission.91

On the other hand, there are those who fear that the wording of s 138 and its treatment by the courts are likely to unfairly punish directors. In the period immediately following the enactment of the 1993 reform package, Shirtcliffe was troubled by s 138(2):

[W]hich says that I can only rely on these persons [listed in s 138(1)] if I have no knowledge that such reliance is unwarranted. What does this mean? … Does it mean I have to be completely certain that the person is up to the job? Or will courts sensibly qualify this obligation so that my duty is just that the outcome of my inquiries, if put on notice, must, after having balanced up the risks, reassure me?

86 Burrowes and Karayan, above n 5.
87 *Skilling v United States*, 561 US, No. 08-1394 (2010).
88 Burrowes and Karayan, above n 5, 406.
91 Ibid.
Here we come to the crux of the issue: I do not know what these positive obligations mean – or what a court will later interpret them to mean. The only prudent response is to oversee and second-guess management.92

Most scathing was the comment on the *Feeney* case by commercial lawyer and former member of the Securities Commission and ACT93 Member of Parliament, Stephen Franks. Franks condemns the court’s decision that the s 138 defence only applies as long as trust in the advisor is warranted and there are no reasons to suspect that the reliance may be misplaced:

[The court’s words] no doubt seem reasonable to lawyers, sitting in comfortable hindsight. But most business decisions are made under uncertainty … [They] are necessarily judgments which balance the cost and practicality of getting better information against the costs and losses from delay, including loss of opportunity.

In practice there are also frequently ‘reasons to suspect that [the trust] may be misplaced’. A director works with the material given. One often has ‘reason to suspect’ that the people on whom one is relying are less than optimum. Some will be learning on the job, and making the mistakes that we all must make. Others will be known to be out of their depth, but retained because they are the devil we know, and in a tight labour market they are better than no one. Some may even be being ‘managed out’ because labour law says they cannot be dismissed. So the ‘no reason to suspect’ qualification … is weasel words … drawn from the sanctimonious phrasing of section 138 of the *Companies Act*.94

These sharply different interpretations of the section and its application lead one to question – does s 138 allow the ‘empty-headed’ to avoid their rightful responsibilities on the grounds of a ‘pure heart’?95 Does it not allow for the inherent uncertainties of real-life business by requiring of directors an unrealistic level of confidence in their advisors before they make use of the provision? Or does it strike the right balance somewhere in between?

V. CONCLUSION

A useful starting point in assessing whether s 138 of the *Companies Act 1993* (NZ) sets an appropriate standard is to summarise the principles arising from the New Zealand cases that consider the section. These principles should provide comfort for those on both sides of the debate noted above. ‘Empty-headedness’ is precluded by the requirements that directors may rely upon advice from advisors or fellow-directors only until (or unless) they have reason not to,96 that further analysis of advice is required when such analysis is necessary for a director to reach an informed decision,97 and that only substantiated documentation may be relied on, rather than just vague verbal assurances that things are operating acceptably.98

But neither are the requirements of the defence too onerous on directors. The cases confirm that directors are not necessarily expected to personally have all of the knowledge and expertise

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93 A small New Zealand political party that, according to its website, ‘stands … for individual freedom and personal responsibility. For smaller and limited government … for private property rights, free markets, choice and competition, low and flat tax’: <http://www.act.org.nz/news/statement-from-hon-rodney-hide>.  
95 Burrowes and Karayan above n 5.  
97 *Mason v Lewis* [2006] 3 NZLR 225; *Goatlands Ltd v Borrell* (2006) 3 NZCCLR 726.  
required to govern the company without recourse to outside advise (unless, of course, a particular area of knowledge is vital to their role as director of the company in question).  In the new era of publically enforced directors’ duties and potential criminal liability in New Zealand, the availability of s 138 to protect against both civil claims and criminal prosecutions, whether brought pursuant to companies’ legislation or other provisions dealing with directors’ duties and responsibilities, will also reassure directors.


THE IMPORTANCE OF THE LOCAL IN A GLOBAL AGE: ANALYSIS OF NETWORKING STRATEGIES IN POSTGRADUATE LAW RESEARCH LEARNING

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ABSTRACT

Research indicates that postgraduate research students, and particularly those researching in law, feel isolated socially and academically from one another, and from scholarly life. Postgraduate research students are now more globally connected because of technology. Yet opportunities to connect with colleagues locally, to share and reflect on research findings, methods and experiences are insufficient. This paper reports on the preliminary stages of a project led by legal and criminological scholars to establish a postgraduate student network that is interdisciplinary, interfaculty and cross institutional in structure with a specific focus on ‘crim*’ related studies including criminology, criminal law and criminal justice. The primary objective of the Network is to enhance student engagement with research cultures within and beyond their own faculties. The paper begins by considering the pedagogical issues around developing such a Network. An absence of research on postgraduate research pedagogy is noted, particularly research on group-based learning strategies. Drawing on existing educational literature, the authors identify six pedagogical grounds that may inform development of the Network: (i) skills acquisition, (ii) perseverance to completion, (iii) as adjunct to supervision, (iv) an additional site for learning, (v) socialisation and identity formation, and (vi) countering the disciplinary isolation and methodological limitations of the law. The second half of the paper reaches beyond the pedagogical literature and presents a survey of existing postgraduate research group strategies locally and internationally, particularly those directed at the learning needs of crim* students more specifically. The authors conclude that developing a crim* group that is pedagogically sound requires a reconceptualization of the broader pedagogical and institutional framing of postgraduate research education (particularly in law).

I. INTRODUCTION

Educational research indicates that the pedagogy of postgraduate research (PGR) education has traditionally been under-theorised, having been largely conceived of as a horizontal, insular and binary process, grounded in a master-apprentice model shaped by the supervisor-candidate relationship. Ultimately, PGR education has tended to emphasise learning through an independent research process culminating in production of ‘the’ dissertation.¹ Recent policy shifts in higher education, seemingly, have not disrupted this dominant model of PGR education, but instead have arguably intensified demands on productivity, transparency and accountability, which further reify this narrow conception.² This traditional and narrow approach to PGR education problematises the pedagogy of PGR learning and suggests a need to invigorate PGR

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² For a discussion of the PhD in the context of these recent policy shifts, see for example Ruth Neumann, ‘Policy Driving Change in Doctoral Education’ in David Boud & Alison Lee (eds) Changing Practices of Doctoral Education (Routledge, 2009) 210-224.
learning in a way that continues to encourage autonomous learning but which concurrently creates alternative learning spaces to account for different spatial and relational contexts for learning, especially through collaborative and peer-based learning opportunities.

This paper argues that a PGR student group or network offers an important pedagogical pathway for enhancing PGR learning, one that we suggest can be informed and shaped by six key pedagogical considerations. The first three fit within the traditionally narrow conceptualisation of PGR education, satisfying the goals of: (i) skills development; (ii) perseverance to completion of the dissertation; and (iii) supporting the supervisor relationship. The latter three reflect a broadened pedagogical framework for PGR education directed at: (iv) creating rich opportunities for peer learning; (v) creating an alternative space and relationships for learning, socialisation and identity formation; and (vi) countering the professionalism, authority and isolation of the legal discipline.

II. Goals and Pedagogy of Postgraduate Research Education

Clearly, the pedagogy of PGR training must reflect and promote the aims and objectives of such education. In Australia, recent policy statements have emphasised that PGR learning should be directed towards the dual objectives of knowledge acquisition and skill development. The dissertation is viewed as the final ‘tangible’ product of PGR training, but the actual process of completion and the skills that must necessarily be developed in such a process are also core outcomes of PGR education. Undoubtedly PGR requires critical engagement with a complex field of learning and development of research skills ‘for the advancement of learning and/or for professional practice.’ However, best practice suggests that PGR training should also be directed towards development of generic skills that aim to ‘extend the capabilities’ of a PGR graduate ‘as a person who is employable, can work well with others and can contribute beyond the area of their immediate research training.’ Generic skills should provide graduates with the tools ‘required to [not only] achieve the timely completion of the degree’ but also the skills required for ‘employment in knowledge industries and further career development.’ In other words, PGR pedagogy should at least be directed towards: (i) attainment of complex understandings of a specialised field of knowledge; (ii) development of research-based skills including strong analytical skills; and (iii) readiness for employability. These three objectives inevitably overlap and interact to shape one another.

Against this institutional view of what PGR training should achieve, two key questions then arise in making decisions around how the PGR experience should be shaped to achieve such outcomes. The first is what specific skills should PGR students attain in their degree; and the second is how should the PGR process be shaped to permit the requisite knowledge and skills acquisition? This second question requires us to think about what learning spaces might complement the traditional supervisor-candidate relationship to better achieve the goals and outcomes expected of PGR training.

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4 Australian Qualifications Framework, above n 3 at 18.

5 Council of Australian Deans and Directors of Graduate Studies, above n 3 at 4.

6 Ibid.

7 Ibid.
A. Skills Acquisition

The Australian Qualifications Framework identifies a suite of skills to be developed in the PGR student. This includes cognitive skills that demonstrate the student’s ability to both acquire an expert understanding of theoretical knowledge and critically evaluate such knowledge and practice through systematic investigation, and which ultimately enables the student to generate original knowledge. The PGR student should also develop ‘expert technical and creative skills applicable to the field of work or learning’ which permit the candidate to ‘design, implement, analyse, theorise and communicate research that makes a significant and original contribution to knowledge and/or professional practice.’ Moreover, the development of communication skills are also viewed as important ‘to explain and critique theoretical propositions, methodologies and conclusions’ and to cogently present original research and its findings to peers and the community at an internationally recognised standard. Development of these skills is not only essential to enable the candidate to undertake discipline-specific research activity but ‘are [also] key capacities when it comes to gaining and keeping employment.’

B. The Process

As indicated, key to pedagogical decisions in shaping PGR training is a consideration of how the candidate-supervisor relationship can be complemented by other effective learning spaces. This question gives rise to two further considerations; first, what role should formal programs such as coursework play in PGR education? Secondly, what role might there be for less formal learning spaces within the PGR process?

In so far as coursework is concerned, the Council of Australian Deans and Directors of Graduate Studies in its Framework for Best Practice in Doctoral Research Education in Australia (DDOCGS Framework) states that ‘within a doctorate [coursework] should be for the purpose of research education whether this be for making a significant contribution to knowledge for the discipline or a profession/professional practice.’

The importance and potential role of coursework in PGR education has been recognised by scholars and educators. Numerous considerations arise in relationship to coursework offerings including, for example, questions of content, timing of offerings and the purpose of the program. It is beyond the scope of the current discussion to answer these questions however, the need to consider how formal coursework and other programs might interact with informal learning spaces, must be noted. The DDOGS Framework in describing the ‘research environment’ of a best practice program states that ‘candidates should have an open, collegial and productive learning environment including a coordinated program of activity to integrate them into their university and faculty, school and/or department.’ Moreover, the framework highlights that ‘cohort or research group activities are particularly appropriate for integrating candidates into the research environment of their university and faculty, school and/or department.’ It is noted that such group activities ‘can be offered across discipline groups’ providing ‘research students

8 Australian Qualifications Framework, above n 3.
9 Ibid at 62.
10 Ibid at 62.
11 Ibid.
13 Council of Australian Deans and Directors of Graduate Studies, above n 3 at 2.
14 See for example B Evans, ‘Doctoral Education in Australia’ in S Powell and H Green (eds), The Doctorate Worldwide (Open University Press, 2007) 105; Neumann, above n 2 at 210.
15 Council of Australian Deans and Directors of Graduate Studies, above n 3 at 4.
16 Ibid.
[with] the opportunity for effective networking opportunities with an expanded group of peers and more “senior” students.'17

Accordingly, less formal learning spaces can be utilised to create such networking opportunities and facilitate socialisation of the PGR student to the research environment. Nettles and Millet (2006) argue that socialisation is a core aspect of doctoral education for students and institutions:

[b]ecause student socialization contributes to students’ performance, satisfaction, and success in doctoral programs. Socialization is also important because the movement to faculty renewal and replacement over the next decade will most likely bring a new focus on issues of faculty recruitment, retention, productivity, and satisfaction. These are all outcomes subsumed in the broad concept of doctoral student socialization - generally, the process by which students acquire the attitudes, beliefs, values, and skills needed to participate effectively in the organized activities of their profession.18

Accordingly, a carefully constructed postgraduate student group can complement the supervisor-student relationship to assist in knowledge and acquisition of critical research skills but importantly may also serve as a platform to equip the PGR student with the skills necessary to function as a productive member of their profession and compete successfully within the employment market place. In order to ensure the group successfully creates pedagogically-informed learning spaces and relations that are at the same time specifically responsive to the aims and objectives of PGR education, a nuanced consideration should specifically be given at the outset to the dynamics between students, the hosting institution/s and the broader academic terrain in developing the group’s organisational structure, governance and activities.

III. EXISTING PGR GROUPS – LESSONS LEARNT

Educational literature and the policy framework that shapes PGR training in Australia point to the role that PGR groups might play in higher research education and the considerations that should shape their development. Additionally we argue that pedagogical decisions that shape this learning pathway should be informed by and draw on the lessons learnt from existing models of such groups. Accordingly, we identified and surveyed existing PGR groups operating within Australia and overseas. Given that our goal is to develop a specific space for exchange on “crim*” related studies including criminology, criminal law and criminal justice we focused in particular on established groups directed at the learning needs of crim* students. Our survey of these groups examined the extent to which and manner in which their structure, governance and activities were influenced by pedagogical considerations.

A. The Methodology

We took a two-pronged approach in researching existing PGR groups. First, we examined the literature for discussion of pedagogical issues in development and use of PGR groups. This method revealed only four PGR groups19 each with a clear institutional and pedagogical

19 Australian Law Postgraduate Network (Australia-wide) (‘ALPN’), The Australian Postgraduate Writing Network (Australia-wide) (‘APWN’), Graduate Researchers in Print (Monash University, Faculty of Arts) (‘GRiP’), Thesis Writing Circle (La Trobe University, Humanities and Social Sciences)
framework, but it did not capture student-led groups or groups of a more organic nature. This methodology also did not necessarily indicate whether groups were currently active. Accordingly, the second approach we took was to engage in web-based searching to locate the webpages of PGR groups. We found an additional 17 groups in this way. This second approach identified groups which were more likely to be student-led, informal, and with no explicit pedagogical framework.

Our research confirmed that consistent with an absence of scholarship on PGR pedagogy, there is also an absence of readily-available data on and analysis of the use of existing PGR groups. Clearly, more research and scholarship is needed around the use and value of PGR groups, including relevant empirical research that can inform and help shape the development of such learning pathways.


21 We limited the PGR groups we searched for in three ways; first, to groups consisting exclusively or primarily of postgraduate research students, thereby excluding a number of reading groups and colloquia/forums (notably in the United States, such as the Harvard Legal Theory Forum and the Washington State University Criminology Reading Group) that specifically include staff and students in their membership. Secondly, we focused on groups that were ‘extracurricular’ in the sense that they did not form part of an assessable unit of study (for a discussion of one such course see Carney, above n 1). Thirdly, we limited our search to those groups which were ongoing and extended beyond a one-off event.

22 Birkbeck Reading Groups (University of London, School of Law, Birkbeck), CompleMED (University of Western Sydney, Centre for Complementary Medicine Research), CRG Postgraduate Research Group (Curtin University, Creativity Research Group), Criminology and Criminal Justice Postgraduate Research Group (University of Edinburgh, School of Law), The Criminology Research Students’ Discussion and Reading Group (University of Oxford, School of Law), Critical Studies Research Group (University of Brighton, Faculty of Arts, School of Humanities), Europa Postgrad Reading Group (Europa Institute, University of Edinburgh), Higher Degree Research Law Commons Initiative (Australian National University, College of Law), Humanities Postgraduate Connections Student Group (University of Southampton, School of Humanities), Sydney Law School Postgraduate Students Committee (University of Sydney, Sydney Law School), Graduate Research Reading and Discussion Groups (University of Melbourne, School of Historical and Philosophical Studies), PGR Crim* Discussion Group (University of Sydney, Sydney Law School), Postgraduate Research Group (University of Warwick, Film and Television Studies), SCCSSR Postgraduate Network (University of Glasgow, Scottish Center for Chinese Social Science Research), Sydney Health Policy Network - Postgraduate Special Interest Group (Menzies Centre for Health Policy), UC Irvine Center in Law, Society and Culture Student Group (University of California, Irvine, Center in Law, Society and Culture), University of Southampton School of Humanities Reading Groups (University of Southampton, School of Humanities).

23 This is particularly so as neither literature review nor web searching will capture groups that are extremely informal and organic in their nature (for example a group of PGR colleagues who start up a writing group or a reading group through ‘word of mouth’). Moreover, neither of these methods will necessarily indicate the current usage of the group by PGR students. As well as the inclusion of this empirical data in pedagogical scholarship, there is also a need for documentation and sharing both within and across institutions, of the knowledge possessed by students operating or involved with PGR groups. PGR students are a relatively transient student population so there is a risk not only of PGR groups coming and going but also of losing valuable knowledge and experiences about the operation of PGR groups, which could benefit other PGR students.
We engaged in a qualitative thematic analysis of the information we located relating to 21 existing PGR groups. The themes included in our analysis were those that emerged from our literature review on PGR pedagogy. Accordingly, we first examined how the structure of the groups can shape pedagogical outcomes by examining the groups’ disciplinary focus, geographical scope, types of activities, online interaction, and membership/target group. We discuss these findings in Part C below. Secondly we analysed the groups by reference to the six pedagogical bases we identified above as being relevant to shaping such a learning strategy, namely skills development, perseverance to completion, adjunct to supervision, the creation of new learning spaces, socialisation and identity formation, and countering the professionalism, authority and isolation of the legal discipline. We discuss this facet of our analysis in Part IV.

C. The Structures of Existing PGR Groups

The pedagogical literature suggests the following structural features may impact on learning outcomes.

1. Discipline

We located only one PGR crim* group in Australia: the PGR Crim* Discussion Group which operates out of the University of Sydney and is open to all University of Sydney PG students. We found two PGR criminology groups in the UK operating out of two different law schools: the Criminology and Criminal Justice Postgraduate Research Group (University of Edinburgh, School of Law) and the Criminology Research Students’ Discussion and Reading Group (University of Oxford, School of Law). Aside from these three crim* specific groups, eleven groups were located within the humanities disciplines and five were located in the discipline of law. The relatively low number of PGR groups confirms our earlier observation that institutionally, PGR programs remain centred on the supervisor and student relationship. The even smaller number of law PGR groups compared to those in the humanities might reflect the particular idiosyncrasies of legal research (particularly doctrinal research).

2. Geographical Scope

The majority of the groups were university specific and operated out of, and for, students in a single institution. The exceptions were two nation-wide groups, which emerged from grants funded by the Australian Teaching and Learning Council. All of the student-led groups were

24 APWN, CRG Postgraduate Research Group (Curtin University), GRiP, Critical Studies Research Group (University of Brighton, Faculty of Arts, School of Humanities), Europa Postgrad Reading Group (Europa Institute, University of Edinburgh), Humanities Postgraduate Connections Student Group (University of Southampton, School of Humanities), Graduate Research Reading and Discussion Groups (University of Melbourne, School of Historical and Philosophical Studies), Postgraduate Research Group (University of Warwick, Film and Television Studies), SCCSSR Postgraduate Network (University of Glasgow, Scottish Center for Chinese Social Science Research), Thesis Writing Circle, University of Southampton School of Humanities Reading Groups (University of Southampton, School of Humanities).

25 APLN, Birkbeck Reading Groups (University of London, School of Law, Birkbeck), Higher Degree Research Law Commons Initiative (Australian National University, College of Law), Sydney Law School Postgraduate Students Committee (University of Sydney, Sydney Law School), UC Irvine Center in Law, Society and Culture Student Group (University of California, Irvine, Center in Law, Society and Culture).

26 For a discussion of these idiosyncrasies and a critique of how these might impact on the PGR experience, see Desmond Manderson, ‘Law: The Search for Community’ (2002) 26(74) Journal of Australian Studies 147.

27 The Australian Law Postgraduate Network and the Australian Postgraduate Writers Network.
confined to one specific university faculty. This raises questions about the absence of inter-university groups, particularly in a purportedly ‘global’ and ‘connected’ era and a university climate that encourages academics to develop funded research projects that include members from a variety of institutions. One possible reason might be that to the extent PGR groups serve to address social isolation, students have a preference for face-to-face contact at a local level so they can interact with those students with whom they usually work side-by-side. Yet, our personal experience as participants and organisers of postgraduate research student conferences suggests that PGR students actually value opportunities to engage with students from other institutions. The success of a PGR group with a broader geographical basis than those currently operating might hinge on factors such as: institutional support across universities, financial support to encourage students from other institutions to participate, shifting the location of meetings to give a sense of shared ownership of the group, and governance structures that enable democratic participation across institutions. Success might also hinge on the online content and online opportunities for engagement, as discussed further below.

3. Activities
The majority of the groups were structured around general meetings, for example, discussion groups or reading groups with no specific skills-based component. The groups that did have a skills-based component were focused predominantly on writing or presenting. The groups with a writing skills component seemed generally to have a strong institutional framework and were led or supported by academics, suggesting that the nature of the activities engaged in by such groups coincides with the level of institutional involvement. This in turn raises questions about whether the lack of writing skills-based activities in the student-led groups is a reflection of a lack of student need, or rather whether it indicates what PGR students have the time, knowledge and resources to organise. A further question that arises is: if structured skills-based activities necessarily coincide with greater academic involvement, how then does this impact on the relational dynamics underpinning various pedagogical aims?

4. Online Dimension
For an overwhelming majority of the PGR groups identified, the online content was limited to information related to upcoming face-to-face events and did not extend to opportunities for online interaction such as blogs or Skype meetings. This was an interesting finding given the growth in eLearning generally in coursework and the growing use of social media in society more generally. Students may prefer face-to-face contact because their very isolation is derived from independent computer-based research, or it might be that face-to-face verbal contact might not be as burdensome as textual engagement given the time already spent writing the dissertation. It might also be that because the majority of groups are within the one faculty or institution, remote, online contact might not be as necessary were groups inter-university in character. Yet on the other hand, online content might still benefit those PGR students who are not situated on campus (for example, due to part-time status, caring responsibilities or geographical distance).

The transience of PGR student populations and the time demands required to update and maintain a website might be disincentives to developing an interactive online component. There

28 Four skills-based components were identified: writing (APWN; GriP; Thesis Writing Circle); presenting (CompleMED Postgraduate Forums; Criminology and Criminal Justice Postgraduate Research Group, Edinburgh University; Critical Studies Research Group; Europa Postgrad Reading Group; PGR Crim* Discussion Group; Postgraduate Research Group); conference organising (Humanities Postgraduate Connections Student Group, The Criminology Research Students’ Discussion and Reading Group; Sydney Law School Postgraduate Research Students Committee); and grant applications (UC Irvine Center in Law, Society and Culture Student Group). Some groups involved multiple skill-based components.

29 The only two groups that did have rather detailed online dimensions were the ALPN and the APWN. The ALPN’s content was non-interactive and outdated; the APWN has some more recent blog posts.
is the risk that an out-dated or unused website could deter new PGR students from participating in the group by suggesting the stagnancy of the group and betraying an active and vibrant community. Many of the sites we found that did contain some form of updated content, including informational content on events, were out of date, with the most recent posts being up to three years old.

5. Membership

The groups were split in relation to membership – some exclusively involved PGR students whereas others involved PGR and postgraduate coursework students (PGC students). This raises questions around the difference in experiences, needs and research interests between these two groups of students. Our own experience suggests that PGR students, by very dint of the depth, intensity and duration of their research tend to have more of an interest in reflecting on research methods, use of theory and research experiences and processes compared to PGC students.

Other issues raised by the data relate to how membership can impact on the operation and sustainability of a group. As mentioned earlier, PGR students are a relatively transient group whose spare time might fluctuate depending on their stage of candidature and other academic work and activities they are engaged in. Some groups require a commitment from participants, whereas others acknowledge the shifting levels of commitment by students. Consideration should also be given to how membership can be established and maintained in a group that is as diverse as the PGR student body. This consideration might impact choices in the group’s organisational structure, activities and meeting places; some of which may have to evolve as the needs of its members change. In order to ensure the needs of members are being met, ongoing consultation with the PGR student body would ideally occur periodically.

IV. THE PEDAGOGICAL BASIS OF PGR GROUPS

Deciding where a PGR student group fits in the pedagogical terrain is important not only because of the potential of the group to be a catalyst for a rethinking of PGR education, but also because the group’s ultimate success will depend in part on institutional support and hence requires recognition at the institutional level. Where the institution remains fixed on a narrow

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30 For example, Brien and Webb flag the risk of online content becoming a grave to a failed community: Donna Lee Brien and Jen Webb, ‘The Australian Postgraduate Writing Network: Developing a Collaborative Learning Environment for Higher Degree Students and Their Supervisors’ in D Orr et al (eds), Lifelong learning: Reflecting on Successes and Framing Futures: Keynote and Refereed Papers from the 5th International Lifelong Learning Conference, Yeppoon, Central Queensland, Australia, 16-19 June 2008 (Central Queensland University Press, 2008) 79, 82-83.

31 The Graduate Researchers in Print group requires students to commit writing a complete draft of a journal article. In comparison, the website for the Graduate Reading and Research Discussion Groups states that: ‘Some groups persist for decades; others wax and wane with shifting student interests’: School of Historical and Philosophical Studies, Graduate Reading and Research Discussion Groups (21 June 2012) University of Melbourne <http://history.unimelb.edu.au/students/postgraduate/reading-discussion-groups.html>

32 For a specific flagging of these concerns in the international student context, see Sara Cotterall, “Doctoral Pedagogy: What Do International PhD Students in Australia Think About It?” (2011) 19(2) Pertanika Journal of Social Science and Humanities 521, 528-529. For a more general discussion of some of the issues facing first-generation PhD students, who might also be from racially disadvantaged or non-upper/middle class backgrounds, see Susan K Gardner and Karri A Holley “‘Those Invisible Barriers Are Real’: The Progression of First-Generation Students Through Doctoral Education” (2011) 44(1) Equity & Excellence in Education 77.
conception of PGR education, a group might ultimately never achieve its maximum potential because it remains incomprehensible or marginalised on a formal, institutional level. 33

The PGR students we identified above were examined to see how the aims and operation of the groups might be linked to the pedagogy of PGR more generally. As noted earlier, the groups’ aims and methods of operation (as self-described on their websites) were analysed by reference to six pedagogical goals.

A. Critical Skills Development

Nearly three-quarters of the groups expressed themselves as being directed towards encouraging and facilitating critical response and/or discussion. 34 Unsurprisingly, in several groups this was linked to student presentation of work or ideas – for example, it was common for the group to be structured around a student presentation followed by critical discussion of the presentation, or simply a discussion about a text or piece of research. Groups typically stated their purpose was, for example, to ‘provide postgraduates with an excellent opportunity to share and discuss their research and ideas’. 35 Despite a prominent focus in the academic literature on the role of PGR groups in developing the writing ability of students, 36 only four groups explicitly proclaimed themselves as aimed at developing writing skills. 37 As noted above, two of these groups appeared to be led by individual academics with a particular interest in this area. 38 Only one group, the Australian Law Postgraduate Network (ALPN), appeared not to be focused on critical skills development. While this group had a comprehensive online presence, it offered no opportunity for face-to-face interaction.

B. Support to Completion and Supplementing Supervision

It is widely recognised that a major factor hindering completion of a postgraduate dissertation is social isolation, 39 and this is particularly the case for researchers in the humanities. 40 All the groups self-described as having the goal of provision of social and peer support for PGR students. This seems to bear out the fact that PGR groups are predominantly discussed in the academic literature (aside from skills-specific groups) for their role in combatting social isolation or offering peer support. 41 For example, the Centre for Complementary Medicine Research at the University of Western Sydney describes its postgraduate forums as being ‘great for networking, providing support for peers and receiving constructive feedback.’ 42

33 For example, Devenish et al note in relation to a postgraduate research students’ group the imbalance between behaviours as postgraduate research students and those that were identified as relevant within the students’ institutional context: R Devenish et al, ‘Peer to Peer Support: The Disappearing Work in the Doctoral Student Experience’ (2009) 28(1) Higher Education Research & Development 59, 60-61.
34 Fifteen out of 21 groups.
36 Cuthbert, Spark and Burke, above n 19; Brien and Webb, above n 30; D Maher et al, “‘Becoming and Being Writers”: The Experiences of Doctoral Students in Writing Groups’ (2008) 30(3) Studies in Continuing Education 263.
37 APWN; GRI; ANU Higher Degree Research Commons Initiative; Thesis Writing Circle.
38 GRI; Thesis Writing Circle.
39 Colbran and Tynan, above n 20.
41 Devenish et al, above n 33.
Although providing peer support was clearly intended as a goal of all groups, the other facet in supporting a student to completion – aiding with production of work – was referred to by only four groups, three of which were specific ‘writing groups’. Moreover, only three groups explicitly identified their role as a support for the student-supervisor relationship. The website of the Thesis Writing Circle at La Trobe University states:

Here is a safe and sociable opportunity to gather responses to your work from more and different readers than your supervisor alone; and perhaps to focus on different aspects of the writing, in closer focus, than supervisory meetings can accommodate.

The limits of the student-supervisor relationship - bounded by time constraints and subject matter - are clearly identified. In contrast, the Australian Postgraduate Writers Network (APWN) lists as one of its goals to improve the quality of supervision, stating its aim is to: ‘Promote collaborations between supervisors and candidates to reduce higher degree research student isolation and attrition and to improve supervision quality’. However, the majority of groups did not make any comment on the supervisor-student relationship in reference to their activities.

C. Creating New Learning Spaces, Identity Formation and Socialisation

In light of our earlier discussion, in addition to extending the pedagogy of PGR education, there is also a need to create and support additional and distinct spaces and relations for learning. On this basis, a PGR student group can provide an alternative space for learning, which is structured around peer relations. In examining whether PGR groups aimed to create new and different spaces for learning we looked at academic involvement and the extent to which groups were student-led. We were also interested in the extent to which groups identified as creating a community of practice.

Communities of practice are defined as ‘a system of relationships between people, activities and the world; developing over time, and in relation to other tangential and overlapping communities of practice’. Shacham and Od-Cohen (2009) identify different themes around communities of practice for PGR students, including the sharing of ideas and experiences, and the diffusion of ideas, amongst others. They considered the diffusion of ideas to be ‘especially significant in light of the fact that the cohort members come from different disciplines... and hence they relate to colleagues representing diverse issues, opinions, and views’. The involvement of participants with different levels of experience and histories of membership, within the groups, is also important to facilitate socialisation and identity formation, as well as renewal.

43 Thesis Writing Circle; GriP; ANU Higher Degree Research Commons Initiative. The fourth group was the Humanities Postgraduate Connections Student Group, University of Southampton.
44 APWN; APLN; Thesis Writing Circle.
45 Humanities and Social Sciences Students, Thesis Writing Circle (2012), La Trobe University <http://www.latrobe.edu.au/students/humanities/your-studies/academic-language-and-learning-unit/thesis-writing-circle>
47 See Manderson, above n 26 at 158.
49 Other themes that emerged were the raising of the level of thinking in these communities of practice; namely more openness to critique and more crystallisation of concepts and ideas, empowerment and emotional support: Miri Shacham and Yehudit Od-Cohen, ‘Rethinking PhD Learning Incorporating Communities of Practice’ (2009) 46(3) Innovations in Education and Teaching International 279, 285-286.
Only two groups, the ALPN and the APWN, explicitly made reference to encouraging or creating communities of practice. This is not to say, however, that other groups were not in fact engaging in this as well despite there being no explicit statement to this effect. The creators of the ALPN describe their intentions for the network as being able to ‘facilitate intellectual collaboration and the foundation of future research networks, thus creating a solid community of practice’ in addition to providing opportunities for collaboration.51

Questions might arise around the sustainability of such communities of practice. As noted above, in some instances online content appears not to have been updated for several years. It may be that the lack of face-to-face contact and the scope of the network – across many institutions, geographically distant – render it unsustainable. It may also be that in some instances the actual articulated purposes of the group are driven by funding or grants objectives, but the practical reality is different.52

The apparent “top-down” approach of the ALPN can be contrasted with the PGR groups in the sample which were student-led – this made up approximately half of the groups, although the information provided for some groups rendered it unclear as to whether or how academics were involved.53 The extent to which academic involvement in PGR groups is necessary and/or desirable has attracted some discussion in the literature on postgraduate pedagogy. Green and Lee (1995) have argued that postgraduate research is a process of ‘becoming and being a certain authorised form of research(er) identity’.54 PGR groups can allow for interactions amongst students giving opportunities to understand their own disciplinary theoretical, methodological, political and ethical perspectives on research and in turn better understand where they fit into academia and what ‘kind’ of academic they are. However the literature draws attention to the dual nature of socialisations for doctoral students – as student and as academic – identities, which are apparently discrete.55 This might itself be problematic insofar as for example, a student-operated PGR group might achieve doctoral student socialisation, but not academic socialisation. If a PGR group is not appropriately recognised by the faculty and integrated into the academic community, it may not achieve one of its ends.56 The involvement of the institution and individual academics in the governance and the activities of the PGR group might thus be considered in relation to ways that these two forms of socialisation can be addressed and possibly even brought together.57

D. Countering Disciplinary Isolation and Methodological Limitations
As noted above at Part II, nearly all the groups were confined to a single institution and indeed, to a single faculty within an institution. The lack of interdisciplinarity is particularly significant for PGR students within the legal discipline, for several inter-connected reasons. One reason is the professionalism of law. This is reflected in undergraduate legal studies which are taught in the framework of ‘professional’ degrees, the focus being on training for professional practice

51 Colbran and Tynan, above n 20 at 40.
52 Both groups were funded by Australian Learning and Teaching Council grants.
53 For example, the CompleMED Postgraduate Forums, CRG Postgraduate Research Group and the ANU Higher Degree Research Commons Initiative.
55 Ibid.
56 See for example the finding of McAlpine and Amundsen that a doctoral student committee set up to advocate in relation to problems encountered by the doctoral student community that the socialisation benefits of the committee were countered by the broader institutional failure to include the doctoral students within the academic community: L McAlpine and C Amundsen, ‘Identity and Agency: Pleasures and Collegiality Among the Challenges of the Doctoral Journey’ (2009) 31(2) Studies in Continuing Education 109, 115.
rather than the study of law itself as an area of social, philosophical, historical and critical inquiry. The second reason is that within the legal discipline, law is constructed as an isolated sphere of knowledge that can be known truthfully only through traditional legal method (i.e. doctrinal method or statutory interpretation). In this way, students of professional law degrees develop a particular faith in the truth of law and a devotional practice to particular legal methods.\(^{58}\) Arguably, the very authority of law tends to marginalise and de-authorise alternative methodologies for knowing the law. Thirdly, this idea of the law only being capable of being known through doctrinal research also marginalises the interdisciplinary study of the law.

A PGR student group, particularly one that is interdisciplinary in nature, could provide an opportunity for students to reframe their learning and relocate their relationship to the law in terms of critique and challenge, and inquiry into the law itself. It could also encourage reflexivity insofar as discussion could take place on issues of method, practice and theory that would not necessarily be considered in the textual process of the dissertation itself. Reflexivity is particularly important in relation to legal research because of the disciplinary demands for a normative or reform dimension that pronounces what the law should be. Furthermore, an interdisciplinary group would also assist in breaking down the authority and privilege of legal scholarship and help law postgraduate research students to see and accept their location as one of a number of positions from which a scholar can engage with the law. This might be particularly relevant for a (sustainable) inter-disciplinary crim* group to address, as the authority of law may have a tendency to marginalise and de-authorise other perspectives on crim*, potentially alienating researchers in other disciplines.

Whilst law might be particularly uni-disciplinary, Miller and Brimicombe (2004), discussing a multidisciplinary postgraduate research course they developed, emphasise the importance of multidisciplinarity in PGR education generally.\(^{59}\) This is on the basis that the PhD as an individual research project encourages disciplinary embedment.\(^{60}\) Another advantage of multidisciplinary PGR students’ groups (notably those focused on specific skills development) is that they can focus on the development of generic, professional, transferrable skills without becoming distracted or immersed in disciplinary-specific issues.\(^{61}\)

V. CONCLUSION

This research seeks to explore how alternative learning spaces might facilitate the goals of training in postgraduate research, with a particular focus on the role of PGR discussion groups outside coursework or institutional requirements. Consistent with an absence of scholarship on PGR pedagogy, we found an absence of readily-available data on and analysis of the use of existing PGR groups. Seeking to develop an interdisciplinary, inter-university PGR group, with a specific crim* focus, our research lead us to analyse the structure, goals, governance and activities of PGR groups operating in Australia and overseas.

Although many groups self-described as undertaking similar activities and focusing on the development of similar skills, we found remarkably few groups which were inter-faculty, let alone inter-university. This was surprising in light of the apparently increasingly global and interconnected nature of academia and academic institutions. Moreover, although the groups found were located via web searching, few had a strong online presence or ongoing activity.

In addition to analysing the structure of PGR groups, we were particularly interested in discerning any pedagogical basis (whether explicit or implicit) for the operation of the PGR groups in our sample. We considered the groups in terms of six key pedagogical considerations. Virtually all the groups were intended to facilitate the development of critical skills, whether by

\(^{58}\) See Manderson, above n 26 at 150, 155-56, 160.
\(^{60}\) Ibid.
\(^{61}\) Cuthbert, Spark and Burke, above n 19.
presenting, engaging in critical discussion, or writing, and all the groups expressed themselves as having a social function, giving implicit recognition to the importance of combating isolation. Interestingly, few groups (aside from some writing groups) were focused on the actual production of research output and very few made any reference to the student-supervisor relationship, despite its looming presence in postgraduate education. Furthermore, virtually no group was explicitly engaged in the creation of communities of practice or socialising students into academia. Finding a balance between institutional integration and student autonomy within groups is likely to be extremely important in terms of sustainability and in enhancing opportunities within PGR learning. Developing a PGR crim* specific group that is pedagogically sound will require a reconceptualization of the broader pedagogical and institutional framing of postgraduate research education (particularly in the legal discipline).
ABSTRACT

Although legal academics tend to think of constitutional law education as a process that commences at University, its foundations are based on background knowledge acquired by students at school. The current school civics curriculum, Discovering Democracy, gives students little grounding in broad concepts such as the meaning of representation, the relationship between the individual and society and theories of government. The result is that students coming to University bring limited contextual knowledge that would assist them in their learning. Furthermore, the fact that constitutional law is compressed into a single semester at most Law Schools, means that the teaching of foundational topics, such as constitutional history and concepts such as democracy, representation and freedom – and in particular, the contested nature of those concepts – receive little space in the curriculum. The consequence is that we produce graduates who are well-equipped to apply the technicalities of the Constitution, but who have had little opportunity to engage in critical thinking about it, and who accept its current form as a given. This has broader societal implications, in that it contributes to the general conservatism of Australian society in relation to constitutional reform. This paper explores these issues, with a particular focus on two specific areas of our Constitution – electoral representation, and legislative scrutiny of the executive. The author urges Law Schools to expand the space allocated to constitutional law in the curriculum so that students take a foundational subject in constitutional law theory before studying the Constitution itself (where that is not already the case) and to incorporate into the curriculum international comparative material against which students can critique our institutions.

I. INTRODUCTION

This paper is the product of teaching constitutional law to undergraduate and research students over 25 years in three jurisdictions, including 15 years in Australia. The first tutorial I usually set the students revolves around the issue of constitutional legitimacy, and requires them to do readings on positivism, natural law, and the Nuremberg trials and then to relate them to contemporary issues in Australian constitutional law. What strikes me most forcefully about my students’ reaction to this exercise is the fact that many of them - often a majority - consider the Nuremberg trials to be nothing more than ‘victors’ justice’, and are either puzzled by, or resistant to, the idea of values to which the legal system should be subject. The other striking reaction is that the majority of students appear happy with our current institutions despite what, in the light of constitutional theory, are its manifest flaws. The positivist mindset of young people - who one would think would usually be idealistic and critical - is surprising. The consequences become apparent in the way they engage with constitutional law - in particular their preparedness to accept the law as something that ‘is’ rather than as a set of norms that require analysis against a supra-legal set of values.

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1 The author previously taught constitutional law at the University of Natal, Pietermaritzburg, South Africa, the University of Waikato, New Zealand and at the University of Canberra.
This paper explores the extent to which Australian constitutional education in its broadest sense adequately prepares citizens and law graduates as critical thinkers about government. Part II discusses the state of civics education in schools, which is an important issue (and one not usually addressed by University law teachers) because for most students (other than those who have done legal studies in Years 11 and 12) civics education provides the only foundational knowledge they have about our constitutional system before arriving at University. Part III looks at the space allocated to constitutional law at Australian Law Schools, in order to determine the extent to which an opportunity is provided for critical and comparative work, and then discusses two key areas of constitutional law (among many) in need of reform - the electoral system and enhancement of parliamentary scrutiny of the executive - which could provide the opportunity to foster critical thinking in students. Part IV briefly discusses material from other jurisdictions which could be incorporated into our curricula in order to foster debate.

II. CIVICS EDUCATION

The school civics curriculum, Discovering Democracy, was released in 1997. It was preceded by the publication of a report in 1994 by the Civics Expert Group established by the Commonwealth which stated that:

Our system of government relies for its efficacy and legitimacy on an informed citizenry; without active, knowledgeable citizens the forms of democratic representation remain empty; without vigilant, informed citizens there is no check on potential tyranny.

Before discussing the content of the Discovering Democracy curriculum it is important to note that civic education faces a limitation imposed by the structure of education across Australia in that, after Year 10, the only mandatory subjects are English and mathematics. For this reason, the curriculum covers only middle primary, upper primary, lower secondary and middle secondary school - equivalent to Years 3 - 10.

On one level, Discovering Democracy is excellent. It explains the operation of the Constitution clearly, accurately and comprehensively. What then is missing? At the time when the Expert Advisory Group was doing its work, the following was stated in a discussion paper on civics and citizenship:

[Y]oung Australians often leave school imbued with democratic values, which they have picked up by a kind of osmosis. The weakness is that many of them might not have any clear idea of where those values come from, or even how to put them into words. How are they able to defend those values unless they know the processes by which those values and not others emerged? How are they to challenge values with which they do not agree, unless they see the processes by which a society can change?

Similarly, a few years later, when the Discovering Democracy curriculum was being written, the following criticism was leveled at the historical state of civics education in Australia:

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4 Donald Horne and Penelope Leyland, Teaching Young Australians to be Australian Citizens – A 2001 Centennial National Priority (National Centre for Australian Studies, Monash University 1994) 2.
Students were presented with facts about Australia’s political history and political system, but were not encouraged to think critically about their political inheritance and what aspects, if any, they might think needed to be changed.  

Whereas the Discovering Democracy curriculum communicates an understanding of the mechanics of the Constitution, what is under-represented in the curriculum is content relating to values – and, equally importantly, competing values. The curriculum is not doing enough to teach students how to engage in critical analysis of our institutions and to evaluate the extent to which they actually serve the values that underlie our constitutional heritage. As one teacher responded when asked to comment on the curriculum:

Very few, if any, of the teachers indicated that their schools had specifically discussed or named the values they espoused, and upon which the civics and citizenship programmes of their schools could be laid. It is probable that in the absence of a set of negotiated and clearly articulated school values, individual teachers may fall back on their own values and mores.  

There are several examples of how the curriculum fails to do this. Although there is discussion of the idea of democracy and the right of each citizen to participate in the system of government by casting a vote, there is no debate on the question of whether the single-member electorate system used for the House of Representatives actually serves that value, and whether it could be better served through the adoption of proportional representation. Similarly, while the materials acknowledge that the composition of the Senate was the result of a compromise over a political issue that split the colonies at the time of the constitutional conventions, they present the outcome as the end of the story. Nowhere does the curriculum address the issue of the negative implications for the weighting of the individual’s voting power inherent in each State having equal representation in the Senate, or the problem that arose from giving the Senate the power to block supply. There is some brief (one page) discussion on whether Australia has too many levels of government, but no alternatives are offered to federalism. Similarly, although there is an exercise on the formation and operation of federation, the focus is on the reasons why federation came about, rather on a critique of its current operation. Federation is presented as an immutable and unquestioned feature of the constitutional landscape, rather than a mode of government that is open to question.

Often however, Discovering Democracy comes tantalisingly close to adopting a critical approach. For example, in the discussion of the concept of majority rule, the question is posed as to what students would feel if they were outvoted on a question, whether rule by a simple majority is fair, and what problems such a system might have, but there is no follow-through to posing the question of whether our unrestrained majoritarian system needs to be changed. In the discussion of the role of the Senate, the incompatibility of its power to block budgets with the operation of responsible government is recognised, but the conclusion reached is that ‘the patch up job (that is, the compromise upon which the federation was founded) continues to

8 Jane Angus (ed) Discovering Democracy - Upper Primary Units (Curriculum Corporation, 2000) 111.
9 Ibid 48-68.
10 Jane Angus (ed), Discovering Democracy – Middle Primary Units (Curriculum Corporation, 2000)12.
work’. Yet is this really true, given what happened in 1975, and wouldn’t this be an appropriate place to canvass some alternatives?

The problem is therefore clear: the curriculum simply explains things as they are, without providing the students with an opportunity to debate what they might be. The Constitution is presented as representing the final culmination of an historical process, and the sub-text essentially is that the Constitution is the best that it can be.

It is true that a critical approach involves a discussion of values, and commentators have remarked on the apprehension that many teachers feel in relation to discussing values yet, as Krinks notes:

Civics education is therefore not a ‘neutral’ exercise; if it is to involve more than just governmental facts, it is inevitable that education for active citizenship will raise value questions about a political system.

This was also reflected in submissions by some teachers to the inquiry by the Joint Standing Committee on Electoral Matters, which noted that:

Accepting that Australian democracy is not value-neutral, a number of teachers were supportive of the use of critical analysis as a basic pedagogy for civics and citizenship education. Teachers acknowledged that students required a level of critical literacy in determining their own thoughts and opinions about the subject matter they learned in class.

It should also be remembered that in 1994 the Civics Education Group recommended that three sets of values be incorporated into a civics curriculum. These were: democratic process (including commitment to individual freedom and respect for different choices, viewpoints and ways of living), social justice (including concern for the welfare rights and dignity of all people and fairness and commitment to readressing disadvantage and to changing discriminatory and violent practices), and ecological sustainability. The policy statement accompanying the release of the Discovering Democracy curriculum said that the curriculum was based on the values of democratic processes and freedoms, government accountability, civility and respect for the law, tolerance and respect for others, social justice and the acceptance of cultural diversity.

However, although the curriculum mentions the importance of these values, nowhere does the curriculum explicitly call on students to engage in critical analysis of current institutions with a view to determining whether they do in fact support those values and, where they do not by presenting alternatives. In other words, the curriculum explains current institutions as owing their origins to these values, without evaluating the degree to which those institutions do in fact serve them.

The Australian education system is currently in the midst of significant change, with the development of a new national curriculum that will be used throughout the Australia from Years K - 12. In 2006 the Ministerial Council on Education, Employment, Training and Youth Affairs (consisting of State, Territory and Commonwealth education Ministers) developed a document entitled Statements of Learning for Civics and Citizenship, which describes a common agreed content for civics and citizenship education in an effort to harmonise what is taught throughout

12 Krinks, above n 5, 19.
15 Ibid 19.
the country. As might be expected, its content corresponds very closely to the Discovering Democracy curriculum which has been widely in use since 1997. The curriculum for civics and citizenship education will be based on the 2006 statement. The new curriculum is being drafted during 2012-13. This means that the opportunity now exists to influence the way in which civics is taught. There is no doubt that Discovering Democracy provides a good resource—what needs to be added to it is material, particularly in the later years of the curriculum, which encourages students to question whether our current Constitution serves the values of freedom and democracy, and to provide them with alternatives to consider where it does not. Our objective must be to produce young people who engage in public debate rather than passively accept received (un)wisdom that our institutions are beyond improvement.

III. ENHANCING CRITICAL THINKING – ISSUES FOR CONSIDERATION

As one of the Priestley 11 subject areas, constitutional law is a mandatory part of the curriculum of any law degree leading to admission to legal practice. There are 31 Law Schools in Australia. Of these 19 prescribe one semester of constitutional law in their curriculum. The other 12 require students to take an introductory course in public law prior to studying constitutional law, and even these often do not contain material which requires students to critique current constitutional structures. In other words, in a majority of Law Schools lecturers are expected to teach fundamental constitutional principles, as well as the entirety of Commonwealth and State constitutional law in the space of 13 weeks. The consequence of this is, of course, that there is barely enough time to teach students the law governing our institutions as it is, much less to pause and invite them to critique those institutions and suggest alternatives.

As a constitutional lawyer with an interest in constitutional reform, I find the lack of space devoted to constitutional critique a matter of concern. The purpose of legal education must be more than just the production of technically-able graduates, equipped to give advice to future employers. It is a truism that, once they graduate, our students become not only practitioners of the law but, to a significant extent, gate-keepers of it. This is because of the fact that such is the complexity of the law that the broad mass of society is ill-equipped to understand much of it, and legal debate is therefore largely framed by law graduates. It is a truism that law graduates are over-represented at all levels of government, and that it is law graduates who have a dominant role in elective politics and the bureaucracy. It follows that unless the legal cadre of society is interested in reform, there is very little chance that reform will occur. The implication for us as legal educators is clear: the political importance of our sub-discipline imposes on us a unique responsibility to society to foster critical thinking in our students and to encourage them to be agents for social change. While it is doubtless true that we all include ‘critical thinking’ as a learning objective in our curricula, we need to recognise the distinction between critical thinking as a mere tool of legal reasoning used to decide legal problems, and critical thinking in the sense of a capacity to critique institutions and suggest alternative ways in which they might operate. I would argue that the evidence that Law Schools have not been fostering the latter type of thinking is provided by the lack of leadership on constitutional reform from our political classes, most of whom are our graduates. Furthermore, although there is a body of literature on

the use of critical methodology in the teaching of constitutional law, the same is not true in relation to reform of the content of the constitutional law syllabus through the incorporation of comparative material which would expose students to new ways of shaping institutions, which is the focus of this paper. This lack of attention to constitutional reform persists despite the fact that, if considered from the perspective of fundamental principles of democracy, freedom and effective control over government, several areas of the Constitution are crying out for reform.

As an academic with a particular interest in constitutional reform, I think that there are many areas of our Constitution in need of attention. Here I have space to mention only two: electoral reform and parliamentary scrutiny of the executive.

A. Representation

One would think it obvious and uncontroversial to say that the electoral system should give any party, irrespective of the geographic spread of its voter support, the chance of forming government. Yet in Australia that is not the case, because under our current electoral system geography is destiny.

The following examples from two federal elections show how distorted are the results produced by our system:

<table>
<thead>
<tr>
<th>Year</th>
<th>Party</th>
<th>Nationwide % of first preference votes</th>
<th>% of seats in House of Representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>Labor</td>
<td>39.4%</td>
<td>52.7%</td>
</tr>
<tr>
<td></td>
<td>Coalition</td>
<td>43.4%</td>
<td>46.7%</td>
</tr>
<tr>
<td>1998</td>
<td>Labor</td>
<td>40.1%</td>
<td>45.2%</td>
</tr>
<tr>
<td></td>
<td>Coalition</td>
<td>39.1%</td>
<td>54%</td>
</tr>
</tbody>
</table>

What is striking about these results is that clearly the ‘wrong’ party won both elections in that the victors (that is, the party which obtained a majority in the House of Representatives) were less popular in terms of nationwide share of the vote than the vanquished. Furthermore, this is by no means a rare occurrence: governments also came to power with fewer votes than were won by the opposition in 1954, 1961, 1969 and 1987).

The electoral system is particularly unfair to minor parties. In 1990 the 11.4% of first preference votes won by the Australian Democrats yielded not one seat for the party – yet the 8.4% of first preference votes cast for the Nationals yielded 9.5% of the seats in the House. In 2004 and 2007 the Greens won over 7% of the vote but achieved no representation in the House, and when they won one seat in the House 2010, that was after winning 11.7% of first preference votes nationwide.


In light of this data, one would think that electoral reform would be an area of significant debate in the curriculum, yet if one looks at the textbooks we write and I use the term ‘we’ deliberately, because the same is true of myself as of other textbook writers — we discuss the electoral system and the failed High Court challenges to it, and leave it at that. None of our texts critiques our electoral system against the principles of democratic representation, nor do they explore other electoral systems and what their implementation might mean for parliamentary government in Australia. Let me be clear in saying that the range of texts available to Constitutional law teachers is varied and of excellent quality — I do not mean to suggest that there is anything deficient in any of them in relation to how they address the law. What I do say, however, is that the pressures of time that we face in covering a very broad syllabus means that we do little to challenge our students to argue how the law might be, as distinct from understanding it as it is, and for law students who have not otherwise studied politics or government, constitutional law is the only subject in the LLB curriculum into which material relating to the electoral system happily fits.

B. Parliamentary Scrutiny Of The Executive

The final area of reform to consider is that of parliamentary scrutiny over the executive. A law is only as effective as is the capacity to enforce it, and the regrettable fact is that although we supposedly live under a system of responsible government, there is very little likelihood that a minister who does not want to subject him or herself to scrutiny by a parliamentary committee, or who prohibits a public servant from doing so, will face sanctions. In theory, parliamentary committees have significant powers. According to Harry Evans, who served as Clerk of the Senate for 21 years, the Senate has the power to issue a summons to compel witnesses to appear before its committees and to produce documents, although usual practice is for an invitation to be sent to the person to attend, and for them to attend voluntarily. Where a summons has been issued, failure to comply with it can be reported by the committee to the Senate which, if it finds that the refusal amounts to contempt, can impose a punishment of fine or imprisonment by virtue of s 7 of the Parliamentary Privileges Act 1987 (Cth). The same would apply to committees of the House of Representatives. On the face of it then, it would appear that the committee system provides MPs with a valuable weapon to use in ensuring government accountability by questioning ministers and public servants. However, in reality Ministers not uncommonly refuse to attend committees when requested to do so and also instruct public servants not to attend and/or answer particular questions. A number of examples of this from the past decade include John Howard’s refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith, to appear at the inquiry into the Children Overboard

23 AG (Cth ex rel McKinlay v Commonwealth (1975) 135 CLR 1 and McGinty v Western Australia (1996) 186 CLR 140.
26 Ibid 416-7 and 423.
27 For examples see Evans, above n 24, 378.
affair, the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture at Abu Ghraib, and the prohibition against public servants appearing before the inquiry into the AWB scandal.

Why then does practice diverge so strikingly from the law? The answer to this question is partly legal, partly political. The legal difficulty derives from the fact that much of the law in this area remains untested in the courts. The law which governs the powers of Parliament, called the law of parliamentary privilege, is contained partly in the Parliamentary Privileges Act 1987 (Cth), and partly in the common law. The Act does not deal with all aspects of Parliamentary privilege, and expressly states that anything not addressed in the act continues to be regulated by the common law rules, adopted into Australian law by s 49 of the Constitution. It is here that the difficulty arises, because although s 7 of the Act confirms that the houses of Parliament have the power to fine or imprison anyone who commits an offence against Parliament, it does not define what those offences are, other than to say (in s 5) that an offence is anything which interferes with the free exercise of the functions of Parliament, its committees or its members. This means that it is ultimately up to the courts, as a part of their every day function of developing the common law, to determine what constitutes a breach of parliamentary privilege.

Assuming then that a government minister or public servant refused to attend a parliamentary committee or to answer questions, would that amount to conduct which could be punished as contempt of Parliament? Although, as stated above, parliamentary officers, such as Harry Evens, claim that it does - and at face value it would indeed seem logical that failure to answer questions amounts to conduct interfering in the functioning of Parliament - the fact remains that a rule of the common law can be stated definitively only by the courts. Although there is case authority relating to the Legislative Council of the New South Wales Parliament to the effect that the chamber has the power to compel a minister who is a member of that chamber to produce documents requested by the chamber, and to suspend him if he does not, the question as it relates to the Commonwealth Parliament has not been contested before the courts. Even if the precedent from the New South Wales Parliament was found to be applicable at the Commonwealth level, the ability of a committee to secure the attendance of witnesses and to punish them if they fail to answer questions faces a political hurdle which stems from the fact that committees are not free agents and do not themselves have power to punish witnesses. That power vests in the house of Parliament that established the committee. This means that no individual member of a committee, or even the committee as a whole, can enforce rules of attendance - it is up to the house which established the committee to do so. A committee which encounters an uncooperative witness must refer the matter to the house which created it, and the house will then decide what action, if any, to take. This exposes a significant weakness in the committee system, and provides a reason why a committee of the House of Representatives will not receive assistance from the House if a minister, or a public servant acting on the instructions of a minister, refuses to give evidence. Since the government, by definition, has a majority in the House, it will obviously block any attempt to punish one of its own ministers.

What then of Senate committees? At times when a government lacks a majority in the Senate, surely the opposition and minor parties would use their majority to force a minister to answer questions to punish him or her if he or she did not - if necessary testing before

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the courts the question of whether the refusal to co-operate with the committee amounted to contempt? The answer to this question was revealed in telling circumstances in 2002, when the Senate was holding an inquiry into the Children Overboard affair. The critical issue in contention was at what stage information from defence personnel to the effect that children had not been thrown overboard was communicated to ministers in the then coalition government, who were in the midst of an election campaign in which they alleged that the children had been thrown overboard. The then defence minister, Peter Reith, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee’s requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the upper house to impose a fine or imprisonment if the committee met with recalcitrance. If the legality of that had been contested, the matter could have been tested in the courts. The reason that this point was not reached was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers. This demonstrates the political cynicism that afflicts what is the two-party system in Australia: As a party which might come to power in the future, Labor was unwilling to establish the precedent that ministers, advisors and public servants should be compellable witnesses before legislative committees. The most that ever occurs to ministers who refuse to provide evidence to Senate committees is that a motion of censure (in other words, a formal slap on the wrist) is passed against them - a remedy which the major parties are happy to use because it causes political embarrassment to the government but does not establish a precedent that would expose ministers to significant penalties such as a fine or imprisonment.

These flaws lie at the heart of the operation of responsible government, yet they receive little or not attention from textbook writers, most of whom confine themselves to a discussion of the theory of parliamentary government, and a mechanical treatment of the number and portfolios covered by committees, without inviting students to critique how the system operates - or fails to operate – in practice.

IV. INTRODUCING COMPARATIVE MATERIAL

Assuming that reform issues were incorporated as an accepted part of the constitutional law syllabus, there is a wealth of comparative material that lecturers could draw upon in order to engage students and to challenge them to visualize alternative constitutional futures. In this part of my paper I suggest jurisdictions whose experience we could use as a basis for debate on constitutional reform, focusing on the issues discussed above. There is, of course, an enormous volume of material from many jurisdictions that could be used. I have drawn upon select material that I found useful when delivering a postgraduate comparative constitutional law subject, but which could equally be introduced into the undergraduate curriculum, assuming that there were two constitutional law subjects in the degree.

33 See for example the failure of the Labor-controlled committee inquiring into the children overboard affair to summons political advisors who had been serving in the offices of the Prime Minister and the Minister of Defence – Megan Saunders, ‘Truth is out there, somewhere’, The Australian (Sydney), 25 October 2002, 12.


35 Although note that there is critique of the ineffectual nature of parliamentary control over the executive in Ratnapala and Crowe, above n 22, 63-6.
A. Representation

Although there is an enormous range of proportional representation systems that could be adopted in place of the current electoral system used for elections to the House of Representatives, the two most commonly recommended alternatives are the Mixed Member Proportional (MMP) Single Transferrable Vote (STV) systems. The closest example of the MMP system - under which half the members of the legislature are elected from single-member constituencies and half are elected from party lists so that the overall percentage of a party’s representation in parliament is the same as its share of the party list vote - is that adopted in New Zealand in 1993. I was fortunate to be in New Zealand when referenda were held on whether to replace the first past the post single-member electorate system with proportional representation, and on which system of proportional representation should be adopted. This period was notable for the sophisticated level of vigorous public debate on the concept of fairness in representation, and for the fact that arguments based on pragmatism, and the alleged governmental instability that proportional representation would bring - which experience in New Zealand and other jurisdictions using MMP has shown to be groundless - were not allowed to divert the focus of the debate from the issue of fairness. There is, therefore, a good deal in the New Zealand experience that we could use to teach our students, not only about the operation of the MMP system itself, but also in relation to not allowing public apathy and the opposition of powerful interests to deter us from pursuing constitutional reform. The other electoral system commonly proposed as an alternative to single-member electorate system is STV, which is based on multi-member electorates which, although it does not lead to the same degree of proportionality as the MMP system, has the advantage that all MPs are answerable to a specific electorate, rather than being elected through a party list. Here we have domestic electoral systems to look to as examples of how STV operates - it is used for the Commonwealth Senate and all State upper houses (barring Tasmania), as well as in the houses to which governments are responsible in Tasmania and the ACT. However, it is also useful to compare the Australian experience with that of the Republic of Ireland - particularly in relation to how the number of members returned by multi-member electorates affects the proportionality of elections. There is therefore no dearth of material that we could - and should - expose our students to as we encourage them to question the fairness of our current electoral arrangements.36

B. Legislative Scrutiny Of The Executive

In thinking about better models of legislative scrutiny over the executive, it is, paradoxically, the United States, which does not have a parliamentary system of government, where committees of Congress enjoy far greater oversight powers over cabinet ministers than does the Australian Parliament. The right of Congress to subpoena non-members to appear before it, and to punish them if they do not, is long established. In 1821 in the case of Anderson v Dunn,37 the Supreme Court held that an investigative power was implicit in Congress' legislative power and that a subpoena power was a necessary element of that investigative power. The leading case on this issue is now McGrain v Daugherty,38 in which the Court held that a power to investigate


37 19 US (6 Wheat.) 204 (1821).

38 273 US 135 (1927).
is “an essential and appropriate auxiliary”39 to the legislative power of Congress. The court also held that the investigative power of Congress can be exercised not only when considering specific legislation, but “for legislative purposes”,40 which includes investigations of whether the executive branch is properly discharging its functions.41

The principle of compellability of cabinet members is balanced by the doctrine of separation of powers, which prevents interference by one branch in the affairs of the other. In \textit{Senate Select Committee on Presidential Campaign Activities v Nixon},42 the Federal Court held that evidence would be compelled from the executive only where it was “demonstrably critical” to the legislature’s inquiry. The doctrine of separation of powers is of particular relevance where the executive raises a claim of executive privilege (equivalent to public interest immunity in Australia), which was recognised in \textit{United States v Nixon}.43 Although this case involved the question of the extent to which executive privilege can serve to defeat a subpoena in which information or attendance of a witness is sought by the judicial branch (in other words, in court proceedings), what was said in this case is generally thought to be of equal relevance to cases where information is sought from the executive by the legislative branch.44 The court held that the executive cannot be compelled to give information if the possibility that communications would be subject to disclosure would impair the confidentiality and candour of policy deliberations within the executive.45 The court explicitly asserted however that the executive’s mere claim of privilege is not determinative – any case involving such a claim will be decided by the courts,46 balancing the competing demands of the interest to be served by disclosing the information against the executive’s claims to confidentiality.47 In \textit{Nixon} the court held that claims of executive privilege will be particularly strong in relation to information relating to foreign affairs, diplomacy and national security,48 but even in a case where a claim of privilege is made based on state secrets the executive must satisfy the court that such an issue is involved, if necessary by providing evidence to the court \textit{in camera}.49 The Supreme Court re-stated these rules on executive privilege in \textit{Nixon v Administrator of General Services},50 in which it held that there was no general undifferentiated right to executive privilege,51 and that a claim of privilege would succeed only where the executive could show that disclosure would

40 Ibid 177.
41 Ibid.
42 498 F.2d 725 (D.C. Cir. 1974), 732-33.
44 See Laurence Tribe, \textit{American Constitutional Law – Volume One} (Foundation Press, 3rd ed, 2000), 784.
46 Ibid 703.
49 \textit{United States v Nixon} 418 US 683 (1974) 713-14. See also \textit{United States v Burr} 25 Fed. Cas. 187 (1807) 190-92 and \textit{United States v Jolliff} 584 F. Supp 229 (1981). The most recent instance of an \textit{in camera} evaluation of the validity of a claim of executive privilege was in 1990, when Federal District Court Judge Greene privately viewed the personal diaries of former President Ronald Reagan, the release of which had been sought by former National Security Advisor, John Poindexter, when he was tried for offences committed as part of the Iran-Contra affair. Having reviewed the diaries, Judge Greene held that they added nothing of substance to evidence already before the court, and upheld the claim of executive privilege – see Mark Rozell, \textit{Executive Privilege: The Dilemma of Secrecy and Democratic Accountability} (Johns Hopkins Press, 1994) 127-30.
51 Ibid 446-47.
This line of cases thus demonstrates that the concept of executive privilege exists, but also that it is
by no means a trump that will defeat any congressional request for information.

It should not however be thought that, because the courts have the ultimate role in deciding
inter-branch disputes, contests between the legislature and the executive are frequently the
subject of litigation in the United States. The legislature generally obtains the information it
seeks, simply because of the executive pays a political price of appearing to have something to
hide in instances where it claims executive privilege. In most cases, the two branches reach
a political compromise, and it is a quite normal feature of the political process in the United
States for members of the executive, including members of the cabinet, to appear voluntarily
before public hearings of congressional committees, or for information to be provided in a
confidential briefing to members of a committee. Disputes are thus almost always settled by
negotiation between Congress and the administration. The fact that the judicial branch is the
ultimate determiner of the degree to which the executive is accountable has not led to the courts
being confronted with policy questions that they are incapable of deciding without becoming
involved in party-political disputes – there is sufficient case law for the courts to engage with
in determining whether a claim of executive privilege is valid. It is a matter of supreme irony
that the legislative branch in the United States has far greater power than is the case under
the system of responsible government we have in Australia, which supposedly subjects the
executive to legislative control.

How then could the level of scrutiny available in the United States be made a feature of the
parliamentary system in Australia? One way would be through the enactment of legislation
(or a constitutional amendment) which conferred on individual members of parliamentary
committees the power to compel witnesses to give evidence before Parliamentary committees
and, subject to a defence of public interest immunity, to make non-compliance an offence.

A similar proposal was made in 1994, when Senator Kernot of the Australian Democrats
introduced a Bill to amend the Parliamentary Privileges Act 1987 (Cth) which would have
made it a criminal offence, prosecutable in the Federal Court at the instance of a House of
Parliament, to fail to comply with an order of a House or a committee. The Bill would also
have empowered the court to order compliance with the legislature’s request. Public servants
who had been instructed by a minister not to comply with a legislative request could have had
a compliance order issued against them but would not have faced the criminal penalty. The
Bill provided for a public interest immunity defence, with the onus being on the accused to
prove that the public interest in not complying outweighed the need for open parliamentary
inquiries. Courts could conduct in camera hearings to determine whether the defence had been
established. The Bill was considered by the Senate Privileges Committee, which recommended
that it not be proceeded with on the ground that virtually all witnesses objected to the courts
determining disputes between the legislature and the executive, and that the Senate should
continue to use such existing mechanisms as it had at its disposal to address government refusals
to give evidence to its committees.

52 Ibid 443.
53 On the political ramifications of claims of executive privilege see Louis Fisher, ‘Congressional
54 Ibid, 325.
55 See the examples cited in Fisher, above n 53, 394-401. Although an incumbent President has
never been summoned to appear before a congressional committee, President Ford agreed to do so
voluntarily to answer questions relating to his pardon of former president Nixon – see Rozell, above
n 49, 90.
56 Rozell, above n 49, 150.
57 William Marshall, ‘The Limits on Congress’s Authority to Investigate the President’ (2004)
University of Illinois Law Review, 806-08.
58 For a discussion of the Bill and its fate see Evans above n 24, 477-78.
The Kernot Bill would have materially advanced the cause of governmental accountability to the legislature because it would have established as part of statute law the obligation of the executive to comply with legislative requests, rather than leaving it, as at present, to be governed by un-litigated, and thus uncertain, common law. Leaving it to the courts to determine the parameters of public interest immunity would also have been beneficial. One defect in the Bill was, however, that court action could have been instituted only by the chamber as a whole—a fact which left un-remedied the problem that neither of the major parties would have been likely to institute an action for fear that the boot might one day be on the other foot. Indeed, it was opposition on the part of the major parties to the project which ensured that the Bill met its demise in committee. The reform I have proposed would address this issue by vesting in individual members of committees the power to subpoena members of the executive.

An attempt must be made to restore the element of responsibility—in the sense of accountability—to responsible government. As Harry Evans, Clerk of the Senate said in a speech to the National Press Club in 2002:

Responsible government was a system which existed from the mid 19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and “rusted on” majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government’s control of the parliamentary processes means that it is never effectively called to account in the lower house.59

The reform proposed in this paper would reverse the power imbalance that exists between legislature and executive, and would make government truly responsible to the legislature—which is what our system is supposed to do.

V. CONCLUSION

Unless we expand the space allocated to constitutional law in the curriculum so as to include a pre-cursor subject to federal constitutional law which teaches students about the political doctrines that underpin constitutionalism and how to critique institutions in light of those doctrines, we will continue producing students who, are infected with a smug self-satisfaction that it is the best possible. As I have sought to illustrate, the Australian Constitution is far from ideal and requires reform in the areas I have discussed, as well as others that I have not had time to address. Only if we produce graduates who are aware of the need for reform and interested in promoting it can the necessary constitutional development occur.

59 Speech delivered by Mr Harry Evans at the National Press Club, Canberra, 11 April 2006, a copy of which is on file with the author.
International legal concepts such as ‘sustainable development’ have a significant impact on the development of policies and legislation that affect global, regional, national and local levels of environmental law. This article investigates the concept of sustainable development in light of the United Nations Conference on Sustainable Development (Rio+20) in June 2012. The aim of this investigation is to examine the impact of the concept of sustainable development and how the latest developments could influence university curriculums and the global outlook of legal education in Australia.

I. INTRODUCTION

The recent United Nations Conference on Sustainable Development (Rio+20) indicated that reliance by all members of the international community upon state leaders and governments to negotiate effective international agreements on sustainable development has not resulted in satisfactory outcomes over the past twenty years.1 There is a view that all individuals need to be educated in sustainable development objectives if humanity is to resolve critical global threats of environmental deterioration.2 Processes that facilitate public access to information and participation can result in increased public pressure on governments to take action on sustainable development.3 Education can assist individuals to participate in these processes4 and encourage future leaders to be citizens of the world with a global outlook. Improvements to education could be achieved by ensuring that sustainable development education programs are included in the curriculums of schools and universities.5 It is critical that education for sustainable development forms part of all disciplines in universities (including law) in the future6 so that individuals are equipped to adopt sustainable lifestyles in a world where the

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3 The Future We Want above n 1, [43].

4 The Future We Want above n 1, [229].


6 The Future We Want above n 1, [233].
availability of some natural resources is rapidly diminishing. This paper will argue that the Australian Bachelor of Laws degree should include the study of sustainable development because some law students will later become leaders and decision-makers on environment and development issues. They may have the opportunity to make decisions addressing sustainable development concerns and influence people’s attitudes. The argument is pursued as follows: first the paper will set out a brief history of the concept of sustainable development and the role education plays in the attainment of sustainable development. Second, the paper discusses the development of an ethical approach to education for sustainable development. Third, the paper reviews the teaching of sustainable development in Australian higher education and concludes by considering the ways in which sustainable development can be included in the education curriculum of Australian universities and law schools.

II. SUSTAINABLE DEVELOPMENT

Sustainable development is a key concept in international environmental law that influences international, regional, national and local legal systems and is defined in a report by the World Commission on Environment and Development (WCED) titled Our Common Future (Brundtland Report). The definition in the Brundtland Report has two important requirements which are: first, that priority should be given to the essential needs of the world’s poor and second, that ‘sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs’. The Brundtland Report takes into account the fact that present and future generations have the right to an adequate environment. This report also notes that the concept of sustainable development implies limits upon technology and the organisation of environmental resources because there are restrictions on the capacity of the biosphere to absorb impacts from human actions.

‘Sustainable development’ is endorsed in a number of international agreements including the Declaration of the United Nations Conference on Environment and Development (Rio Declaration), Agenda 21: Programme of Action for Sustainable Development, (Agenda 21) and the Programme for the Further Implementation of Agenda 21. One of the reasons that the United Nations (UN) General Assembly organised the 1992 UNCED was to develop Agenda 21 as a program of action for worldwide sustainable development. This blueprint for

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8 The Future We Want above n 1.[43].
9 World Commission on Environment and Development, Our Common Future (Australian edition, Oxford University Press, 1987) 43 (‘Brundtland Report’). Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future. Far from requiring the cessation of economic growth, it recognizes that the problems of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits. [Sustainable development] contains within it two key concepts:

- The concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- The idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.’

11 Brundtland Report above n 9, 8.
13 Agenda 21 above n 2.
future sustainable global action anticipates that such action will be taken by governments, non-governmental organisations (NGOs), business, the private sector and individuals. About forty chapters in this document cover a range of strategies to foster economic development that is environmentally sustainable and to prevent further deterioration of the environment as the result of human activities. This program for action applies in conjunction with the principles in the Rio Declaration to improve the management and protection of the environment and the future lives of all human beings. However a number of states and NGOs were dissatisfied with the outcome of UNCED because there was no international agreement on an Earth Charter. Another difficulty is that both Agenda 21 and the Rio Declaration are soft law agreements (that is they are not binding on states) and this has resulted in problems with their implementation.

At the World Summit on Sustainable Development (WSSD) in 2002, the Declaration on Sustainable Development (Johannesburg Declaration) and the Plan of Implementation (POI) were negotiated. ‘Sustainable development’ is promoted in these agreements as a means for achieving economic, social and environmental objectives that will improve the quality of life for present and future generations. The Johannesburg Declaration describes the concept as having three main pillars: economic development, social development and environmental protection. The WSSD identified social development as the third pillar of sustainable development and considered that these three pillars are interdependent. The aim of sustainable development is to ensure that the action concerned (such as the management of natural resources) can continue to support future generations and in order to achieve this outcome the ecological balance of the environment must be taken into account. Key challenges identified at the WSSD for future action on sustainable development include: poverty eradication, changing consumption and production patterns, and careful management of natural resources. These international agreements added emphasis to the earlier sustainable development instruments however they have not resulted in any major improvement on action for sustainable development.

The reason for this is that sustainable development has not been clearly defined in the Brundtland Report and whether or not it forms a principle of international law, remains controversial. The majority decision in the International Court of Justice (ICJ) Case Concerning the Gabčíkovo-Nagymaros Project referred to ‘sustainable development’ as a concept of international law and recognised that this concept includes a focus on social equity, both intra-generational equity and inter-generational equity. A-Khavari and Rothwell analyse the outcome of this case:

What is the status of sustainable development in customary international law? The court implicitly rejected the assertion that sustainable development is a principle of international law by calling it a concept.

15 Agenda 21, above n 2, 3.
16 Ibid.
19 Ibid.
20 Ibid.
21 The Future We Want, above n 1, [19].
This concept is also referred to in international environmental conventions including the United Nations Framework Convention on Climate Change and the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification. The study of this concept illustrates the difficulty for new fields of international law that rely primarily on the development of ‘soft law’ agreements to influence and change state policy and practice with the potential for some concepts to eventually become part of international customary law. Some commentators have pointed out that sustainable development is a policy which can lead to changes in existing law. Arguably, the abovementioned sustainable development programs should extend beyond this application as merely policy, to instead require action by states because they are designed to change the way that humans live in the future in order to prevent irreversible environmental destruction.

Clearly, there has been a failure to achieve much progress on the implementation of earlier commitments to sustainable development since the United Nations Conference on Environment and Development in 1992.

We acknowledge that since 1992 there have been areas of insufficient progress and setbacks in the integration of the three dimensions of sustainable development, aggravated by multiple financial, economic, food and energy crises, which have threatened the ability of all countries, in particular developing countries, to achieve sustainable development.

One of the problems has been the failure to focus on the environmental pillar so global environmental degradation has continued to occur and will eventually lead to further deterioration of economic and social conditions for human beings. Evidence of continuing degradation is contained in the OECD Environmental Outlook to 2050 report which points out that it is critical for action to be taken now to prevent further environmental deterioration, and that postponing action will result in increasing costs, weak growth and the risk of future catastrophic changes to the environment. Another problem is that even though there have been a number of agreements on sustainable development during the past twenty years, these agreements lack binding international standards and permit states to have a broad discretion to adopt policies that suit their circumstances.

The outcome of the Rio+20 Conference in June 2012 is another non-binding agreement called The Future We Want. Once again, state governments claim that they are trying to achieve a sustainable future for present and future generations and the planet. They aim to increase their efforts to eradicate poverty and they call for ‘a holistic approach to sustainable development which will guide humanity to live in harmony with nature.’ Two main themes at the Rio+20 Conference were the promotion of the green economy, and the strengthening of the international institutional framework for sustainable development.

It is likely that the outcomes of the Rio+20 Conference over the next decade will again result in little progress as these commitments are not binding and are worded in such broad and general terms that it is difficult to know what action is required. States are proposing the

29 The Future We Want, above n 1, [19].
30 Ibid [20].
32 OECD, above n 7, 26.
development of a green economy in the context of sustainable development and the reform of sustainable development institutions to adopt more effective governance. However the words ‘green economy’ are not defined in the agreement and some of the main proposals for institutional reforms are left to further negotiation by states in the future. One possible method that could improve sustainable development outcomes is for schools and universities to focus on education that encourages all individuals to take action on sustainable development because education can promote sustainable development and improve the ability of people to deal with environment and development concerns.

III. EDUCATION AND SUSTAINABLE DEVELOPMENT

Education plays a key role in the achievement of sustainable development and can encourage public participation as well as ensure that all individuals and major groups make progress on sustainable development objectives. Agenda 21 indicates that education is essential to changing individual’s views so that they become aware of environmental ethics, are encouraged to take action to address sustainable development issues and effectively participate in decision-making.33

The United Nations General Assembly declared that 2005 -2014 is the ‘Decade of Education for Sustainable Development’ and noted the significant role which education plays in achieving sustainable development.34 The aim is to integrate principles and values of sustainable development into all areas of education.35 Education for sustainable development is:

"[T]ransformative learning. It promotes a sense of both local and global responsibility, encourages future-oriented and critical thinking, integrates traditional knowledge, builds recognition of global interdependence and promotes reflection on new lifestyles that combine well-being, quality of life, and respect for nature and other people."36

The aim of education for sustainable development is to achieve a transformation in the way that people think about their relationship to the environment and to encourage everyone to change their behaviour and attitude so that all individuals can contribute to the achievement of sustainable development goals.37 The shortcomings of the reliance on state government to negotiate effective environmental international agreements has led to the development of civil society initiatives from members of the public, organisations and NGOs. One example is the inadequacy of the present international legal regime on climate change:

"[T]he short term effectiveness of the international climate change regime must be called into question. Global GHG [greenhouse gas] emissions continue to increase, and although the precise meaning of “dangerous anthropogenic interferences with the climate system” has yet to be defined, preventing such interference is generally expected to involve emission reductions well beyond the level called for in the Kyoto Protocol."38

33 Agenda 21, above n 2, [36.3], ‘It is also critical for achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making.’ See also World Summit on Sustainable Development Plan of Implementation above n 18, [116].
36 Ibid [8].
37 Ibid [74].
An illustration of civil society engagement that fosters an ethical approach to sustainable development is through the development of the Earth Charter.

IV ETHICS – THE EARTH CHARTER

In 1990, the Association of Universities for a Sustainable Future drafted the Talloires Declaration\(^39\) Ten Point Action Plan to encourage universities from all around the world to take action because of concern about the degradation of the environment and the depletion of natural resources. The universities in this declaration agreed on a number of proposals including action to ‘increase awareness of environmentally sustainable development, create an institutional culture of sustainability and educate for environmentally responsible citizenship’.\(^40\)

This Association of Universities for a Sustainable Future also supports the Earth Charter as a resource to advance sustainable development in higher education.\(^31\)

The development of a charter was recommended in the Brundtland Report,\(^42\) however negotiations amongst states at the United Nations Conference on Environment and Development (UNCED) in 1992 failed to agree on an intergovernmental charter of environmental ethics.\(^43\) In order to further this project, the Earth Charter Commission was formed and the drafting process for a new charter was undertaken by many groups from different communities in over forty countries. So the present Earth Charter is aimed at people rather than governments\(^44\) and is not an international agreement negotiated by states. However this charter influences civil society as an ethical guide and covers four key themes: ‘respect and care for the community of life’, ‘ecological integrity’, ‘social and economic justice’ and ‘democracy, non-violence and peace’.\(^45\)

The Earth Charter has adopted an intrinsic view of the environment as Bosselmann indicates in the following quote:

> Environmental concerns are perceived differently from social and economic concerns. The environment is not perceived as the resource base for human consumption and not as one of three equally important factors, but as the basis of all life. This shift from a narrow human-centred to a broader life-centred perspective is expressed in respect and care for the community of life and ecological integrity as the two overarching principles of governance.\(^46\)

The Earth Charter bases its ethics on ecological integrity and has been adopted by a number of communities, cities, governments as well as by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Union for the Conservation of Nature (IUCN).\(^37\) The ethical challenge for sustainable development education\(^48\) and the goal of the current UN Decade of Education for Sustainable Development is to ‘integrate the values inherent

\(^39\) Association of Universities for a Sustainable Future The Talloires Declaration \(<http://www.ulsf.org/programs_talloires.html>\). There are 350 signatories including 21 from Australia. See \(<http://www.ulsf.org/programs_talloires_signatories.html#Australia>\).

\(^40\) Ibid.

\(^41\) Ibid.

\(^42\) Brendan Mackay, ‘The Earth Charter, Ethics and Global Governance’ in Laura Westra, Klaus Bosselmann and Richard Westra (eds), Reconciling Human Existence with Ecological Integrity (Earthscan, 2008) 61, 64.

\(^43\) The Earth Charter Initiative, Values and Principles to Foster a Sustainable Future \(<http://www.earthcharterinaction.org/content/>\).

\(^44\) Mackay, above n 48, 64.

\(^45\) Ibid 63.

\(^46\) Klaus Bosselmann, Principles of Sustainability: Transforming Law and Governance (Ashgate Publishing Group, 2008) 178.

\(^47\) Laura Westra and Klaus Bosselmann, ‘Introduction’ in Laura Westra, Klaus Bosselmann and Richard Westra (eds), Reconciling Human Existence with Ecological Integrity (Earthscan, 2008) 3, 4.

in sustainable development into all aspects of learning to encourage changes in attitudes and behaviour that allow for a more sustainable and just society for all.49 UNESCO has a leadership role to play in education for sustainable development and views education as vital to achieving sustainable development because presently there is a lack of knowledge about how to deal with global environmental, economic and social crises. Education of present and future leaders can lead to the development of solutions to these problems.50

The Earth Charter is a useful guide about global ethics for sustainability and could possibly form a foundation for a new UN legally binding agreement on environment and development.51 This charter has been used in teaching programs52 and has the potential to influence public ethics and the education of individuals about sustainable development in the future.

*The Future We Want* shows this movement towards an ethical shift is also influencing agreements at the international level. The wording of this agreement demonstrates an intrinsic view of the relationship of humans with nature and the following paragraph reflects a change in attitude by humans to way they live in their natural environment:

> We recognize that planet Earth and its ecosystems are our home and that “Mother Earth” is a common expression in a number of countries and regions, and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature.53

An understanding of these ethical changes could be incorporated into programs designed for sustainable development education to encourage a change in attitude by students to their relationship with their environment.

The Rio+20 Conference and the publicity associated with this conference provided an opportunity for civil society to engage with sustainable development issues. Many higher education institutions made voluntary commitments to the Higher Education Sustainability Initiative at the Rio+20 Conference.54 This initiative included a declaration that the higher education institutions would teach sustainable development concepts across all disciplines55 and promoted a broad view of education for sustainable development:

> Education for sustainable development aims at enabling everyone to acquire the values, competencies, skills and knowledge necessary to contribute to building a more sustainable society. This implies revising teaching content to respond to global and local challenges. It should

49 Ibid 17.
51 Mackay, above n 48, 69.
52 Ibid 64.
53 *The Future We Want*, above n 1, [39].
55 Rio + 20 UN Conference on Environment and Development, *Higher Education Sustainability Initiative for Rio +20* <http://www.unsd2012.org/rio20/hei_engage.html> ‘As Chancellors, Presidents, Rectors, Deans and Leaders of Higher Education Institutions and related organizations, we acknowledge the responsibility that we bear in the international pursuit of sustainable development. On the occasion of the United Nations Conference on Sustainable Development, held in Rio de Janeiro from 20-22 June 2012, we agree to support the following actions: Teach sustainable development concepts, ensuring that they form a part of the core curriculum across all disciplines so that future higher education graduates develop skills necessary to enter sustainable development workforces and have an explicit understanding of how to achieve a society that values people, the planet and profits in a manner that respects the finite resource boundaries of the earth. Higher Education Institutions are also encouraged to provide sustainability training to professionals and practitioners.’
also promote teaching methods that enable students to acquire skills such as interdisciplinary thinking, integrated planning, understanding complexity, cooperating with others in decision-making processes, and participating in local, national and global processes towards sustainable development.56

In addition to these higher education commitments at the Rio+20 Conference, developments have occurred through a civil society movement that have encouraged universities to adopt short, medium and long term actions on sustainable development in education.

V Implications for University Education

Concerned citizens decided to galvanise civil society in order to progress the sustainable development agenda by forming a strategy that advances a Global Citizens Movement.57 This engagement led to proposals to organise global civil society and the development of a Global Citizens Movement58 that would unify the global society on sustainable development. Indeed, the Global Citizens Movement is occurring because of the failure of state governments to develop effective governance of institutions at the international level that could implement sustainable development agreements. Fortunately, this reluctance of governments to advance sustainable development objectives has not deterred the civil society movement from taking positive action. This civil society movement has led to the drafting of a number of peoples’ treaties on sustainable development issues to encourage organisations and the public to make progress on sustainable development action. The Peoples’ Sustainability Treaties59 create a platform to enable a collective voice of civil society and allow participation by the public in a number of areas of sustainable development. Some of these areas include consumption and production, sustainable development governance and corporate social responsibility. These peoples’ treaties are not international legal agreements and are not binding, but they have the potential to impact on a number of areas concerning sustainable development including education at universities.

VI People’s Sustainability Treaty on Higher Education

The Peoples’ Sustainability Treaty on Higher Education indicates that there should be changes in five areas for educational institutions such as universities. These areas are: cultural change, campus management, curriculum, community engagement and connecting the system (where policies are aligned with sustainable development objectives). This treaty was drafted with input from higher education agencies and organisations together with student bodies.60

The signatories to this people’s treaty 61 commit to a number of actions to achieve these changes with immediate, short-term (by 2013), medium-term (2012-2015) and long-term

56 Ibid.
58 Peoples’ Sustainability Treaties, People’s Sustainability Treaties Alternative Pathway for a Sustainable Transition <http://sustainabilitytreaties.org/movement/>.
59 Peoples’ Sustainability Treaties, People’s Sustainability Treaties- Treaties@Rio+20 <http://sustainabilitytreaties.org/draft-treaties/>.
60 Peoples’ Sustainability Treaties, People’s Sustainability Treaty on Higher Education, Preamble, foreword <http://sustainabilitytreaties.files.wordpress.com/2012/05/peoples-sustainability-treaty-on-higher-education-draft-for-rio20.pdf>- The Treaty has been drafted by representatives from twenty five higher education agencies, organisations, associations and student groups rooted in different parts of the world.’
(2016-2025) actions. As far as curriculum is concerned, a university that is a signatory to this agreement should take action in the short-term to provide ‘supportive frameworks for embedding education for sustainable development competencies within higher education experiences.’ A medium-term action is to mainstream education for sustainable development in national education programs and to ensure sustainability literacy and engagement is an integral part of all curriculums. In the long-term, the aim is to embed education for sustainability competencies within teaching and learning programs and to enable all staff and students to engage with this agenda. So there are proactive movements in civil society to encourage changes that promote sustainable development as part of the curriculum.

The University of Western Sydney (UWS) is an example of an Australian university that will promote these changes. The United Nations University approved the establishment of a Regional Centre of Expertise on Education for Sustainable Development in the Greater Western Sydney region. UWS has also endorsed the Peoples’ Sustainability Treaty on Higher Education and this treaty has implications both for ensuring the campus is setting sustainability priorities in campus management (such as energy efficiency) and also for development of the curriculum and research. The aim of the university is to reorient curriculum to align with sustainable development in the future. This will be achieved through encouragement for students to participate in existing sustainable development units and the adoption of new courses. It is probable that a number of other universities in Australia and overseas will adopt similar practices in the future.

VII UNIVERSITIES IN AUSTRALIA

Education in sustainable development is necessary for all major groups and individuals to play a role in furthering sustainable development. The challenge to promote education for sustainable development in universities is acknowledged in The Future We Want:

We strongly encourage educational institutions to consider adopting good practices in sustainability management on their campuses and in their communities with the active participation of, inter alia, students, teachers and local partners, and teaching sustainable development as an integrated component across disciplines.

The Australian Government action plan, Living Sustainably: The Australian Government’s National Action Plan for Education for Sustainability is a framework for national action that sets out strategies covering education for sustainability and will enable all Australians to

63 Ibid 8 medium-term action 4.
64 Ibid long-term action goal 3.
66 University of Western Sydney, Sustainability UWS Curriculum <http://www.uws.edu.au/sustainability> ‘The University has a wide range of units of study, majors and sub-majors which focus on issues of social, economic and environmental sustainability.’
68 The Future We Want, above n 1, [234].
have knowledge and skills necessary for living sustainably.\textsuperscript{69} This action plan forms part of Australia’s participation to the UN Decade of Education for Sustainable Development.\textsuperscript{70} The second strategy in this plan is called ‘reorienting education systems to sustainability’.\textsuperscript{71} Action required to implement this strategy including the development of a program to support change for sustainability throughout universities including: research, teaching and learning, as well as management of the campus.\textsuperscript{72} This approach should be adopted in universities in Australia where sustainability units could be taught as part of the curriculum in all university degrees.

The success of achieving action on sustainable development requires actions by all individuals, companies and organisations\textsuperscript{73} so academics at law schools in Australia could consider methods for implementing changes to the curriculum.

\section*{VIII The Concept of Sustainable Development in Australian Law Schools}

To date, the legal profession and academics have generally been reluctant to incorporate sustainable development units as a compulsory requirement of the legal curriculum. However this debate should be on the reform agenda as the Australian government has flagged that sustainability can be incorporated into professional learning qualifications (including law) as part of the focus on sustainability education in the National Action Plan on Education for Sustainable Development:

\subsection*{2.2.4 Sustainability for key professions}

The Australian Government will work with appropriate partners to promote integration of sustainability into professional learning qualifications and university degree accreditation. This project will research incorporating sustainability into university courses for key professions such as engineering, accountancy, economics, law, architecture, planning and teaching. Priority will be given to those professions with the greatest and most immediate impact on sustainability outcomes. This work will build on the existing work of the Australian Research Institute in Education for Sustainability with business schools and teacher education institutions.\textsuperscript{74}

The concept of sustainable development is usually taught in law schools as part of units that are electives such as environmental law\textsuperscript{75} or international environmental law. However all law students would benefit from learning about the objectives of sustainable development and the ethics of living a sustainable lifestyle because these skills and values will enable them to engage in public participation in decision-making,\textsuperscript{76} it is recommended that law schools include environmental law as a compulsory unit in their legal programs, indeed, Southern Cross University is an example of a university that does so.\textsuperscript{77}

\begin{flushleft}
\textsuperscript{71} Living Sustainably, above n 75, 21.
\textsuperscript{72} ibid 23 [2.2.1].
\textsuperscript{73} See Agenda 21, above n 2, [23.2], [36(5) (i)].
\textsuperscript{74} Living Sustainably above n 75, 23.
\textsuperscript{76} Agenda 21, above n 2, [36.3].
\end{flushleft}
Certainly there should be a requirement that students study environmental law or international environmental law as part of their law degree because these units incorporate the study of sustainable development. Some academics may argue that there is justification for their particular area of expertise to be included as part of the law curriculum instead of environmental law. Arguably, the present generation of academics would be remiss not to take into account the issue of education for sustainable development in the near future because continuing environmental deterioration and accompanying economic and social problems are likely to have serious consequences for the well-being of future generations who will not have access to the wealth of natural assets that the present generation enjoys. According to the Executive Summary of the OECD Environmental Outlook to 2050 report:

Over the last four decades, human endeavour has unleashed unprecedented economic growth in the pursuit of higher living standards. While the world’s population has increased by over 3 billion people since 1970, the size of the world economy has more than tripled. While this growth has pulled millions out of poverty, it has been unevenly distributed and incurred significant cost to the environment. Natural assets have been and continue to be depleted, with the services they deliver already compromised by environmental pollution. Providing for a further 2 billion people by 2050 and improving the living standards for all will challenge our ability to manage and restore those natural assets on which all life depends. Failure to do so will have serious consequences, especially for the poor, and ultimately undermine the growth and human development of future generations.78

Education for sustainable development is a necessity for the next generation of lawyers who live in a world where the problems concerning legal protection of the environment are not confined to the boundaries of one country particularly concerning areas that are shared such as the climate. Presently, the focus of legal education on the Priestley 11 requirements that set out bodies of substantive law in detail as necessary for legal curriculums, are out of date. This reliance on a list of substantive law requirements has failed to take into account major changes in society,79 so it is timely to reconsider the future direction of legal education in Australia.

It is preferable that these new programs should encourage an education that takes an ethical approach to sustainable development. Legal academics should consider changes to the curriculum to ensure that students can study a sustainable development unit with an understanding of ethical issues concerning the protection of the local, regional and global environment. New curriculum development and innovative teaching methods could encourage effective learning outcomes on this topic. One initiative is to engage students in public participation in sustainability projects. The University of Western Sydney in partnership with two other organisations is working to protect the health of the Hawkesbury-Nepean River by providing monitoring through the Hawkesbury River Waterkeeper.80 This organisation can also provide opportunities for student involvement in community responses where the health of the river is under threat.

A focus on education for sustainable development could lead to the education of globally responsible law leaders, innovative thinkers and lawyers who will be able to develop legal frameworks to deal with global environmental challenges such as climate change and loss of biological diversity.

78 OECD, above n 7, 26.

IX CONCLUSION

The reasons for the emphasis on education in recent sustainable development initiatives are to encourage the development of globally responsible citizens and to educate future leaders on environmental, economic, and social issues of global concern. Many of these developments in education are now being adopted by some universities even though state governments have not succeeded in negotiating binding international agreements on sustainable development. Consequently, civil society, organisations, NGOs and other environmental groups are now taking the initiative to progress sustainable development objectives. This is an indication of a global social civil society movement\(^1\) dedicated to change and taking positive action on sustainable development because of the failure of governance at the international level.

The global effects of social, economic and environmental changes are rapidly impacting on Australian society and in the light of these developments the Australian government has endorsed education for sustainable development. Clearly, leaders in the legal profession, law reformers and academics can discuss these issues when considering curriculum and the training of future lawyers as ethical global citizens for the benefit of our future global society.

The challenge for educating lawyers with a global outlook is that the real question is not how to provide lawyers with the tools to adapt legal concepts through comparative law or international law to improve the Australian legal system. Rather, the challenge is to educate lawyers as global citizens who have an ethical view of respect for nature\(^2\) with a desire to contribute to solutions for the legal protection of the global environment.

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\(^1\) See Peoples’ Sustainability Treaties, People’s Sustainability Treaties Alternative Pathway for a Sustainable Transition< http://sustainabilitytreaties.org/movement/>. 

\(^2\) See Bosselmann, above n 52.
COMPARATIVE PROFESSIONAL RESPONSIBILITY AND LEGAL ETHICS EDUCATION: PRIVILEGE IN GLOBAL LEGAL SERVICES

BY MAGDALENE D’SILVA*

ABSTRACT

This paper discusses the impact of globalisation on Australian professional responsibility and legal ethics education by a brief critical analysis of the doctrine of client/legal professional privilege in global legal services such as international arbitration.

The analysis is used to support the paper’s premise that current approaches to Australian professional responsibility and legal ethics education that are de-lineated by a state and territory focus, can be up-dated. This is not only because of moves toward a national Australian legal profession, but because of the need to equip all Australian law graduates with the requisite skills to identify and handle new ethical challenges posed by a global legal services environment.

I. INTRODUCTION

[G]lobalisation has directly affected the delivery of legal services ...1

Law schools and other legal education providers should recognise their own professional responsibility in integrating legal and comparative ethics in their programs ...2

The impact of globalisation on the ethics of Australian legal practice is gaining national attention. In April 2012 the Honourable Chief Justice Bathurst, of the Supreme Court of New South Wales, spearheaded debate on this topic in a presentation to the Commonwealth Lawyers’ Regional Conference,3 in which he addressed the arrival of the mega global law firm phenomenon in Australia and the rise of litigation funders.4 These changes in Australian legal practice are caused by globalisation, and as His Honour rightly highlighted, they in turn pose new challenges for the ethical traditions of Australia’s legal profession. In addition, the growth in global legal services in Australia is formally recognised by Australian law schools and national bodies.5 Law schools in Australia and indeed everywhere, therefore have an arguable duty to provide law graduates with an awareness and ability to deal with new ethical challenges:

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2 Ibid 851.
4 Ibid.
5 See the International Legal Services Advisory Council (ILSAC) Third Statistic's Survey 2008–2009, which provides statistics evidencing empirical profit growth and expansion in Australia’s global legal services market of an increase by $165.1 million AUD since the first survey was conducted in the 2004–05 financial year. Also consider initiatives by the Australian Government Office of Learning and Teaching Project on Internationalising the Australian Law Curriculum (see French, CJ, ‘Horses for Courses’, International Legal Services Advisory Council and Internationalising the Australian law curriculum for enhanced global legal education and practice National Symposium, Canberra, 16 March 2012).
Australian law graduates who intend to become lawyers need to be conscious of the new legal ethics challenges they will face in their future legal practice careers. This need has increased following several major corporate scandals domestically and abroad over the last decade, that in turn triggered national and international legislative reform which specifically sought to modify lawyer behaviour extra-territorially through the regulation of privilege, among other matters.7 This paper therefore suggests that it is timely for ‘Professional Conduct’, as a Priestley 11 core subject in the Australian law school curriculum, to integrate examples of ethical challenges caused by globalisation across its key elements. The elements currently required to be taught within this subject entail: coverage of personal and professional conduct in a practitioner’s duties to: the law, to the Courts, to clients and fellow practitioners, as well as a basic knowledge of holding monies in trust accounts.9 Professional conduct (which is more broadly referred to in this paper as professional responsibility and legal ethics) does not necessarily need to be altered to include globalisation as a separate component in itself. Rather, the suggestion here is that issues of globalisation need to be integrated across each of the required elements so that law graduates are aware of the ethical issues that can arise in a global legal services environment.

One reason for suggesting this update is that legal education standards in Australia already indicate that graduates of the Bachelor of Laws degree should demonstrate an understanding of international and comparative contexts.10 As an overseas scholar has more bluntly put it: ‘[i]t is educational malpractice to ignore the present and ever growing impact of globalization on the delivery and regulation of legal services.’11 This becomes relevant where pedagogy does not address professional responsibility and legal ethical issues arising in cross-border legal practice12 (such as where a Professional Conduct course focuses on the formal position in only one Australian state).

Another reason to update Professional Conduct is that globalisation involves and affects the operation of domestic law firms,13 not just global law firms.14 Furthermore, economic

8 As encompassed in Legal Profession Admission Rules 2005 (NSW) Regulation 95(1)(b).
10 Ibid 121.
12 Daly, above n 11, 1253.
globalisation in the form of international trade agreements, is arguably influencing the nature and operation of the legal profession within each Australian state and territory. Aside from moves by the Council of Australian Governments (COAG) toward a national legal profession, globalisation has changed the way in which the State now regulates the profession as ‘legal services providers’ whose skills are seen as doing more than facilitating the attainment of justice, but rather as ‘creating value’ by adding efficiencies in commercial transactions and making legal services a profitable national trade export in a market environment that has simultaneously transformed clients into ‘legal services consumers’. The State may also now regard the legal profession as a major contributor to national gross domestic product. This approach may be legitimate if one accepts the view that ‘lawyers do not merely respond to client demands, they take the initiative to construct services that appeal to clients who want to operate transnationally … Certain kinds of lawyers prosper with globalisation’.

Comments from current and former members of Australia’s judiciary, about the impact of the global law firm phenomenon and legal outsourcing on Australian legal practice, manifest strong interest in the effect globalisation is having on the professional conduct standards of Australian lawyers. Such interest sits alongside initiatives for international mutual recognition of foreign lawyers and law degree qualifications from different nations. Although this paper is written primarily for a readership of Australian legal education providers of undergraduate law students, its main premise may be equally pertinent for continuing legal education providers of


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postgraduate law students and admitted practising lawyers because questions about the impact of global corporate governance on legal education, and on professional responsibility and legal ethics per se, have been the subject of critical analysis in Australia and overseas for at least a decade.

Accepting for the present the premise that globalisation needs to be integrated across each of the required elements of a Professional Conduct course, the paper attempts to garner support by examining the doctrine of legal professional privilege and client legal privilege (also conjunctively referred to in this article as ‘privilege’) in two parts. The first part critically analyses the law on privilege in Australia and abroad — with greater emphasis on the law in Australia — to demonstrate the ethical tensions between national and global legal practice. The second part briefly discusses privilege in front-end and back-end global legal services. The article’s conclusion is that globalisation makes it necessary for professional responsibility and legal ethics pedagogy to include discourse on comparative legal cultures and values.

It is worth briefly explaining the reasons for choosing to examine the law on privilege to support the case for integrating globalisation into Australian professional responsibility and legal ethics education. First, privilege is regarded throughout the common law world as an integral aspect of professional responsibility and legal ethics in the sense that it is a part of ‘the integrity of legal representation’. Second, privilege is studied in the Professional Conduct course curriculum because it involves the lawyer’s duty to maintain the confidentiality of their client’s communications. Third, large law firms themselves may be taking a scrupulous approach to these issues given the potential repercussions in large-scale litigation.

In addition, the author’s experience is that latent uncertainty seems to persist about the differences between legal professional privilege and client legal privilege in Australia, which may be more wide spread given the nuanced differences in the formal regulation of professional

responsible law and legal ethics that remain between Australia’s states and territories. Uncertainty about the law on privilege in Australia may be further compounded by globalisation when Australian lawyers are involved in: cross-border national legal practice, act for an overseas client, deal with an overseas-admitted lawyer, or are involved in international arbitration — a private form of multi-jurisdictional dispute resolution process which falls outside the normal civil procedures and rules of evidence that apply in Australian courts, and requires lawyer sensitivity and adaptability to the convergence of differences in diverse national legal systems.33 This is especially important when acting in matters involving conflicts of law questions in transnational civil procedure, cross-border contracts, as well as international arbitration.34 These questions include: deciding which laws apply in the absence of a global law on privilege35 or, in the absence of a global regulator, who decides and oversees the decision’s enforcement?36 However caution is warranted against any assumption that the absence of formal global legal ethics regulation means unbridled conduct without self-regulation.37

This paper does not seek to answer these questions, which are instead used to demonstrate why aspects of globalisation, comparative professional responsibility and legal ethics,38 need to be integrated into the Australian law school curriculum. How that is done is a matter for further discussion involving direct collaboration between legal education providers (including overseas law schools),39 academics, the practising legal profession (particularly global law firms), and

36 Voluntary rules and guidelines issued by international legal profession bodies such as the International Bar Association aim to positively influence legal profession behaviour around the world might be considered a form of soft-law global legal ethics regulation. See for example Danielle Jasmin Kirby, ‘The European Union’s Gatekeeper Initiative: The European Union Enlists Lawyers In The Fight Against Money Laundering and Terrorist Financing’ (2008) 37(1) Hofstra Law Review 261, 263.
the legal profession’s representative bodies, so that courses are well structured, accurately informed and legitimate. This also requires an honest appraisal of an academy’s co-ordination of its course materials and assessment methods.

II. PRIVILEGE: A BRIEF OVERVIEW

This section will demonstrate that multi-jurisdictional issues of professional conduct exist within Australia and internationally for the law on privilege, for which there is a plethora of common law, text book commentary and academic literature. It is thus suffice for present purposes to give a brief overview of the main substantive elements. In the rest of this section, client legal privilege, legal professional privilege will be referred to as privilege to encompass the notion that certain confidential client communications are protected from otherwise lawfully mandated disclosure. This term also encompasses the concept of professional secrecy in civil law jurisdictions. Although as the next section of the article attempts to explain, a distinction between these terms should otherwise be maintained because substantive and procedural differences remain.

Privilege in Australia and in most of the common law world, can be broadly defined as: a right which belongs to a lawyer’s client, for confidential communications between a lawyer and a client (which includes communications made to or from the lawyer or client with a third party), to be protected from compulsory production in legal proceedings or where otherwise required by law, if such communications were made for the dominant purpose of obtaining legal advice or current or anticipated legal proceedings. Although this dominant purpose test for determining which communications are protected by this privilege, applies at common law as well as under the uniform evidence legislation, its operation and availability, and the test for the waiver of each form of privilege, are slightly different between Australia’s state and territories. The following sections explain some of the key differences within Australia and then briefly consider the legal approach to privilege that is taken in other common law and civil law systems.

A. Australia

In Australia privilege is both a substantive right at common law (‘legal professional privilege’) and a rule of evidence in litigation under uniform evidence legislation (‘client legal privilege’). Both forms of privilege require that at the time the relevant communications were created, they

40 Groups include the International Legal Services Advisory Council (ILSAC) and Australia’s Large Law Firms Group Ltd (LLFG).
41 Daly, above n 11, 1257.
43 Kirby, above n 35, 266.
45 The uniform evidence legislation has been enacted in the jurisdictions of the Commonwealth, New South Wales, the Australian Capital Territory, Victoria and Tasmania: Gino Dal Pont, Lawyers’ Professional Responsibility (Thomson Reuters, 4th ed, 2010), 245.
were confidential and made for the dominant purpose of legal advice or existing or anticipated litigation. Under the dominant purpose test at common law, the party claiming privilege (namely the client), must show on the balance of probabilities that as a matter of objective fact, the purpose of obtaining legal advice, or existing or anticipated litigation, dominated all other purposes which motivated the creation of the communication(s). A practical conundrum that arises is what constitutes ‘anticipated litigation’, which the courts have said must be more than just a general apprehension of any litigation; it is the anticipation of particular litigation by parties who can be identified.

Another practical conundrum which has been the subject of increasing litigation in Australia and overseas is whether confidential in-house communications with in-house lawyers, are protected by privilege, as such lawyers usually serve other purposes in the lawyer–employer/client relationship beyond giving legal advice or acting in litigation. In-house lawyers in Australia are not necessarily required to hold a current practicing certificate in order for privilege to attach to their communications; indeed, so long as any lawyer is admitted to practice (including foreign admitted lawyers in Australia), the lack of a current practicing certificate will not abrogate the lawyer–client relationship that is required for privilege to attach. This is because the key factor is whether the relevant legal advice for which the communications were created, was given with the ‘necessary degree of independence’.

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46 Where litigation is on foot, confidentiality is subjectively defined under s 117 of the uniform evidence legislation as having been made by or to a person who was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law. By comparison, the legal test for establishing confidentiality at common law is arguably more objective. See for example Smith Kline & French Laboratories (Aust) Ltd v Secretary Department of Community Services and Health (1990) FCR 73; Rickard Constructions Pty Ltd v Rickard Hails Moretti & Ors [2006] NSWSC 234.

47 Grant v Downs (1976) 135 CLR 674 at 688; Baker v Campbell (1983) 153 CLR 52 at 112; Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49.

48 Ibid.


51 This is particularly with regard to determining who is the client for the purpose of legal advice privilege: Three Rivers District Council v Governor & Company of the Bank of England (No 5) [2004] 2 WLR 1065; Three Rivers District Council v Governor & Company of the Bank of England (No 6) [2005] 1 AC 610; Managing General Partner Ltd and others v Babcock & Brown Global Partners [2010] EWHC 2176 (Ch).

52 This includes government lawyers by virtue of the inclusive definition of ‘client’ under s 117 of the uniform evidence legislation.

53 Dal Pont, above n 45, 293–301; AWB v Cole (No 5) [2006] FCA 1234. Fraudulent and illegal purposes are not protected by privilege at common law (Re Kearney: Ex parte Attorney-General for the Northern Territory (1985) 59 ALJR 749) or under the uniform evidence legislation (S 125).


55 Waterford v Commonwealth (1987) 163 CLR 54; Australian Hospital Care v Duggan (No 2) [1999] VSC 131. Privilege attaches to client communications with foreign lawyers in Australia at common law (Grofas Pty Ltd v Australia & New Zealand Banking Group Ltd (1993) 117 ALR 669; Kennedy v Wallace (2004) 142 FCR 185). Privilege also similarly attaches under the uniform evidence legislation. For example the Evidence Act 1995 (NSW) s 177 (c) defines ‘lawyer’ as including ‘an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country’.

By contrast, client legal privilege under the uniform evidence legislation applies where the confidential communication’s dominant purpose is for legal advice or litigation, and also where an unrepresented party has made their own communication with another person for the dominant purpose of preparing for or conducting the legal proceeding. Client legal privilege thus applies to situations requiring the disclosure of otherwise confidential communications where evidence is being adduced in legal proceedings in a relevant court. However client legal privilege under the uniform evidence legislation does not apply in non-judicial proceedings, such as tribunal hearings.

Although both forms of privilege invoke the dominant purpose test, important differences remain between legal professional privilege at common law, and client legal privilege under the uniform evidence legislation. These differences mean that other than for the purposes of this paper, in legal education and legal practice the terms should not be conceptually conflated. One difference is that unlike client legal privilege under the uniform evidence legislation, legal professional privilege at common law does not exist outside the lawyer–client relationship, meaning that parties who are not legally represented by a lawyer cannot claim privilege over their own communications with third parties in situations where disclosure of those communications has been mandated by law in a forum outside judicial legal proceedings.

Another difference relates to when each form of privilege applies. In New South Wales for example, the provisions for client legal privilege under the Evidence Act 1995 (NSW) apply to the tendering of evidence at trial as well as to pre-trial procedures (such as discovery and subpoena for production) due to the operation of the Uniform Procedure Rules 2005 (NSW). By contrast, in other Australian jurisdictions there is some uncertainty as to when and whether client legal privilege under the uniform evidence legislation applies to pre-trial procedures and at trial. There is senior commentary to the effect that litigation in the Federal jurisdiction still requires the application of common law legal professional privilege for the exchange of evidence exchange at the pre-trial stage, but client legal privilege under the Evidence Act 1995 (Cth) applies when adducing evidence at trial. The application of each form of privilege is depicted below in Table 1.

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57 Evidence Act 1995 (NSW) s 118.
58 Evidence Act 1995 (NSW) s 119.
59 Evidence Act 1995 (NSW) s 120.
60 Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors [2006] NSWSC 350.
61 Some commentators suggest that when the High Court changed the common law legal professional privilege from sole purpose to dominant purpose in Esso (1999) above n 43, that it did so to bring Australian common law into line with the position under the uniform evidence legislation. Other commentators however say that the High Court was influenced by the law that already existed in other common law jurisdictions. See Dal Pont, above n 46, 250.
64 Ross above n 42, 361. McDougall, above n 63, has said that ‘the High Court has now decided that the Evidence Act test if client legal privilege does not apply outside the context of adducing evidence in court and does not result in any alteration of the common law.’ R McDougall cites the cases of: Northern Territory v GPAO (199) 196 CLR 553, Esso Australia Resources Ltd v FCT (1999) 201 CLR 49 and Mann v Carnell (1999) 201 CLR 1.
65 McDougall, above n 63.
Table 1: Forms of privilege and their application (NSW and Commonwealth)  

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</table>

These jurisdictional differences in turn affect the applicable test for waiver, which describes the circumstance in which the protection of privilege is forfeited. At common law:

[O]nce the conditions for the existence of legal professional privilege are established, there is no room for the court to decide whether, in light of some particular public interest, the privilege should be overridden or disregarded.  

However the actions of the parties can still amount to a client’s claim for privilege effectively being waived. This is the case in the test for waiver of legal professional privilege at common law, which is generally referred to as the fairness doctrine. Here, depending on the particular circumstances of the matter and the question of what is fair for the parties involved, privilege over a confidential communication can be lost if it is 'leaked, overheard or intercepted by a third party, or a copy is obtained by the opposing party'.

There is more uncertainty in the common law as to whether a determination of fairness involves considerations of inconsistent behaviour. The High Court said (in obiter) in Mann v Carnell (1999):

It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege … What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

Decisions of the Supreme Court of New South Wales such as Goldberg v Ng (1995) have similarly invoked notions of fairness which demonstrate that at common law, privilege can be inadvertently lost by waiver where the disclosing party or client did not subjectively intend

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66 Table prepared by Monica Ibrahim LLB (Macq).
67 McDougall, above n 63.
69 Ross, above n 42, 381 cites Rumping v DPP [1964] AC 814; Culcraft v Guest [1898] 1 QB 759.
70 201 CLR 1, 28–9.
71 132 ALR 57.
for this to occur. These cases show that the law on privilege in Australia, widely differs in its
operation and application, depending on the jurisdiction.

By comparison, the test for waiver of client legal privilege under the uniform evidence
legislation immediately invokes notions of inconsistency under s 122.72 This section allows
evidence of otherwise confidential and privileged communications to be adduced where the
client or relevant party has consented or acted in a way that is inconsistent with the claim
for legal advice or litigation privilege (under s 118 or s 119) being maintained. In contrast to
principles of fairness at common law, s 122(3)(a)(b) of the uniform evidence legislation refers
to the inconsistent act by the client or relevant party, amounting to disclosure to another of the
substance of the evidence sought to be adduced knowingly and voluntarily, or, with express or
implied consent.73 Parties to litigation who disclose the substance of legal advice they have
received, to third parties (such as through the broadcast media), may therefore be interpreted
as having waived privilege over such advice.74 However this is not always the case where
the disclosure was for other reasons outside the litigation, such that it could not be said to be
inconsistent with maintaining a claim of privilege.75

In summary, the general law on privilege in Australia is unsettled, with principles of notions
of fairness and inconsistency applying in some courts while others have ruled it out,76 and yet
others considering a client or relevant party’s state of mind to assess whether waiver of privilege
was done knowingly and voluntarily.77 Recent case law and academic commentary in Australia78
suggest that common law fairness apply when interpreting the uniform evidence legislation.
However, as these questions remain unsettled they demonstrate the point that legal education
in Australia needs to ensure law graduates are aware of the differences when acting across state
and territory borders, as well as when providing legal services to international/ global clients
who retain lawyers in Australia to represent their interests within Australian borders.

B. Other Legal Systems

This section briefly covers some different approaches to the law on privilege in overseas legal
systems. As the purpose is to illustrate the point that Australian law graduates entering a global
legal services environment need to be aware that legal ethics challenges are addressed differently
across national borders, the section does not seek (or need) to provide an in-depth analysis.

Although ‘[b]oth the common and civil law systems respectfully acknowledge the fundamental
duty of a lawyer to maintain the confidentiality of client information’,79 McComish80 has
eruditely analysed the question of whether and how foreign legal professional privilege should
be recognised in Australia where a multi-jurisdictional cross-border matter involves a foreign/
overseas admitted lawyer. Acknowledging that the prevailing Anglo-American view is that the
law of the forum of the matter should apply, McComish opines that this is by no means clear,
and advocates for the application of foreign law rather than ‘entangle the law of the forum in

72 Ross, above n 42, 380–81.
73 This is subject to exceptions in s 122(5) with regard to disclosures by third parties who are not the
client or a party as defined under s 117.
74 Ampolesx Ltd v Perpetual Trustee Co (Canberra) Ltd (1996)137 ALR 28.
75 Osland v Secretary to the Department of Justice [2008] HCA 37; Timothy Mills v Walter Wojcech
77 Telstra Corp Ltd v BT Australasia Pty Ltd (1998) 156 ALR 634.
78 Artistic Builders Pty Ltd v Nash [2009]NSWSC 102. Ross, above n 43, 383 cites D Moujali,
‘Recent Developments’ Barnews: Journal of the NSW Bar Association (Summer 2008-2009) 13–
15.
79 Daly, above n 11, 1277.
80 James McComish, ‘Foreign Legal Professional Privilege: A New Problem for Australian Private
questions of foreign privilege.81 The debate’s existence shows why law graduates and practising lawyers in Australia need to be conscious of professional responsibility and legal ethical issues beyond state and national borders (privilege being the example used in this paper to illustrate the point). Yet as there is no ‘level playing-field’82 across the world for the law on privilege, the consistency of regulation by individual nation states is perhaps patchwork at the global level, meaning that law firms and lawyers providing global legal services need to self-regulate on such issues.83

In countries such as Japan, where the law recognises the protection of confidential information, such protection is not afforded on the basis of any concept of privilege over communications made for the purpose of legal advice or litigation.84 In the United States, which like Australia regulates its legal profession in a federal manner,85 privilege (referred to as attorney–client privilege) exists to protect not only communications made for the purpose of legal advice but also other work done so that legal advice can be given (the work-product doctrine).86 A similar form of liberalisation occurred in the United Kingdom to some extent when the House of Lords in Three Rivers (No 6)87 extended the scope of legal advice privilege in corporate legal services by stating that ‘legal advice is not confined to telling the client the law; it must include advice as to what should be prudently and sensibly done in the relevant legal context’88 (author’s emphasis). As the House of Lords did not comment on key aspects of the lower Court of Appeal’s decision in Three Rivers (No 5),89 both decisions are relevant to the question of ‘who is the client’ in a privilege claim by a corporate entity.90

Nevertheless, the operation of that class of privilege is still considered uncertain91 (the meaning of relevant legal context is regarded to be unclear)92 with some commentators suggesting the uncertainty be answered by the law of agency.93 Others have referred to English law on privilege as adopting a ‘liberal approach … English law permits privilege in a document, once established, to be retained as against the rest of the world’.94

By contrast, privilege operates differently in the civil law systems of many European Union nations. In Germany, lawyer–client confidentiality is contained in its national constitution (Grundgesetz). Under Germany’s Criminal Code all information received by a lawyer while acting in that capacity must be kept confidential; breaching it is an offence.95 However disclosure

81 Ibid 298.
82 See the articles cited above n 37.
83 McComish, above n 81, 306.
84 Cronin, above n 87, 917.
85 McComish, above n 81, 309.
91 Cronin, above n 87, 918.
92 Loughrey, above n 91, 110.
is permitted to prevent a crime. In comparison, privilege in France (professional secrecy) operates as follows:

[In all matters, whether in the domain of counselling or defence, the consultations addressed by a lawyer at his client or destined thereto, the correspondence exchanged between the client and his lawyer ... and, more generally, all items of the file, are covered by professional secrecy.]

French professional secrecy cannot be: waived by the client, breached by a lawyer to prevent the commission of a crime, nor divulged by the lawyer to anyone including a person to whom the client has already confided the information. A similar approach is taken in Greece, and in Switzerland where privilege is strengthened by the fact of privacy being enshrined as a constitutional right. In Islamic shari'a law a protection is imposed for all communications related to a client’s legal representation by a lawyer. A distinguishing feature of privilege in civil law systems is that it belongs to the lawyer; not the client. In addition, confidential communications with in-house lawyers are not protected by privilege within the EU, even where a privilege claim involves a lawyer from a common law jurisdiction to whose communications privilege would otherwise have attached.

C. Privilege in Global Legal Services

The issue of culture is one of the neglected aspects of the globalisation of the legal profession. Culture is ... fundamental to our discussion because of the relationship between ethical norms and cultural norms.

If it is recognised that a nation’s legal system manifests unique cultural norms and values, it follows that nuanced differences in the law on privilege within Australia and other nations present legal ethical challenges for lawyers and law firms providing global legal services across national borders. This section critically analyses a few examples of such challenges in global legal services.

1. Non-Contentious Legal Services: Privilege In Cross-Border Transactions

Legal advice privilege applies to non-contentious transactional legal advice services that traverse national and international borders such as: mergers and acquisitions, corporate due diligence, securitisation, private equity and capital markets. Retaining lawyers to act in such matters at a transnational level, arguably gives international clients an added degree of protection from any legal compulsion to disclose confidential communications and documents to third parties or state based regulators. The consequence is that lawyers providing global cross-border transactional legal advice services, face regulatory risks by virtue of inconsistent or non-existent global regulation of global legal services. The risk may be heightened by economic pressure if

96 McComish, above n 81, 305.
98 Ibid.
99 Daly, above n 11, 1278.
100 McComish, above n 81, 303.
101 Rogers, above n 35, 371.
102 Daly, above n 11, 1278.
105 See Hill, above n 83.
it is accepted that a legitimate role for lawyers is to create value in front-end transactional legal advice services by ‘reducing a transaction costs’.106

Although it is not possible to fully analyse that notion here,107 leading commentators have long raised attention to the fact that lawyers fulfil a gatekeeper role as reputational intermediaries in corporate governance, by facilitating transaction legitimacy in lending the firm’s reputational capital to the deal.108 Lawyers also create value in front-end transactional legal advice services by providing the added protection of privilege, as perhaps illustrated by common law decisions which invariably entail pre-trial skirmishes over privilege claims by corporate clients attempting to prevent the divulgence of evidence, in litigation or to state based regulatory third parties.109

Concerns have thus arisen about the potential misuse of privilege in international cross-border legal services such as money laundering.110 Although the protection of privilege in many jurisdictions is not available where the communication’s purpose is fraudulent or criminal,111 some lawyers (such as those in Australia) are not directly subject to anti-money laundering regulation.112 This contrasts with the position in other common law jurisdictions such as the United Kingdom (UK), whose lawyers are subject to anti-money laundering regulation that requires them to disclose confidential client information to regulator third parties where the necessary suspicion is formed.113 Such regulation does not override litigation privilege but may still override legal advice privilege, because UK law does not absolve lawyers of a statutory duty to report money-laundering suspicions about clients in transactional legal advice.114 Indeed, this aspect of the United Kingdom’s regulation of front-end legal services115 may apply to all lawyers from overseas who physically serve clients in the UK, whether or not they obtain local legal admission, or maintain their status as a foreign admitted lawyer from overseas.116 In summary, it is submitted that international differences in the law on privilege in non-contentious transactional global legal services, present legal ethical challenges for the global lawyer.117

106 Gilson, above n 18.
107 Australian legal academic commentary appears to recognise the idea that lawyers create value in transactions as trite. See for example Michelle Sanson, Thalia Anthony and David Worswick Connecting With Law (Oxford University Press, 2011) 360.
112 The second tranche of the Anti-Money Laundering and Counter-Terrorist Financing Act 2006 (Cth) which was originally intended to directly regulate legal services provided within Australia, has not been enacted at the time of writing.
2. Contentious Legal Services: Privilege In International Arbitration

The most significant lesson I have learnt in several decades of practical experience as counsel or arbitrator, my choice would unhesitatingly be the extreme importance of the cultural dimension.118

This section briefly discusses global legal ethics in international arbitration where the law on confidentiality and privilege may be uncertain and require the lawyers involved to exercise a multi-jurisdictional ethical sensitivity.119 International arbitration is a private dispute resolution adjudication process that occurs outside the public courts of a nation’s judicial system by which the contracting parties agree to be bound by an enforceable decision of a neutral third-party arbitrator.120 Globalisation has enabled international arbitration to become the preferred method of private cross-border commercial contract dispute resolution for at least two reasons: the perceived neutrality of the arbitral process outside the national court system of any one country, and in theory at least, the relative ease by which an international arbitral award (as compared to a national court judgment) may be enforced in the 146 nations that have signed the United Nations’ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’).121 Although most international commercial arbitrations invariably take place in the world’s leading financial centres, Australia is striving to position itself as an attractive seat for international arbitration in the already competitive Asia-Pacific region, spearheaded by the introduction of supportive amendments to the International Arbitration Act 1974 (Cth) that follow international standards to the extent it adopts the UNCITRAL Model Law.122

Commentary by leading Australian international arbitrators highlight the fact that complex substantive and procedural differences exist between the legal rules for the conduct of litigation and arbitration (at both the domestic and the international level), to which lawyers in this field must be fully conversant and able to address.123 While it is not possible here to outline all the complexities, a key difference concerns confidentiality. Although the conduct of the arbitration proceeding itself is private (behind closed doors, in camera),124 confidentiality obligations are not automatically imposed upon the parties at common law in Australia for matters such as the exchange of evidence or discovery of documents, meaning that confidentiality needs to have already been agreed by the parties in the arbitration agreement.125 The position might well be different if the same arbitration is being conducted overseas.126 In England for instance,

119 For an excellent analysis and discussion see Rogers, above n 35.
124 Rana and Sanson, above n 33, 206.
125 Rana and Sanson, above n 33, 207, cite Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10. The confidentiality provisions for international arbitration in Australia under the International Arbitration Act 1974 (Cth) ss 23 C, 23D only apply if the parties opt in.
126 Rana and Sanson, above n 33, 207.
where London is widely recognised as the leading global arbitral centre, the courts have adopted the view that confidentiality is a requisite denouement of the inherently private character of arbitration. Furthermore, the law on privilege in international arbitration is uncertain because no consistent global rules that govern when privilege arises and when it is waived, presently exist. This means law graduates entering a global legal services environment in areas such as international arbitration will inevitably face different approaches to the regulation of legal ethics issues that are inherent in global legal practice itself. As Rana and Sanson state:

International commercial arbitration typically involves a blend of the rules of evidence in both the common law and civil law systems ... Arbitrary tribunals are not bound by national laws on the admissibility of evidence. The parties’ lawyers may thus need to possess an arsenal of sensitive cultural and legal ethical skills, because such issues are determined by an arbitral tribunal in a way that converges ‘distinct norms and values of different legal cultures’. Accordingly, variances in the law on privilege present potential legal ethical challenges for lawyers providing contentious global legal services, such as in international arbitration. In Australia the domestic rules of evidence that would usually apply to litigation in a public court, do not apply in the private forum of an international arbitration in Australia — meaning that client legal privilege under the uniform evidence legislation would be irrelevant. One might then presume that Australian common law on legal professional privilege would apply, but only to such extent that the disputing parties’ arbitration clause has not specified that the law of another nation shall apply.

Acknowledgment needs to be made of the existence of voluntary conduct codes issued by international bodies which seek to encourage increased convergence on professional responsibility and ethical standards in global legal services, such as in international arbitration. These include: the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999), the IBA Guidelines on Conflicts of Interest in International Arbitration (2004) and the IBA Rules of Ethics for International Arbitrators. These rules remain optional and their adoption by the world’s arbitral institutions, or by parties in ad hoc international arbitration, may be influenced by whether the disputing parties’ lawyers are from a civil law or common law system. As Rogers has adroitly stated:

It is ... perplexing to contemplate how to ascertain the ‘cultural values’ of the international arbitration community. International arbitration exists between cultural boundaries and is intended to fuse multiple diverse traditions... Indeed, the dynamic increase in the ranks of

127 With a few exceptions.
128 See the leading Court of Appeal decisions in Dolling-Baker v Merrett (1991) 2 All ER 890 and, more recently, in Ali Shipping Corporation v Shipyard 'Trogr' (1998) 2 All ER 136.
131 Rana and Sanson, above n 33, 189.
133 Rana and Sanson, above n 33, 189. Also see Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors [2006] NSWSC 530.
134 Moses, above n 121, 270–305.
participants is one of the major sources of pressure for development of an established ethical regime.\textsuperscript{136}

The prospect of more international arbitration in Australia brings with it inherent cross-jurisdictional and cross-cultural legal ethical questions for the parties’ lawyers as well as for the international arbitrator(s) presiding over the arbitral tribunal.\textsuperscript{137} If and where Australian law schools seek to include courses on global legal services (such as international arbitration), this arguably entails a corresponding duty to include education on the global legal ethics issues which are inherent in such services.

\section{Conclusion}

This paper has argued that Australian professional responsibility and legal ethics education needs to include aspects which are affected by globalisation as the pursuit of more global legal services work by Australia’s legal profession, attracts new global legal ethical challenges. The law on privilege in Australia and overseas is only one example — but a clear one — in which national and global legal services present new and complex ethical challenges for lawyers and law firms providing cross-border legal services to global clients. A state based Professional Conduct curriculum based on legal formalism thus needs to be up-dated to ensure that Australian law graduates have the requisite skills to meet global legal ethical standards of duty, competence and care.

\textsuperscript{136} Rogers, above n 35, 407.

A SHIFT IN TIME SAVES NO-ONE: MOBILE TECHNOLOGIES AND THE NRL V OPTUS DECISION

KAYLEEN MANWARING*

ABSTRACT

In 2006, additions to the ‘fair dealing’ exceptions were made to the Copyright Act 1968 (Cth) to recognise current community expectations about what should constitute legal copying. These included exceptions for ‘time-shifting’ and ‘format-shifting’, methods heavily used by the mobile-equipped generation to listen and watch all forms of content on their mobile phones and tablets.

Earlier this year, Federal Court judges issued trial and appeal judgments in the first case in Australia to interpret the ‘time-shifting’ exception contained in s 111 of the Copyright Act 1968 (Cth) (s 111). The contrasting decisions of the trial judge and the Full Federal Court in Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2) and National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd have been the focus of much interest in the media and telecommunications industries. This paper will briefly discuss problems with s 111, and propose an alternative exception for private and domestic use which may assist in encouraging innovation in the digital industry sector.

I. INTRODUCTION

On 30 March 2012, the Commonwealth Attorney-General announced a review by the Australian Law Reform Commission (ALRC) of the exceptions in the Copyright Act 1968 (Cth) (‘ALRC review’). This release followed close on the heels of Rares J’s ground-breaking copyright decision in the Federal Court, in Optus v NRL. This case was the first in Australia to interpret the new ‘time-shifting’ exception introduced by the Copyright Amendment Act 2006 (2006 Amendment Act).

The decision of the trial judge in this case was overturned by the Full Federal Court (‘Full Court’) in April this year. However, the Full Court acknowledged the ‘difficulty and considerable uncertainty’ inherent in the application of the time-shifting exception. Despite this acknowledged uncertainty, the High Court has refused special leave to appeal in this case. In any event, it is unlikely that the drafting problems and public policy issues to which s 111 gives rise could have been satisfactorily dealt with judicially: so the ALRC review is opportune.

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1 On 7 September 2012, the High Court of Australia refused Singtel Optus Pty Ltd’s application for special leave to appeal in this case.
3 (2012) 201 FCR 147 (‘NRL v Optus’) (appeal decision before Finn, Emmett and Bennett JJ of the full bench of the Federal Court).
6 Copyright Act 1968 (Cth) s 111.
8 NRL v Optus (2012) 201 FCR 147, 152 [9].
II. The Facts

The copyright in free-to-air televised broadcasts of football games in Australia’s two most popular codes (Australian Rules and rugby league) is owned by the Australian Football League (‘AFL’) and National Rugby League partnership (‘NRL’) respectively. The AFL and NRL both granted Australia’s largest telecommunications provider, Telstra Corporation Ltd (‘Telstra’), an exclusive licence to communicate these games to the public on the internet and on mobile devices. It is supposed that Telstra paid handsomely for the privilege: the deal with the AFL alone is alleged to be worth more than AUD $150 million over 5 years.

The utility of this licence deal was threatened by the innovation activities of Singtel Optus Pty Ltd and its subsidiary, Optus Mobile Pty Ltd (together ‘Optus’). In mid-July 2011, Optus began offering a cloud-based service to its mobile subscribers called ‘TV Now’. The TV Now service (suspended after the Full Court decision) allowed subscribers to use a mobile application, or the TV Now website, to record their choice of free-to-air television shows, and watch the shows on any or all of their mobile telephone, tablet or PC devices. Optus offered a free service (to subscribers) with limited recording time, as well as two fee-based plans offering additional time.

The TV Now service was based on a fully-automated software and hardware system, which was set up, owned and maintained by Optus. ‘Record’ requests from user devices were sent to a user database located on Optus equipment. If a ‘record’ request was received, free-to-air broadcasts intercepted by Optus antennae and receivers were converted and recorded in four different MPEG formats on Optus servers (compatible with PC viewing via the website, or on Apple, Android and other 3G devices). These copies were unique to each user (for example, if 10 users requested to record a particular football match, then 40 different copies were made of the same match - each identified in the Optus system with an unique customer ID).

When a ‘play’ request was received, the TV Now system would stream the unique recording in the relevant format to the requesting device. No additional copy was made on either the Optus equipment or user device when the recording was played. Recordings were automatically deleted after 30 days.

10 As set out in the trial judge’s decision in Optus v NRL (2012) 199 FCR 300.
13 0c/45 min, (approx) $7/5 hours, (approx) $10/20 hours. Optus v NRL (2012) 199 FCR 300, 308 [15].
14 The technology worked somewhat differently for Apple devices, giving rise to ‘discrete’ issues in relation to s 111: the parties agreed to deal with these issues separately from the existing proceedings. Ibid 334-335 [115].
Figure 1: A simplified diagram of the TV Now system

III. THE ACTION

A. Optus Claims Unjustifiable Threats

The action was commenced not by the rights holders but by Optus. When confronted with claims by the NRL and AFL that the TV Now system infringed their copyright in the broadcast of the football games and they would seek to shut the system down, Optus responded by bringing proceedings in the Federal Court under s 202 of the Copyright Act 1968 (Cth) for unjustifiable threats of infringement proceedings. The AFL and NRL duly cross-claimed for copyright infringement, and Telstra, the exclusive licensee of the internet and mobile rights, was also joined.

15 Considerable assistance in drafting this diagram was received from diagrams of comparable systems used in the US and Japan, prepared by Naoya Isoda, ‘Copyright Infringement Liability of Placeshifting Services in the United States and Japan’ (2011) 7 Washington Journal of Law, Technology & Arts 149, 200-204.
B. AFL, NRL and Telstra Cross-Claim for Infringement of Copyright

The AFL, NRL and Telstra based their cross-claim on sections 85-87 and section 101 of the Copyright Act 1968 (Cth). These sections provide that copyright is infringed in a film, sound recording or broadcast, if a person without permission:

- makes a copy or film of the relevant copyright material;
- causes the material to be seen or heard in public; and/or
- communicates the material to the public.

C. Optus’ Defence

There was no dispute about the facts. Optus defended the claim that they had infringed copyright by making copies of the broadcast and streaming them to the users of the TV Now service by counter-claiming that s 111 applied:

111 Recording broadcasts for replaying at more convenient time

(1) This section applies if a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made….

(2) The making of the film or recording does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast...

Optus claimed that each user of the TV Now service had been the one to ‘make’ the recorded copies, and replay them, for their own private or domestic use. This was not an infringement of copyright, Optus argued, under the time-shifting exception in s 111. No party sought damages at this stage, only a declaration as to the legality or otherwise of Optus’ system.

IV. The Decisions

A. At Trial

The main issues Rares J decided at trial were: 16

16 The NRL (but not the other parties) also pressed an issue as to whether the recording was an ‘article’, or ‘article or thing’ under s 103 and s 111(3)(d), which prohibits sale or distribution of an article infringing copyright (s103) or an article or thing made for private or domestic use (s 111(3)(d)). Rares J held in Optus v NRL (2012) 199 FCR 300, 333-334 [110-111] that s 103 was not breached because there was no infringement of copyright, and that s 111(3)(d) did not apply because there was no distribution of Optus’ server (held to be the article or thing under s 24). For a much more detailed analysis of the decision at first instance, see Rebecca Giblin, ‘Optus v NRL: A Seismic Shift for Time Shifting in Australia’ (2012) <http://ssrn.com/paper=2007950>. 
1. Who made the recordings stored on the Optus servers?

TV Now users (not Optus), as ‘[i]f the user does not click “record”, no films will be brought into existence.’a

2. Could the maker avoid liability for copyright infringement under s 111(2) of the Copyright Act 1968 (Cth)?

Yes, as the making was solely for private and domestic use.

3. Who communicated (electronically transmitted or made available online) the programs to the user?

Users. Optus ‘did nothing to determine the content of that communication’.b

4. Was the transmission a communication ‘to the public’ in breach of s 86(c) or s 87(c) of the Copyright Act 1968 (Cth)?

No. ‘[A] communication made by the user to himself or herself of the film that he or she recorded is not made “to the public”’.c

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**1. The Authorities**

This case was the first to consider the interpretation of s 111 of the Copyright Act 1968 (Cth). Therefore, Rares J took guidance from two foreign authorities which dealt with similar fact situations:

- the US Second Circuit Court of Appeals decision in *Cartoon Network LP, LLLP v CSC Holdings Inc* (‘Cartoon Network’);17 and
- the Singapore Court of Appeal decision in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* (‘RecordTV’).18

The judge also relied on an analogy with the facts in a High Court of Australia case, *University of New South Wales v Moorhouse*.19 The High Court in this case held that a university was not primarily liable for copyright infringement for copies made by a person who used a photocopier in the university library to make infringing copies.20

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2. The Trial Judge’s Conclusion

From one perspective, Rares J’s interpretation is a sensible one. The Explanatory Memoranda21 to the 2006 Amendment Act imply that the primary purpose behind s 111 was to allow users to watch content they already had a right to watch at a time of their choosing without further charge, consistent with community expectations. The section, consistent with an implicit aim

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17 *Cartoon Network LP, LLLP v CSC Holdings Inc* 536 F 3d 121 (2nd Cir 2008).
18 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] SGCA 43.
19 (1975) 133 CLR 1 (‘Moorhouse’).
20 However, the university was held to have authorised the infringing copies in breach of s 36 of the Copyright Act 1968 (Cth).
21 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) and Further Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
of technological neutrality, does not on its face confine itself to particular devices or systems available at the time, such as VCRs or DVRs.

Additionally, the drafting of the section was changed during the parliamentary process to broaden the scope of the exception. The original drafting required the copying to be in ‘domestic premises’; this was removed in the final draft, and a definition of private and domestic use was added that specifically allowed for use ‘on or off domestic premises’. This amendment was obviously intended to allow recording and viewing to take place anywhere, anytime in order to give users flexibility; a flexibility directly relevant for users of mobile technology.

The section on its face does not prohibit the assistance of third parties to achieve the desired object. This makes sense as the vast majority of users cannot ‘make’ a film or recording and watch it later without third party supply of a physical device (such as a DVR or computer) and/or a software program. In fact, the first Explanatory Memorandum backing the 2006 Amendment Act specifically recognised the role of third parties in supplying ‘digital devices and services’ (emphasis added) for private copying.

B. The Full Court

The Full Court praised the trial judge and said that he had ‘reasoned cogently’. However, despite this, the Full Court held that he did not correctly interpret s 111. Finn, Emmett and Bennett JJ found instead that Optus had infringed copyright in the broadcasts. The unanimous judgment held:

- Optus alone, or Optus and the users jointly, were the ‘makers’ of the recordings; and
- Optus could not rely on the so-called ‘private and domestic use defence’ of s 111, as the Full Court felt there was nothing in the section that suggested it was intended to cover commercial copying on behalf of individuals.

1. The Reasoning

(a) The ‘Maker’ of the Copies

Rares J at first instance held that:

- The ordinary and natural meaning of “makes” and “making” in the sense ... is “to create” by initiating a process utilising technology or equipment that records the broadcast.

This interpretation of the meaning of ‘makes’ led to the trial judge’s conclusion that:

22 The Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) mentions maintaining the technological neutrality (or technical neutrality – the terms appear to be interchangeable in this context) of the Act no less than five times, although not expressly in reference to the new s 111. In the earlier Copyright Amendment (Digital Agenda) Act 2000 (Cth), a stated objective of the legislation was ‘[t]o replace technology-specific rights with technology-neutral rights so that amendments to the Act are not needed each time there is a development in technology’.

23 Further Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 7 [27-29].

24 S 10(1) Copyright Act 1968 (Cth), discussed in Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6 [14].


27 NRL v Optus (2012) 201 FCR 147, 152 [9].

28 NRL v Optus (2012) 201 FCR 147, 163-171 [55-99].

29 The preferred view of the Full Court was that of joint and several responsibility, but they did not think it necessary to rule definitively on this point. Ibid 167 [78].

30 Ibid 169 [89].

31 Optus v NRL (2012) 199 FCR 300, 322 [64].
the user of the TV Now service makes each of the films ... when he or she clicks on the “record” button ... This is because the user is solely responsible for the creation of those films. He or she decides whether or not to make the films and only he or she has the means of being able to view them. If the user does not click “record”, no films will be brought into existence that he or she can play back later. The service that TV Now offers ... is substantively no different from a VCR or DVR.32

The Full Court disagreed with Rares J’s assessment of the ‘maker’ of the copies on four grounds:33

(i) Definition Of ‘Make’
They disagreed with Rares J’s definition of the word ‘make’ as ‘create’. The Court preferred the AFL’s definition: ‘to produce (a material thing) by giving a certain form to a portion of matter’. The judges said that making is a ‘fundamental concept’ under the Act and ‘the essence of it is the idea of ... creating or producing ... a physical thing’.34 However, the Court did recognise that there was a need for a ‘causative agency’.35 This led to the conclusion that both Optus and the user were (probably) jointly and severally the makers of the copies: the user was the ‘instigat[or]’ of the copying, but it was Optus who ‘effect[ed]’ it.36 This reasoning was supported by the Full Court’s analysis of the relationship between the parties evidenced in the contract between them.37

(ii) How The System Works
The Full Court felt that ‘Optus [was] not merely making available its system to another who uses it to copy a broadcast’.38 They considered that:

Optus’ role in the making of a copy – ie in capturing the broadcast and then in embodying its images and sounds in the hard disk – is so pervasive that, even though entirely automated, it cannot be disregarded when the ‘person’ who does the act of copying is to be identified.39

(iii) The Analogies Used
The Full Court also rejected the trial judge’s use of the Moorhouse photocopier analogy. They expressed significant doubt that analogies were useful at all, as:

they both divert attention from what the TV Now system has been designed to do and pre-suppose what is the function (albeit automated) it performs in the ongoing Optus-subscriber relationship.40

However, they did hold that if an analogy was to be used, the TV Now system was not analogous to the Moorhouse situation: it was closer to that of a commercial photocopier who takes material given to it and copies it on behalf of its customers,41 with the implication that this would not be sufficient to attract the protection of s 111.

32 Ibid 322 [63].
33 NRL v Optus (2012) 201 FCR 147, 163-165 [58-65].
34 Ibid 164 [58].
35 Ibid.
36 Ibid 167 [76].
37 Ibid 167 [74, 76].
38 Ibid 166 [68].
39 Ibid 165 [67].
40 Ibid 164 [60] (relating back to the discussion in 163 [57]).
41 Ibid 166 [71].
The Full Court added that the way the TV Now system had been designed made Optus the ‘main performer of the act of [copying]’, adopting the language and conclusions of a Japanese appellate court examining similar technology.

(iv) Problems With ‘Volitional Conduct’

The Full Court considered a concept labelled ‘volitional conduct’ concept used in Cartoon Network was not relevant in Australian law. The court in Cartoon Network considered that:

[in determining who actually “makes” a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct …](43)

The use of the ‘volitional conduct’ requirement, according to the Full Court, was unnecessary in Australian law and put an inappropriate gloss on the word ‘make’ in ss 86 and 87 of the Copyright Act 1968 (Cth). They held that:

[it] ... is not apparent to us why a person who designs and operates a wholly automated copying system ought as of course not be treated as a “maker” of an infringing copy where the system itself is configured designedly so as to respond to a third party command to make that copy.44

(b) Could Optus As ‘Maker’ Nevertheless Claim Protection Under s 111?

In deciding this question, the Full Court examined the various bills and explanatory memoranda leading up to the passing of the new s 111. Unfortunately for Optus, the Full Court held that:

[there is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals... [T]he natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it.45

2. ‘Policy And A Technologically Neutral Interpretation’

The Full Court ended their decision with a brief discussion of statutory construction, in an attempt to shore up its particular interpretation of s 111. The judges acknowledged the desirability of technological neutrality, and recognised it as a parliamentary objective in previous amendments to the Copyright Act 1968 (Cth).46 However, the Full Court expressly recognised that their interpretation was not a technologically neutral one (unlike the decision at first instance), but felt constrained by what they saw as the ‘clear and limited legislative purpose of s 111’ to insist on an interpretation which excluded at least some of the technologies post-dating the section.47

42 Ibid 164 [60], citing Re Rokuraku II, First Petty Bench of the Supreme Court, Japan, 20 January 2011. This case concerned similar technology to the TV Now system and the First Petty Bench held that it was the service provider who performed the reproduction, not the user. Not cited in the Full Court’s decision was a similar decision 11 months later by the Paris Court of Appeal in Cour d’appel de Paris, Pôle 5, chambre 1, 14 décembre 2011, Wizzgo/Metropole Television et autres (Wizzgo). For an English language summary of Wizzgo, see Anne-Sophie Laborde, ‘Online digital video provider does not benefit from private copying exception’ (2012) International Law Office Media and Entertainment Newsletter <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=4f0eff65-d63f-4a2a-9601-c1fa0088733e&redir=1>.

43 NRL v Optus (2012) 201 FCR 147, 164-165 [62-63], citing Cartoon Network, 536 F 3d 121 (2nd Cir 2008), 10 [131].

44 NRL v Optus (2012) 201 FCR 147, 165 [64].

45 Ibid 169 [89].

46 Ibid 170 [95].

47 Ibid 170 [96].
This conclusion was followed by a brief discussion of ‘interpretation informed by legislative policy’, and the concept of purposive construction contained in the Acts Interpretation Act 1901 (Cth):

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.\(^4^9\)

The Full Court concluded that despite the use of policy as a tool of construction for ‘many centuries’, this tool had some limits, in particular:

if the apparently confined words of a statute are to be given a more extended scope, not only must they be capable as a matter of language of sustaining such an extension, there must also be some indication in the legislation, its purpose and context of whether, and if so how, the legislature would wish to extend what, on its face, is the confined scope of the statute or of a section of it.\(^5^0\)

Essentially, the Full Court saw Rares J’s decision, which adopted the purposive approach, as an inappropriate attempt to extend the scope of the section, an attempt which the Full Court believed was not supported by the language of the section or any express legislative purpose.

Like Rares J, the Singapore Court of Appeal took a purposive approach, but with one significant addition:

... where the Copyright Act is unclear as to how much copyright protection ought to be granted to a copyright owner, the courts should not be quick to construe a statutory provision so liberally as to deter or restrict technological innovations by preventing them from being applied in a manner which would benefit the public without harming the rights of the copyright owner. (emphasis added)\(^5^1\)

It is arguable that the technology in this case did actually cause harm to the copyright owners, in the form of revenue loss from licence deals with Telstra and other service providers. This is pertinent as the government did express some intention to protect this type of revenue, stating that “reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners”\(^5^2\) (emphasis added). However, the Full Court did not mention this point. This is perhaps unsurprising, considering the Court’s expressed determination to justify their decision purely on interpretation of the precise language of the section.

V. LOST IN THE CLOUD, OR, WHERE TO FROM HERE?

A. Ambiguity And Applicability

Contrary to the Full Court’s conclusion that the trial judge had used the purposive approach to inappropriately extend the scope of the section, it is arguable that the trial judge’s interpretation is consistent with the current wording of s 111; The problem is, so is the Full Court’s! The essential problem with the case does not lie in the interpretation of the section contained in either judgment. The problem lies in the actual drafting of the section, which is simply ambiguous, leaving gaps which cannot easily be filled by the judicial process.

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48 Ibid 170 [97].
49 S15AA.
51 RecordTV, [2010] SGCA 43, 64.
52 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 1.
The most likely reason for this ambiguity is not hard to discover. The 2006 Amendment Act attracted trenchant criticism from the Senate Standing Committee\(^\text{53}\) and other members of parliament.\(^\text{54}\) Criticism did not focus on the actual content of the provisions, rather on the perception that they were pushed through without sufficient time for consideration.

Kimberlee Weatherall, in a prescient 2007 article, criticised the lack of guiding principles applying to the Copyright Act 1968 (Cth), and said that this was ‘indicative of a deeper failure to think through the policy goals’\(^\text{55}\). The problems with a lack of consideration of those goals, and an underdone drafting job, are borne out by the result in this particular decision. Also, in the absence of such guiding principles, it is unlikely that the ambiguity inherent in s 111 can be appropriately resolved by the courts.

The Full Court’s approach has created an additional problem: how can this decision be applied in other contexts? The Full Court clearly confined its decision to the particular TV Now service: ‘different relationships and differing technologies may well yield different conclusions to the ‘who makes the copy’ question’\(^\text{56}\).

Unfortunately, the Full Court did not attempt to give any general guidelines on how to answer this question in other circumstances. They also rejected the use of analogies as aids to interpretation. This case has left the public and industry with little assistance in establishing which technologies may breach this provision. The High Court’s decision to refuse special leave means that assistance will not soon be forthcoming.

Of course, courts could attempt to extend the Full Court’s judgment to its fullest extent and hold that if there is any role by a third party (other than pure supply of a device) then you have joint ‘makers’ and the non-user party will not be able to avoid liability for copyright infringement by the use of s 111. However, this is not borne out by the reasoning of the Full Court. In particular, the judges placed significant emphasis on the ‘pervasiveness’ of Optus’ role in the making of the copies as part of the TV Now service, which indicates that there is some threshold level of involvement by a third party before they are considered a ‘maker’.

Unhelpfully, the Full Court gave little guidance on what that threshold level might be. For example, if the Full Court’s reasoning is applied, how would s 111 and other sections of the Copyright Act 1968 (Cth) deal with a technology which worked like this:

- program broadcasts, selected by the user, are intercepted via the user’s personal digital receiver;
- the broadcasts are then converted, transmitted to, copied and stored on a cloud server maintained by a third party; and
- the programs are later transmitted to and played by the user on their personal device?

This scenario raises a number of questions about the interpretation of s 111 and other sections of the Copyright Act 1968 (Cth). Would the third party’s role be considered ‘pervasive’ enough to fall within the Full Court’s definition of ‘maker’? The process of conversion, transmission and storage of the signal may well require multiple copies to be created, depending on the technology: how would this be treated under s 111, especially considering the use of the word ‘solely’? Would transmission to the cloud server be a ‘communication to the public’ in breach of the copyright holder’s rights?

All of these are technical questions that would likely arise for discussion in an Australian court. However, none of these questions in the end point usefully to whether or not as a matter of public policy, this technology and its use should be allowed. Should not lawmakers’ questions

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\(^{54}\) Eg Commonwealth, Parliamentary Debates, House of Representatives, 1 November 2006, 28 (Nicola Roxon).

\(^{55}\) Weatherall, above n 7, 21.

\(^{56}\) NRL v Optus (2012) 201 FCR 147, 171 [100].
be about ease of use for consumers, and the encouragement of technological innovation? Or alternatively, from a rights holder perspective, would this type of copying have the potential to damage revenue streams to the extent that continued production of cultural content would no longer make economic sense?

In essence, the questions asked should be less about the ‘pervasiveness’ of third party roles and more about how the technology affects the balance between users and rights holders.

B What Should Happen to Section 111?

1. The Need For A Clearer Legislative Choice

In the present matter such are the conflicting interests and values, such are the possible consequential considerations of which account might need to be taken that, if a choice is to be made to extend or otherwise modify an exception such as s 111, this requires a legislative choice to be made, not a judicial one.57

As discussed, it is arguably that Rares J’s interpretation of s 111 was not an extension or modification of s 111 as held by the Full Court, rather just one possible interpretation of an ambiguous section. However, in the light of the courts’ clear difference of opinion, in particular about the definition of ‘makes’, a clearer legislative choice does need to be made. In contrast to mostly piecemeal approaches to reform that have characterised amendments to copyright law in recent times, a comprehensive review by the ALRC is to be welcomed.

However, the Australian government does not have untrammelled discretion as to the drafting of their exceptions. The ALRC review will have to take into account Australia’s international obligations, in particular the ‘three-step test’ introduced in the Berne Convention.58 One of the most relevant recent articulation of the ‘three-step test’ can be found in Article 13 of TRIPs:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.59(emphasis added)

The most certain way to proceed, considering the technical nature of the Full Court’s decision, would be to draft the section to one of two extremes:

1. Take the Full Court’s decision to its furthest possible extent and state clearly that users can only time-shift using devices and/or systems over which they have total possession, control, and proprietary rights; or

2. Confirm Rares J’s purpose-based approach, and expressly permit a user who has a right to view content to use any device or system it prefers to time-shift that content, whether or not a third party is involved. Corporate entities may still make a profit out of selling a shifting service, but in order to comply with the ‘three step test’ this profit at the expense of the rights holders should be circumscribed eg by restrictions on the use of copies for anything other than the private purpose of the individual.

Both of these approaches have the benefit of increased certainty, but are not equal in their ability to balance the rights of content creators, digital product and service providers, and users.

57 Ibid 171 [99].
2. Costs And Benefits

The first approach above provides most benefit to content rights holders. However, note that not only Optus’ TV Now service, but at least two other TV-recording cloud services have been suspended\(^60\) as a direct result of the Full Court’s judgment in NRL \(v\) Optus\(^61\). As a consequence, any amendment to the Copyright Act 1968 (Cth) which cements the Full Court’s interpretation of the time-shifting right is not likely to assist ‘industries investing in the delivery of digital devices and services’\(^62\) and ‘the importance of the digital economy and the opportunities for innovation ... created by the emergence of new digital technologies’.\(^63\)

Any legislative approach which discourages competition between and innovation by digital service providers will also adversely affect consumer choice in digital technologies, and their legitimate interest in ‘fair access to and wide dissemination of information’.\(^64\) The ALRC is additionally of the opinion that ‘[n]ew business models should be allowed to develop without copyright hindering these benefits’.\(^65\)

Content rights holders do have a legitimate interest in being paid for content, to support development. However, it is arguable that community standards – which led to the introduction of a time-shifting right for private and domestic use in the first place\(^66\) - are such that a ‘double payment’ for content is not part of that legitimate interest\(^67\). This may limit the commercial ability of companies to enter into secondary content distribution deals like the one between the NRL, AFL and Telstra. However, the extent of those limitations may not be as significant as content developers fear, especially if they themselves invest in innovative delivery technologies: for example, the US National Basketball League appears to be attracting considerable revenue from its internet distribution model, even though it competes with legal time-shifting services.\(^68\)

The second approach above promotes both consumer choice and innovation in technology development. With appropriate restrictions on user rights (required by the ‘three-step test’ in any event), it should not unduly threaten the initial content investment and the legitimate interests of rights holders.

3. A New Private And Domestic Use Exception?

A ‘new general exception for private and domestic use’ (aimed at both the time- and format-shifting exceptions) is currently being considered by the ALRC.\(^69\) The combination of the two

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\(^{60}\) Considering the High Court’s refusal of special leave, it is likely that the services will now be permanently shut down.


\(^{62}\) An interest group that the Australian government has previously expressed a legislative desire to protect. Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), cited by Rares J in Optus \(v\) NRL (2012) 199 FCR 300, 319 [54].

\(^{63}\) Attorney-General of Australia, ALRC Terms of Reference: Copyright and the Digital Economy (2012), advised to the Australian Law Reform Commission on 29 June 2012

\(^{64}\) Australian Law Reform Commission, Copyright and the Digital Economy, Issues Paper 42 (IP 42), (2012), 20 [35].

\(^{65}\) Australian Law Reform Commission, Copyright and the Digital Economy, Issues Paper 42 (IP 42), (2012), 20 [35].

\(^{66}\) Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.

\(^{67}\) Note that this also applies to free-to-air services, as there is an ultimate (albeit indirect) cost to consumers for content in free-to-air services (the impact of advertising costs on pricing of consumer goods and services).

\(^{68}\) Christophor Rick, Over 1.9 Billion Online Video Streams at NBA.com for 2010 Season (2011) ReelSEO <http://www.reelseo.com/19-billion-online-video-streams-nbacom-2010-season> at 3 February 2012, cited in Giblin, above n16.

\(^{69}\) Australian Law Reform Commission, Copyright and the Digital Economy, Issues Paper 42 (IP 42), (2012), 31 [89].
A shift in time saves no-one

exceptions appears to be a sensible one: at the very least it should reduce the complexity of the current legislative arrangements. A more general exception is also to be welcomed if it assists a move towards the desired technological neutrality.

A 2007 proposal for an exception along similar lines allowed ‘fair copying for the purposes of private and domestic use of legitimately purchased material.’ This type of amendment could well ‘be less technology-bound and more adaptable to changing market conditions,’ but adopting this broad wording without more may lead to significant uncertainty and a consequent reluctance to innovate. An arguably more certain (but as yet untested) approach can be found in the recent Canadian Copyright Modernization Act:

29.22 (1) It is not an infringement of copyright for an individual to reproduce a work … or any substantial part of a work … if

(a) the copy … from which the reproduction is made is not an infringing copy;

(b) the individual legally obtained the copy … from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;

(c) the individual, in order to make the reproduction, did not circumvent … a technological protection measure…;

(d) the individual does not give the reproduction away; and

(e) the reproduction is used only for private purposes.

However, considering the strict interpretation of the Full Court, any drafting of an Australian exception should attempt to avoid further controversy as to the specific nature of the actors in a private copying scenario. Prudent drafting practice would also dictate a section along the following lines:

the individual may use the products or services of a third party to make the reproduction. Any copies made by or under the control of a third party must not be used for any purpose other than to facilitate the rights of the individual under this section.

VI. CONCLUSION

This case is just one illustration that Australia is still struggling to find a coherent view of what copyright should protect, and how it should do so. Mobile and cloud technologies are undeniably useful tools to navigate an increasingly globalised world: it is disappointing to see their use and continued development hampered by the incoherence of principle underlying the Copyright Act 1968 (Cth), an incoherence which has led to ambiguity and uncertainty in the drafting of legislative provisions. It is hoped that the ALRC review will provide a long-awaited opportunity for a thorough exploration of the operational, economic and logistical issues arising from private and domestic use of copyright material, and also lead to more certain outcomes and a better balancing of the interests of content developers, users and technological innovators alike.

70 Weatherall, above n 7, 34.
71 (S.C. 2012, c. 20), assented to on 29 June 2012, s 22, inserting a new s 29.22 into Canada’s Copyright Act. R.S.C., 1985, c. C-42. At the time of writing, the amendments were not yet in force.
72 This subsection would also be required under Australian law due to international obligations such as Article 17.4 (7) of the Australia-United States Free Trade Agreement, entered into force 1 January 2005.
COSMOPOLITANISM, LAW AND THE CHALLENGE OF GLOBALISATION

Melville A Thomas*

I. INTRODUCTION

‘[The whole idea of humanity] is an ideal of our reason. In this idea all the millions of rational beings on this earth are one, and this includes the past and the future … It is this idea then that underlies the wishes and efforts of the cosmopolitan.’

Drost von Muller 1797

In July 2011, the Venice Academy of Human Rights held a week-long summer school on the subject of ‘Human Rights and the Cosmopolitan Idea(l)’ at San Nicolo Monastery, organised by the European Inter–University Centre for Human Rights and Democratization. A group of forty scholars, academics, lawyers and post-graduate students from all parts of the world gathered to study and listen to four highly respected professors who have a special interest in international law and human rights: David Held, a political scientist from the United Kingdom; Boaventura de Sousa Santos, a legal sociologist from Portugal; Onuma Yasuaki, a international legal scholar from Japan; and Abdullahi A. An-Na’im, a Sudanese-born academic who teaches in the United States. As a participant I studied, and engaged with these professors by raising questions about their theories and interpretations of international society.

This paper will evaluate critically the cosmopolitan legal theories raised at the Venice Academy with an emphasis on the tension and conflict between traditional Western liberal cosmopolitanism (‘global citizenship’ and world governance) and ‘subaltern’ cosmopolitanism (which prioritises the plight of economically and culturally oppressed peoples, such as Indigenous

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2 The six-day programme, at the Venice Academy of Human Rights from July 11-16 2011, was comprised of 36 hours of lectures, seminars and discussions rounds. I would like to thank Venice Academy for the reading materials provided to me as a participant and will acknowledge the source such material, including articles and book chapters.

3 At the time of the conference David Held was Graham Wallas Professor of Political Science, London School of Economics.

4 Professor of Sociology, School of Economics University of Coimbra, Portugal; and Distinguished Legal Scholar at the University of Wisconsin-Madison Law School.

5 Emeritus Professor at the University of Tokyo.

6 Charles Howard Chandler Professor, Emory University School of Law.
peoples and people living with HIV/AIDS requiring access to anti-retroviral drugs’). Despite major epistemological differences and cultural backgrounds, these four professors agreed that a more egalitarian and just international economic, political and legal order needs urgent attention in these harsh neo-liberal times of global market forces.8

Part II of this article will consider the extent to which 21st century liberal cosmopolitan scholarship – exemplified by David Held’s *Cosmopolitanism: Ideals and Realities*9 – is part of an historical human rights tradition spanning 2500 years of Western legal and political science, from classical Greece to the 20th century. Held’s thesis is that the post-World War II international legal architecture is a potentially solid foundation on which to build a coherent international order based on the cosmopolitan principle that every person has ‘equal moral worth’, rights and duties, regardless of culture, tradition or difference.10

Part III of the article considers alternative views to conventional Western liberal cosmopolitanism which is based on a world-view of global citizenship and global governance. Part III will assess critically the unorthodox jurisprudence of Bouaventura de Sousa Santos.11 Neo-liberal globalization, Santos argues, is responsible for an unsustainable divide between the global ‘North and South’.12 Santos claims that globalisation ‘from above’ is responsible for most human rights abuses in terms of economic, social and cultural rights.13 Santos further claims that the only form of cosmopolitanism that has any chance of human emancipation is

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8 By global market forces I mean a situation in which international economic motives and corporate profit margins override religious, patriotic, cosmopolitan and other beliefs and values.

9 David Held *Cosmopolitanism – Ideals and Realities* (Polity Press, 2010). This book was recommended by the by the Venice Academy for participants to read.

10 Ibid, 49, 95.

11 Part III will refer to the following works by Boaventura de Sousa Santos: (1) Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (Butterworths Lexis Nexis, 2nd edition, 2002), especially chapters 1, 2, 5 and 9. Chapter 9 was recommended reading from the Venice Academy; (2) Boaventura de Sousa Santos, ‘Human Rights as an Emancipatory Script’ in Boaventura de Sousa Santos (ed), *Another Knowledge is Possible: Beyond Northern Epistemologies* 3-41 (this chapter was also recommended reading from the Venice Academy); (3) Boaventura de Sousa Santos and Caesar A Rodriguez-Garavito, ‘Law, Politics, and the Subaltern in Counter-Hegemonic Globalization’ in Boaventura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 1-27; and (4) Boaventura de Sousa Santos, ‘Beyond Neoliberal Governance: the World Social Forum as Subaltern Cosmopolitan Politics and Legality’ in Boaventura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University press, 2005) 29-68. It should be noted that Santos’s chapter ‘Human Rights as an Emancipatory Script’ draws heavily on chapter five in *Toward and New Legal Common Sense*. Some of his arguments are clearer and more succinct in this chapter published in 2007 and brought up to date since *Toward a New Legal Common Sense* was published in its second edition in 2002.

12 Santos, *Toward a New Legal Common Sense*, above n 11, 447-449. The term ‘global south’ has historically been used to describe states such as South Africa, India, Brazil and Egypt that were undeveloped, non-Industrial and non-democratic developing states in the 20th Century. This term is now largely an anachronism. States such as Brazil and India no longer fit into this ‘divide’. Santos’s use of this term is further explained in Part III, ff 143.

13 Santos, ‘Human Rights as an Emancipatory Script’ above n 11, 6-11; Santos, *Toward a New Legal Common Sense*, above n 11, 177-182.
‘subaltern cosmopolitanism’.\footnote{Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 8-11. NB: in this work, Santos uses the term ‘insurgent cosmopolitanism’ rather than ‘subaltern cosmopolitanism’ mainly for rhetorical effect. Phenomenologically, both terms are used to describe the same phenomena that is the use/manipulation of law – state, regional, global – to further oppressed peoples’ struggles against neo-liberal globalization. See also Santos, Toward a New Legal Common Sense, above n 11, 465.} Onuma Yasuaki\footnote{Onuma Yasuaki, ‘In Quest of Intercivilizational Human Rights’ The Centre For Asian Pacific Affairs: Occasional Paper Number 2 (1996) 1. This article was obtained from the Venice Academy, June 20, 2011 and was recommended reading.} and Abdullah An-Na’im\footnote{Abdullah Ahamed An-Na’im, ‘Taming the Imperial Impulse: Realising a Pragmatic Moral Vision’ Economic and Political Weekly, March 26, 2011, 58. This article was obtained from the Venice Academy, June 20, 2011 and was recommended reading.} also question the possibility and desirability of a universal order based on Western liberal cosmopolitan values.\footnote{On Western cosmopolitan values see: Held, above n 9, 69-75.}

My argument is that both liberal and subaltern cosmopolitan theories have much to offer scholars concerned with understanding and remedying human rights abuses that severely disadvantage national minorities and people in the undeveloped world. Held’s suggestions for international legal reform if realized would make global governance far more effective and just. Santos’s criticism of liberal cosmopolitanism cannot be easily dismissed as pure anti-Western rhetoric. Many of Santos’s arguments concerning neo-liberal globalization (market forces) and the ‘emancipatory’ potential of law for oppressed peoples are convincing. Human rights jurists, as explained in Parts II and III, know all too well the practical challenges that have to be overcome for a more just international legal order to be realized.\footnote{See Held, above n 9, 210-211. On Western cosmopolitan values see: PART II below.} How for example, can short-term and often spurious national interest calculations (economic or political) be effectively challenged? This question cannot be emphasized enough.

II. WESTERN COSMOPOLITANISM AND UNIVERSALISM

A. Origins

Cosmopolitanism and universalism have been expressed in various ways throughout Western civilization, from antiquity to the Enlightenment and modernity. These terms have been used for over 2500 years to explain a philosophical view of humanity where all people are viewed as world citizens, regardless of race, culture or nationality.\footnote{For contrasting views on cosmopolitan history and ideology see Held, above n 9, 15; Santos, ‘Human Rights as an Emancipatory Script’ above n, 11, 9-10.} Most scholars agree that cosmopolitanism had its origins in classical Greece during the 4th century BC.\footnote{For a succinct history of cosmopolitan thought – from ancient Greece to the present – see ‘Cosmopolitanism’ explained in the Stanford Encyclopaedia of Philosophy, (on-line): <http://plato.stanford.edu/entries/cosmopolitanism>. On Hellenic universalism see, especially, Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (MacMillan and Company, 1911) 29-30; David J Bederman, ‘Religion and the Sources of International Law in Antiquity’ in Mark W Janis, The Influence of Religion on the Development of International Law (Martinus Nijhoff publishers, 1995) 3-25.} Roman jurists such as Cicero went one step further and proclaimed a universal natural law that transcended culture, positive law and state sovereignty.\footnote{Cicero quoted in FR Cowell, Cicero and the Roman Republic (Harmondsworth, 1964) 354-355.} However, the neo-Marxist scholar Enrst Bloch, in Natural Law and Human Dignity, argued that the idea of universalism only occurred after the expansion of the Roman Empire when inter-state trade and commerce needed to be regulated by the Roman law of nations.\footnote{On the link between the Roman ius gentium and ius naturale see, generally, Ernst Bloch, Natural Law and Human Dignity (MIT Press, 1988) 19-20.}
The challenge of universalism a millennium later was to be similarly supported by medieval Christian jurists\textsuperscript{23} who viewed ‘sovereignty’ as necessarily limited.\textsuperscript{24} The Dutch jurist Hugo Grotius, writing during the European Thirty Years’ War (1618-1648), also believed that certain natural laws existed that should not be violated by rulers and those in authority.\textsuperscript{25} When rulers exploited and were cruel to their own subjects, third party intervention could be lawful.\textsuperscript{26}

From Antiquity to the Renaissance, cosmopolitan and universalistic thought and a supporting natural law theory challenged the absolutism of the state. The idea of the ‘world citizen’, philosophically and politically, and which is at the heart of cosmopolitan thought, was seriously considered during the European Enlightenment by Immanuel Kant\textsuperscript{27} and other Enlightenment thinkers, such as Drost Von Muller.\textsuperscript{28}

In this celebrated and humanitarian period of cosmopolitanism, Enlightenment thinkers tried to make people aware of their ‘world citizenship’ status.\textsuperscript{29} According to Kant, on the political level what was required for a cosmopolitan order to be realized was a federation of republican states.\textsuperscript{30} This Enlightenment view of cosmopolitanism\textsuperscript{31} was based on a faith in human reason, where ‘the political becomes, by moral necessity, “cosmopolitical.”’\textsuperscript{32} However, some of Kant’s critics in the late 18\textsuperscript{th} century, often found his view of human nature and reason to be philosophically questionable.\textsuperscript{33} Despite such criticism, Kant’s ideals of world citizenship became a source of inspiration for post-WWII liberal and cosmopolitan scholars, whose work will now be addressed.

In the late 20\textsuperscript{th} century cosmopolitan thinking was re-imagined and re-inspired by the post-war international human rights settlement.\textsuperscript{34} Cosmopolitanism in the 21\textsuperscript{st} Century has been supported and critiqued by various scholars from disciplines such as political science,\textsuperscript{35} philosophy\textsuperscript{36} and international law.\textsuperscript{37} For example, in a philosophical inquiry about the arguments for and against universal values, Kwame Appiah insists that cosmopolitanism is quite a ‘simple idea’.\textsuperscript{38} It is based on a need to ‘develop habits of co-existence: conversation in its older meaning, of living


\textsuperscript{25} Hugo Grotius, \textit{De Jure Belli Ac Pacis} Book II Chapter XX section XL (Carnegie, 1925) 504.

\textsuperscript{26} Ibid, 582.

\textsuperscript{27} On the cosmopolitan right to hospitality see Immanuel Kant, \textit{Perpetual Peace} (Columbia University Press, 1939) 23-27.

\textsuperscript{28} Geiman above n 1, 517-521.

\textsuperscript{29} Ibid, 517-521.

\textsuperscript{30} See Ibid, 517 for Geiman’s discussion of Kant’s major cosmopolitan principles developed in \textit{Perpetual Perpetual Peace} and other works.

\textsuperscript{31} Ibid.


\textsuperscript{33} Geiman, above n 1, 519.

\textsuperscript{34} See, generally, Held above n 9, 14-17, 55-56, 239-240.

\textsuperscript{35} Ibid, 14-17. See also Gillian Brock and Harry Brighthouse, \textit{The Political Philosophy of Cosmopolitanism} (Cambridge University Press, 2005).


\textsuperscript{38} Appiah, above n 36, xviii-xix
together. Appiah, a professor of philosophy, takes a critical view of the universalist position but points out that if relativism is correct then there would be no need for any dialogue at all.

Modern-day cosmopolitans from the discipline of international relations such as Thomas Pogge and David Held, recognise that there are three major principles owed to the whole of humanity: (i) egalitarian individualism, (ii) reciprocal recognition, and (iii) impartialist reasoning. Influenced by Stoic philosophy, which ‘appealed to notions of nature and reason’, the Enlightenment and 20th century cosmopolitan thinking, Held endeavours to place cosmopolitan theory at the heart of the international system, which, he argues, is in need of a more clearly stated ethical foundation. Held’s pragmatic application of cosmopolitan theory to the many problems confronting the international legal and political system will now be assessed.

**B. David Held’s Cosmopolitanism: Ideals and Realities**

1. Cosmopolitan Reasoning

In *Cosmopolitanism: Ideals and Realities*, David Held develops a convincing justification for cosmopolitanism to inform global governance and decision-making. He argues that the world is no longer made up of ‘discrete civilizations’ but is multi-polar, where Western hegemony is in steady decline. This world order requires far more effective institutions of global governance to deal with the complex political, economic and social problems that affect all societies. It is a world of ‘overlapping communities of fate’. Held’s vision of cosmopolitan law transcends conventional conceptions of international law as law between states, rejecting both positivism and traditional realism.

The United Nations Charter, the European Union, the International Criminal Court and the Nuremberg Judgment are all examples of how the sovereign-centric Westphalian system...
of international relations has changed. For Held ‘the era of classic sovereignty’ is over. A cosmopolitan model of sovereignty needs to be envisaged, in theory and practice. Held acknowledges that while cosmopolitan principles are universal, ‘cultural and political specificity’ cannot be ignored. Although cosmopolitan principles have their genesis in the West, this does not make them imperialistic or a repudiation of, say, Islam: origins and validity are separate issues,’ he argues. The challenge for Islam Held believes, is to deny the legitimacy of radical fundamentalism and for it to continue to embrace modernity, human rights and democracy as it has done in the past. The challenge for the West and particularly the United States is to respect and build upon a global ‘rule of law’ rather than to engage in war, which only weakens international institutions. Both Islam and the West, Held insists, must confront their own dangerous ideologies and practices.

Held’s basic argument is that ‘each person [is] an autonomous moral agent entitled to equal dignity and consideration’. Essentially this is a liberal-universalist view of the individual vis-à-vis the state, now applied to the global world order. According to Held, the transformations that have occurred in global governance since the end of World War II will need even more specific cosmopolitan principles broad enough to accommodate all peoples and cultural traditions. Held explains two meta-principles that could support global governance (at least in theory): the Meta-Principle of Autonomy (MPA) and the Meta-Principle of Impartialist Reasoning (MPIR). The meta-principle of autonomy requires that, for citizens to enjoy free and equal treatment, democratic institutions are vital. The second meta-principle is a justification for an ‘impartial moral standpoint’ that presumably could be used to a guide a future human rights court or Human Security Council, about deciding particular claims.

Held believes that impartialist reasoning is fundamental to solving international disputes and competing claims. So, for example, if a party claims their particular rights have been violated, before a future higher court of appeal based on impartialist reasoning, these claims should be tested against a ‘larger, human standpoint’. However, an unresolved contradiction between individual rights and collective rights - a clash of sovereignties - is juxtaposed in the following two sentences:

I take cosmopolitanism ultimately to connote the ethical and political space which sets out the terms of reference for the recognition of peoples’ moral worth [etc] … [The] connotation of
these basic ideals cannot be separated from the hermeneutic complexity of traditions, with their unique temporal and cultural structures.  

Obviously mindful of avoiding the pitfalls of relativism Held insists that the prevention of ‘serious harm’ should be a priority that over-rides all other interests (national, vested, or otherwise). One is left wondering what serious harm entails and how impartial arbitrators or judges of the (near) future would be intellectually equipped to deal with ‘the hermeneutic complexity of traditions’; as well as conflicting claims (for example national majorities vis-à-vis oppressed national minorities). Having considered some of Held’s guiding principles and justifications, the next section will evaluate his argument for putting cosmopolitan theory into international practice.

2. Cosmopolitanism in Practice

Held’s vision of cosmopolitan law requires the ‘subordination’ of the sovereign state to a higher legal order. Fundamental to this legal order is the re-conceptualization of citizenship – a Kantian ‘world citizenship’ as opposed to mere national citizenship. For this legal order to be functional certain national prerogatives will have to be surrendered in exchange for:

[S]ubmission to ICJ and ICC jurisdiction; the creation of a new international human rights court, and an international environmental court to address legal issues involving the global commons.

Held makes a strong case for such global legal institutions to be implemented. They would, after all, be the logical progression of the UN system. He realizes that for a cosmopolitan legal order to work, it must be supported by political, economic and cultural cosmopolitanism. So in political terms, global issues such as climate change and poverty cannot be solved unless authority is ‘multi-layered’. To defend cosmopolitan law, international security forces would also be required. In economic terms, there must be an institution that regulates human rights law and economic law. Held directly challenges existing market mechanisms and claims that poverty can only be tackled by political intervention and global taxation measures. If these essentially liberal cosmopolitan institutions and principles were realized, the territorial state would lose its legitimacy as the only valid authority and place for sovereignty. This would indeed be a world order based on Kant’s philosophy, dusted off and reformulated anew.

The current world order Held believes, is be-devilled with systemic problems. He considers the reasons why the international community has so far failed to solve pressing problems such as climate change and the ever-widening gap between rich and poor countries. Held points to an emerging crisis within the existing international order:

The post-war multilateral order is in trouble. With the resurgence of nationalism and unilateralism in US foreign policy, EU disarray and growing confidence of China, India and Brazil in world economic fora, the political tectonic plates appear to be shifting.
In Held’s assessment there is much confusion about the respective roles of international organisations in dealing with global challenges, including HIV/AIDS. There is also much ‘inertia’ by international agencies about solving the most basic causes of human suffering, such as malaria. Global problem solving is often completely ineffective. What ultimately is required Held suggests, is a move away from liberal globalisation to a globalisation based on social democracy with much greater regulation of global finance. Reforming the UN Security Council so that it is more responsive to crises that demand international intervention is also imperative.

3. A Critique of Held’s Liberal Cosmopolitanism

Regardless of the validity of Held’s ideals about international governance the world is still made up of sovereign states: democratic, quasi-democratic and authoritarian. How can democratic governments who so often think in terms of short-term electoral cycles address global issues such as climate change without making unpopular decisions by-passing their citizenry? Held’s cosmopolitan principles may be inspiring but at the end of the day ‘democratic princes’ and ‘princesses’, to use his language, are accountable to their constituents. This goes to the question posed at the start of this paper: how can cosmopolitan ideals compete with national interests? This problem cannot be emphasized enough. A concerted effort by democratic governments to break out of populist thinking is a complex challenge that is acknowledged by Held.

There is no doubt that many legal and international political science academics, especially from the positivist and realist schools would find Held’s ideas about a future global order to be unrealistic and implausible. Surely an international military force and a global taxation regime would require the surrendering of nation-state sovereignty on a massive and unprecedented scale? In response, Held would claim that the Nuremberg judgment and subsequent war crimes tribunals and the International Criminal Court have already eroded state sovereignty. Further incremental developments towards world governance are obviously possible.

The other problem that has to be addressed is what ideology should inform global governance? Held seems to suggest that social democracy, as developed in Europe, would be the best ideology for democratic global governance. However, considering that social democracy has had rather limited success in some Western countries, such a global ideological shift seems unlikely to occur. Nevertheless, Cosmopolitanism: Ideals and Realities is an optimistic, bold and imaginative thesis, yet grounded in the world’s complex empirical order based on an Enlightenment philosophy that recognizes the ability of people to see themselves as global citizens; that vested interests can be challenged and finally overcome; and that difference can be accommodated and celebrated.

What Held finds redeemable in Western civilization theorists such as Boaventura de Sousa Santos do not. The loss of human dignity caused by neo-liberal globalisation goes beyond the

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84 Ibid, 161.
85 Ibid, 161.
86 Ibid, 162.
87 Ibid, 184-207, 246-249.
88 Ibid, 170-171.
90 Ibid, 211-212.
92 Held, above n 9, 247-248. NB: Held suggests that it is possible for European social democrats to seek the support of progressive forces in the US to establish new global institutions.
comprehension of modernism (and Western positivist jurisprudence), which Boaventura de Sousa Santos claims, is a ‘narrow and reductionist canon that arrogantly discredits, silences or negates the legal experiences of large bodies of [the] population.’ Part III will assess the challenge of ‘subaltern cosmopolitanism’ eloquently described by Santos in his confronting critique of an alternative to Western modernity’s historical narrative, which itself is based on an Enlightenment teleology: the liberal idea of progress.

### III. COSMOPOLITAN ALTERNATIVES

#### A. Santos’ ‘Post-Modern’ Jurisprudence

Boaventura de Sousa Santos compels us to consider an alternative cosmopolitanism to the model proposed by David Held. He provides concrete examples, as explained below, of how ‘subaltern cosmopolitan legality’ can effectively restore peoples’ human dignity. There is, however, no teleology, or grand narrative or theory that can encapsulate and explain the diversity and complexity of oppressed peoples’ struggles. When Santos explained the interaction between law and globalization in the first edition of *Toward a New Common Sense* in 1995, William

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96 Santos, *Toward a New Legal Common Sense*, above n 11, 494.

97 For example, the traditional historical narrative of the origins, development and universalisation of human rights is very much a part of Western legal scholarship and jurisprudence, exemplified by Nick O’Neil, Simon Rice and Roger Douglas’s textbook *Retreat From Injustice – Human Rights in Australian Law* (Federation Press, 2004) 2-10. Their narrative is that human rights first emerged from natural law philosophy in Ancient Greece and later from the Roman Republic and Empire (Cicero). Natural law later gains a theological dimension in medieval Europe (Aquinas), and with the collapse of the Holy Roman Empire natural rights gradually become part of the secular philosophies of the Enlightenment – Locke, Mills, Montesquieu – and in theory and in practice in the *French Declaration of the Rights of Man and Citizen* in 1789. These authors bring the narrative to the present stage by prioritising civil and political rights. Yet collective rights, which are at odds with the Western canon, are questioned: ‘[A]re these rights human rights if they are claimed collectively by communities or groups within a community, or are they better described as peoples’ rights?’

98 Santos and Rodriguez claim that ‘subaltern cosmopolitan legality’ is not a theory but a ‘perspective’ which is about ‘social inclusion’ for the majority of the world’s populace: ‘the plurality of efforts at counter-hegemonic globalization’ they write ‘cannot be encompassed by an overarching theory’. See Santos and Rodriguez, ‘Law, Politics, and the Subaltern in Counter-Hegemonic Globalization’, above n 11, 12-14.


Twining, a professor of jurisprudence, acknowledged the seriousness of Santos’s argument that ‘modernity is in crisis’.  

1. Subaltern Cosmopolitan Examples

According to Santos, subaltern cosmopolitan movements, such as the Zapatist movement in Mexico, adopt counter-hegemonic practices to further their causes. The purpose of ‘subaltern cosmopolitan legality’, ultimately, is the removal of social fascism and the establishment of a more inclusive and ‘convivial’ society based on ‘transformative justice that transcends the horizons of global capitalism’. Subaltern cosmopolitan legality reflects:

[T]he aspirations of oppressed groups to organize their resistance and consolidate political coalitions on the same scale as the one used by the oppressors to victimize them, that is, the global scale.

Subaltern cosmopolitan legality is obviously necessary for the empowerment of the most marginalised people. Santos identifies Indigenous peoples, refugees and migrant workers as highly vulnerable to the exploitative nature of the dominant globalisation.

Santos’s examples of subaltern legal cosmopolitanism include: Indigenous peoples who attempt to uphold their conception of human dignity against a dominant neo-colonial culture and

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102 William Twining, Globalization and Legal Theory (2000) 202-3. See also some staggering statistics concerning war and depopulation from 18th to 20th centuries, cited by Santos in Toward a New Legal Common Sense, above n 11, 9 (paragraph two). ‘Modernity’ in this paper means the secular developments in law, science, reason, democracy and state sovereignty from the 19th century – a continuation of the 18th Century European Enlightenment - where reason and science displaced religion and superstition. The expression ‘modernity in crisis’ means the collapse of Enlightenment humanism, state absolutism, law and science into the barbarism of the 20th Century (the Jewish Holocaust). The ‘crisis of modernity’ has been disturbingly explained by the Jewish literary critic George Steiner: In Bluebeard’s Castle – Some Notes Towards a Re-definition of Culture (Faber and Faber, 1971) chapters 1 and 2.

103 Santos, Toward a New Legal Common Sense, above n 11, 460-462.

104 Ibid, 467.

105 On ‘rise of social fascism’ see Santos, Toward a New Legal Common Sense, above n 11, 447-458.

106 Ibid, 469.

107 Ibid, 469.


109 Santos, Toward a New Legal Common Sense, above n 11, 241-251.

110 Ibid, 224-228. Citizenship, Santos argues, needs to be separated from the territorial sovereign-state. Ibid, 237. He writes: ‘the plight of illegal immigrants and asylum seekers is one of the most dramatic consequences of the impoverishment of the principle of community once it has been reduced to the national community.’ Ibid, 235. Cf Held, above n 9, 179-180. Held is essentially in agreement with Santos’s cosmopolitan view of citizenship. See also Hannah Arendt’s seminal work, The Origins of Totalitarianism (Harcourt Brace Jovanovich, 1979), 292-293: The more the numbers of the rightless people increased the greater became the temptation to pay less attention to the deeds of the persecuting governments than to the status of the persecuted.


111 Santos, Toward a New Legal Common Sense, above n 11, 221-224.

112 Santos, Toward a New Legal Common Sense; above n 11, 179; Santos, ‘Human Rights as an Emancipatory Script’, above n 11. 8.
transnational companies;\textsuperscript{113} HIV activists who have successfully argued against patent protection of HIV drugs in countries such as South Africa;\textsuperscript{114} transnational anti-sweatshop organizations;\textsuperscript{115} and small communities, as in Columbia, which have stood up to aggressive state and non-state forces.\textsuperscript{116} Another instance where cosmopolitan legality has been achieved is when the state, as in Brazil, has been utilized to further political struggles for a redistributive democracy.\textsuperscript{117} How subaltern cosmopolitanism differs in theory and practice from liberal cosmopolitanism vis-à-vis globalization will now be considered.

2. The Need for Cosmopolitanism and Globalization ‘From Below’

According to Santos, the Western idea of cosmopolitanism, from ancient Greece to the Enlightenment and on to modernity, is an ideology used to justify colonialism and imperialism.\textsuperscript{118} He asks: ‘who needs cosmopolitanism?’ ‘The answer’, he writes, ‘is simple. Whoever is a victim of intolerance and discrimination needs tolerance … whoever is a non-citizen needs world citizenship.’\textsuperscript{119} Santo’s depiction of the Western globalisation and cosmopolitanism is at times very negative. Santos blames neo-liberal globalization as the major cause of global economic injustice and human suffering.\textsuperscript{120}

Globalisation has two conflicting forces in Santos’s view: Western globalisation, which is dominant, and counter-hegemonic globalization, which is opposed to global capitalism. The former is comprised of two processes: ‘globalised localisms’ and ‘localized globalisms’.\textsuperscript{121}

With the first process a particular local entity, such as the English language or Hollywood


\textsuperscript{115} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 482.

\textsuperscript{116} Ibid, 488-489. Santos’s discussion of the peace asserted against all odds by the community of San Jose de Apartado in Columbia in the 1990s is an excellent example of subaltern cosmopolitanism ‘from below’.

\textsuperscript{117} Ibid, 490-491. See, especially, Santos’s discussion of the Worker’s Party (PT) in Porto Alegre, Brazil, where participatory budgeting and taxation (market socialism) were pursued.

\textsuperscript{118} Santos, ‘Human Rights as an Emancipatory Script’ above n 11, 9.

\textsuperscript{119} Ibid, 460. This passage is also included and expanded in Santos and Rodriguez-Garavito’s chapter ‘Law, Politics, and the Subaltern in Counter-Hegemonic Globalization’, above n 11, 14: ‘[i]n short ‘the large majority of the world’s populace, excluded from top-down cosmopolitan projects, needs a different type of cosmopolitanism. Subaltern cosmopolitanism … is therefore of an oppositional variety.’

\textsuperscript{120} In much bolder language than in \textit{Toward a New Legal Common Sense} (2002) Santos in 2007 claimed that because human misery caused by the history of global capitalism has been so extreme, that a global trial of those who have participated in its excesses – states and transnational corporations – is necessary. The trial of global capitalism therefore appears to be a ‘human right’, according to my interpretation of Santos. See Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 25: ‘The verdict will be enforceable … and will constitute an ongoing never ending project, the project of a socialist society.’

\textsuperscript{121} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 179; Santos, ‘Human Rights as an Emancipatory Script’, above n 11. 8.
The other side of this phenomenon is ‘localised globalisms’, where local conditions are adversely affected by transnational practices which cause ‘subordinate inclusion’. Globalized localism is imposed by ‘core countries’ such as the United States.

The second form of globalisation is counter-hegemonic and is opposed to the twin processes described above. It is made up of diverse movements. The World Social Forum, Indigenous and feminist groups, aligned with international ‘networks’ and NGOs, are part of a worldwide phenomenon of globalization from below.

3. Universal Human Rights: Another form of Globalization?

The division between Western globalization and counter-hegemonic globalization results in a similar division in Santos’s sociology between Western cosmopolitanism on the one hand and subaltern cosmopolitanism on the other. Human rights, Santos asserts, are ‘universal only when they are viewed from a Western standpoint.’ The Universal Declaration of Human Rights (1948) is dismissed by Santos as being originally drafted without worldwide consensus. The tension between universal human rights and relativism, he argues, does need to be overcome:

Against universalism, we must develop cross-cultural dialogues on isomorphic concerns.
Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation from regulation.

The first step towards a necessary ‘cross-cultural dialogue’ on human rights, according to Santos, is the reciprocal recognition of ‘cultural incompleteness and weakness’.

[The fundamental weakness of Western culture consists in dichotomizing too strictly between the individual and society … On the other hand, the fundamental weakness of Hindi and Islamic cultures consists in that they both fail to recognize that human suffering has an irreducible individual dimension …

122 Santos, Toward a New Legal Common Sense, above n 11, 178; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 7. See also William Twining’s excellent analysis of Santos’s work, above n 102, 5, 221.

123 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 8 (emphasis added).

124 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 9; See also Santos, Toward a New Legal Common Sense, above n 11, 331-335, where Santos explains the involvement of the US in reforming the judicial system of countries such as Columbia – another form of ‘globalised localism’.

125 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 9. See also Santos, Toward a New Legal Common Sense, above n 11, 180-181.


127 Santos, ‘Human Rights as an Emancipatory Script’, above n 11,9. In this chapter, Santos describes these movements in terms of ‘insurgent cosmopolitanism’, a counter-hegemonic globalization from below’ (emphasis added).

128 Santos, Toward a New Legal Common Sense, above n 11, 269; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 12.

129 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 13; Santos, Toward a New Legal Common Sense, above n 11, 271.

130 Santos, Toward a New Legal Common Sense, above n 11, 271-272; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 14.

131 Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 15; Santos, Toward a New Legal Common Sense, above n 11, 272.

132 Santos, Toward a New Legal Common Sense, above n 11, 274; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 17.
Human rights, Santos argues, must therefore be re-conceptualized in terms of ‘multicultural human rights.’\textsuperscript{133} The need for subaltern cosmopolitanism can only be understood and appreciated, however, when the negative social forces that exclude and oppress are seen for what they are.\textsuperscript{134}

\textit{Toward a New Legal Common Sense} is a subtle and penetrating analysis of Western legal history where Santos turns on its head the liberal progressive narrative about modernity - law, scientism, positivism and inalienable rights.\textsuperscript{135} From the French Revolution in 1789 the West has been heading towards a crisis. The denouement of modernity? - Fascism.\textsuperscript{136} Reborn anew in the late 20\textsuperscript{th} and early 21\textsuperscript{st} centuries, fascism, Santos claims, is now a salient feature of the privatized, quasi-democratic nation-state, which is a source of exploitation, not emancipation.\textsuperscript{137} And the state itself is now an instrument of globalisation and transnational corporations.\textsuperscript{138}

4. Social Fascism and Globalization

Santos believes that neo-liberal globalisation has directly caused the emergence of social fascism, or ‘pluralist fascism’ that undermines democracy.\textsuperscript{139} People are living in a state of constant ‘anxiety’ due to privatisation and the uncertainty caused by neo-liberalism and privatisation.\textsuperscript{140} Social fascism creates societies with the following hierarchies: ‘intimate civil society’ which is made up of the elite who enjoy all rights; ‘strange civil society’ where people are merely afforded civil and political rights but not social and economic rights; and ‘uncivil society’ where no ‘rule of law’ exists at all. It is in uncivil society which is a larger part of impoverished countries, where subaltern cosmopolitanism is most needed.\textsuperscript{141}

While Santos’s anti-universalist claims are questionable\textsuperscript{142} he persuasively argues that a purely top-down approach to human rights abuses will not remedy the major violations of human rights effecting millions of people in the ‘global South’.\textsuperscript{143} Influenced by neo-Marxism\textsuperscript{144}

\textsuperscript{134} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 447-458.
\textsuperscript{135} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 21, 25, 37, 40-41, 43-44, 51; and 436-438.
\textsuperscript{137} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 72-73, 78-79; 447, 449.
\textsuperscript{139} Ibid, 453.
\textsuperscript{140} Ibid, 455.
\textsuperscript{141} Ibid, 457. Uncivil society is larger in ‘peripheral’ countries; but note Santos’s discussion of ‘legal plurality’ and what constitutes a very real but unrecognized legal society; see chapter 4, \textit{Toward a New Legal Common Sense}, above n 11, especially 112-113, 117-125, 155-156, 158-162.
\textsuperscript{142} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 270; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 25, 29, where he argues that ‘the right to bring historical capitalism to trial in a world tribunal’ must be a tent of ‘Intercultural post-Imperial human rights’.
\textsuperscript{143} The division between the ‘global North and South’, according to Santos, is not purely a geographical concept, but one he uses as a ‘metaphor’: ‘To use the metaphor of hierarchy in the world system, we have to learn from the South.’ He asks: ‘What can we learn from Indigenous peoples, who in a sense are the South of the South?’ Santos, \textit{Toward a New Legal Common Sense}, above n 11, 254 (emphasis added).
\textsuperscript{144} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 270; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 25, 29.
and post-modernism,\textsuperscript{145} Santos’s depiction of the breakdown of modernity is convincing. He claims the world is now in a ‘transitional phase’ between the collapse of the Enlightenment project and a new uncharted era, ‘where there are no modern solutions.’\textsuperscript{146}

\textbf{5. A Critique of Santos’s ‘Post-Modern’ Cosmopolitanism}

Santos repudiates the idea of any grand narrative or theory to solve social, economic and cultural injustices. Nevertheless he espouses a counter-hegemonic ‘narrative’ himself – not only is Western modernity (read liberalism) purely exploitative and in crisis, there are emerging signs of disparate subaltern movements and subaltern global resistance.\textsuperscript{147} Hence, to my mind, the logic of lumping all things Western into the same basket – market forces, Coca Cola, universal human rights etc.\textsuperscript{148} David Held remarked quite correctly at the Venice Academy that Santos appeared ‘black and white’ in his thinking that the West was ‘bad and the rest was good’.\textsuperscript{149}

David Held has made many of the same criticisms of market forces that Santos does but without the total negation of Western history and liberalism. A major point of difference lies in their understanding of global injustice. Universal human rights are dismissed by Santos as another form of Western imperialism. Subaltern groups can only further their causes if they manipulate legal institutions to further their struggles to achieve some kind of amelioration.\textsuperscript{150} Santos is an idealist but his ‘solutions’ and examples of ‘counter hegemonic’ globalisation are unlikely to make much difference to the unequal power relations between nation-states, corporations and peoples.

The other criticism of Santos’s work concerns his ‘reconceptualization of human rights’ based on multicultural values. While he argues that collective rights, the right to self-determination and the right to knowledge\textsuperscript{151} should trump traditional Western liberalism, his utopian vision is open to the charge that, when taken to its logical conclusion, the individual’s human worth and dignity could ultimately be devalued. The extent to which there is an inherent conflict between individual and cultural rights in theory and practice, will be discussed in the final section of this paper.

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\textsuperscript{145} Santos’s sociological jurisprudence, which he describes as ‘oppositional post-modernism’ is neither ‘modernist’ or ‘post-modernist’ in the traditional sense of these words, he claims. Santos believes that the problems of modernity need ‘post-modern solutions’. On this see Santos, \textit{Toward a New Legal Common Sense}, above n 11, xvii. To my mind, Santos does not fit into any established/orthodox legal theories, including deconstruction. On post-modernism and deconstructionism and legal theory, generally, see Ian Ward, \textit{Introduction to Critical Legal Theory} (Routledge, 2006) 155-156, 164-173.

\textsuperscript{146} Santos, \textit{Toward a New Legal Common Sense}, above n 11, xvii

\textsuperscript{147} Santos, \textit{Toward a New Legal Common Sense}, above n 11, 495.

\textsuperscript{148} Santos, \textit{Towards a New Legal Common Sense}, above n 11, 178, 269; Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 7, 12.

\textsuperscript{149} \textit{Venice Academy of Human Rights}, ‘Round Table Discussion’ between Santos, Held, Yasuaki and An-Na’im on Thursday 14\textsuperscript{th} July 2011. See link to EiUC and 2011 Venice Academy: \url{http://www.eiuc.org/veniceacademy/index.php?option=com_content&task=view&id=21&Itemid=52}.

For a picture of the four professors, scroll to bottom of the page. Held is first right, Santos is second on the right of moderator Emeritus Professor Attracta Ingram. This is my recollection of the robust debate between these professors.

\textsuperscript{150} Santos, ‘Human Rights as an Emancipatory Script’, above n 11, 10.

B. Cultural Rights vis-à-vis Individual Rights

1. Theory
A broad range of scholars support Santos’s views about Western hypocrisy and exploitation, questioning the possibility and desirability of a world order based on universal human rights. A conflict between traditional Western political rights and cultural rights and self-determination will continue into the 21st century, Onuma Yasuaki predicted in 1996. Abdullah A. An-Na’im is also skeptical of universal claims based on shared values. An-Na’im finds that there is no ‘moral, political or pragmatic difference between international terrorism in the name of Islamic jihad’ and the ‘humanitarian intervention claimed by the US in Iraq.’ The general consensus among critical scholars is that Western cosmopolitanism is in danger of being used as an imperialistic cloak for Western national interest calculations at the expense of international legal order.

Yasuaki, in attempting to bridge this divide between Western and non-Western human traditions, finds that a discourse on universal human rights is possible even though many cultures have not had the tradition of the West with modernization, secularization and individual liberal rights as part of their own heritage. Yasuaki’s argument is that ‘intercivilizational rights’ (akin to Santos’s ‘multicultural rights’) require some Western rights to be modified. Yet how does this world-view make sense of conflicting human rights claims that occur even at the international level? One recent example highlights the problem with this argument.

2. Practice
A controversial and very real clash between individual and cultural rights occurred in late 2010, when the General Assembly removed ‘sexual orientation’ from the prohibition of summary or extrajudicial executions, ‘approved by a vote of 79 in favour to 70 against with 17 abstentions.’ The amendment made a global minority group ‘rightless.’ Western states were generally against the amendment, including the United Kingdom and many non-Western states either supported or acquiesced in favour of it. This example demonstrates a continuing conflict between individual and cultural rights that all scholars discussed in this essay have sought to reconcile. When analysed, the arguments supporting this resolution at the General Assembly, in effect, sanctioned the persecution of another historically victimized minority group, mainly

153 Yasuaki, above n 15, 13.
154 An-Na’im, above n 16, 57.
155 Cohen, above n 37, 163.
156 Yasuaki, above n 15, 1.
158 Hannah Arendt used this term to describe the situation of refugees in The Origins of Totalitarianism, above n 110, 293.
159 UN media release, above n 157.
for national-cultural interests. While the Assembly reversed the amendment after much pressure from lobby groups, what this shows is that a cosmopolitan legal order based on universal human rights will often be fiercely contested not only in theory but also in state and international practice. National and cultural interest calculations – even blatant nationalism and prejudice – are still arguments used against universalism and cosmopolitanism in the 21st century, even at the level of the United Nations.

IV. Conclusion

Cosmopolitanism, whether liberal or subaltern, has much to offer scholars and activists concerned with human rights abuses that affect disadvantaged groups. The example discussed in the last paragraph supports the argument put forward by liberals, that basic human rights – in this case the right to life - must be upheld over religious and cultural nationalism. Herein lies the strength of Held’s liberal-humanist perspective of human rights, cosmopolitanism and international law. However, as argued in Part II, David Held does not seem to be as concerned as he should be about the possible conflict between minorities and majorities and the clash of sovereignties. By contrast, Santos finds that oppressed groups can manipulate law for ‘emancipatory’ purposes.

It is the view of this writer that neo-liberalism, as correctly explained by Santos, has resulted in a situation where international economic motives and corporate profit margins override religious, patriotic, cosmopolitan and other beliefs and values, where only market forces dominate the real pattern of behaviour. This means that Western consumer society, based on a finite materialistic ideology, marginalizes the poor and oppressed of the world.

In conclusion there are challenges that confront both liberal and subaltern cosmopolitanism. Without a natural law theory, cosmopolitans cannot avoid falling back on (or at least they cannot ignore) cultural relativism. Modernist and post-modernist attempts to make sense of this theoretical challenge often lead to the same relativistic logic. Ultimately, a dialogue about rights, duties and responsibilities will always be needed to address social exclusion, marginalization and injustice. My argument, then, is that it is possible to uphold the importance of the ‘Nuremberg promise’ exemplified by the International Criminal Court as the foundation for a ‘global rule of law’, whilst also acknowledging and supporting the subaltern struggles against globalization and exploitation. Despite epistemological and ideological differences both Held’s and Santos’s

160 Ibid. The spurious arguments raised at the United Nations were in line with the fascist rationale for the enactment of homophobic laws in countries such as Uganda. On the rise of homophobia globally see, for example, ‘Uganda Parliament Committee Backs Anti-Homosexuality Bill’ Human Rights Watch (on-line), 12 May, 2011 <http://www.hrw.org/news/2011/05/12/uganda-parliament-committee-backs-anti-homosexuality-bill>.


163 Santos acknowledges that while subaltern cosmopolitan legality is ‘yet but a bud’, it is a reality that he believes requires attention and further investigation. Santos, Toward a New legal Common Sense, above n 11, 495. Many of the subaltern struggles discussed in Toward a New Legal Common Sense have been subsequently researched and further explained by scholars sympathetic to Santos’s world-view. See also Boavetura de Sousa Santos and Caesar A. Rodriguez-Garavito (eds) Law and Globalization from Below, above n 11, 1-27; Rodriguez-Garavito and Arenas above n 113; and Klug above n 114.

164 Richard Falk, Revitalizing International Law (Iowa State University Press, 1989) 222. In 1989, Falk described the ‘Nuremberg Promise’ quite prophetically: [I]n the future international relations would be carried on within the limits set by the Nuremberg Judgment, or else the wrong doers, even government officials not defeated in war, would be subject to some effective procedures of legal challenge.
scholarship is thoughtful and original. Their work should be of great interest to those who advocate a global ‘rule of law’ in the world’s complex empirical order. As Charles de Visscher, the eminent jurist and judge of the International Court of Justice wrote in 1957:

Scientific objectivity forbids accepting [international law] as an accomplished reality. Doctrine does better service to the progress of law when it points out the sometimes openly anti-social consequences of the present distribution of power than when it gives reign to a sort of ‘legal totalitarianism’ which manifests behind a façade of unreal architecture the present disorder of international relations.\(^{165}\)

So the question is: can cosmopolitanism survive in the world of theory and practice in the 21st century?

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165 Charles de Visscher, above n 50, 138.
WHY ALTERNATIVE DISPUTE RESOLUTION SKILLS ARE ESSENTIAL FOR BUSINESS STUDENTS

Amanda Carrigan*

Abstract

Mediation is to enterprise, as litigation is to legal practice. Alternative dispute resolution (ADR) skills are taught within law and some business faculties as optional subjects. However, these skills are also essential for all business students. This paper argues the need for awareness of ADR processes to be brought to undergraduate business students as a part of business practice. Business students should be specifically taught basic skills to recognize where ADR methods may be used where a dispute exists, in the same way all law students must show basic competency in the use of ADR processes.

I. Introduction

Law teachers ensure that business students have the skills to recognize legal issues within business practice which enables them to determine whether they can deal with disputes themselves, or whether there is need to retain legal advice services. These skills should include knowledge of ADR so that business students are empowered to identify when and how business disputes may be more effectively addressed and resolved. Mediation, for example, may be effective where there may be an intention to facilitate and cultivate ongoing future business dealings with the other party or parties involved.

As tertiary educators we provide instruction about the Australian legal system, contract, tort, legislation and where the risk of litigation may arise. Business students are expected to understand binding obligations and legislative requirements in commercial practice, managing a business, their obligations to others in that business as well as ethics and business practice. However, managing business disputes is not addressed. In Australia, as in other comparable jurisdictions such as New Zealand, there is an identified trend toward the use of more tailored dispute resolution processes in commerce due to a need for business students to learn about alternatives to litigation.

An awareness of dispute resolution techniques should form part of the graduate attributes of undergraduate business students. In an increasingly competitive globalized education environment, Australian tertiary business faculties must offer undergraduate education that provides relevant skills for modern enterprise in a globalized economy.

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II. ADR SKILLS EDUCATION

The evolution of ADR in Australia has a well documented history and continues to evolve within the Australian legal system. ADR processes range from mediation and negotiation, conciliation and arbitration. With the obvious exception of negotiation, ADR requires a third party impartial facilitator. Mediation is the simplest form of facilitated dispute resolution where a neutral mediator guides the parties to agree their own solution. Conciliators and arbitrators will have different levels of determinative powers as agreed by the parties or as legislated.

Commencing each ADR process will also differ. At one end of the spectrum of commencing dispute resolution the process will be initiated by one person approaching the other party with whom they are in dispute. In other cases there is a contractual obligation for a particular form of ADR.

At the other end of the dispute resolution spectrum there is court ordered ADR or at times court case management requirement where parties are required to attempt mediation prior to obtaining a hearing date. At this stage the parties are expected to participate in an ADR process. Business students therefore need to be ready to participate in ADR such as court ordered mediation, and to understand what is expected of them. Where mediation is required by the Court and a party does not comply or participate in good faith, the Court may impose sanctions for inappropriate behavior such as an uncooperative attitude.

Conflict is a normal part of business experience. The methods of dealing with conflict will be determined by the actual individuals involved, the number of participants in a conflict, the circumstances, the type and level of conflict, as well as the history of the relationships between disputants and whether there are any pre-existing requirements for dealing with a dispute, such as the terms of a contract.

Disputes are also a fundamental part of the experience of business, whether within entities engaged in business or where there are issues with customers, clients, suppliers or competitors. Whether there is an individual participating in agreements for services, a partnership in crisis, a trading trust, a corporation or an unincorporated entity the issues remain constant. Disputes require attention, time and very often compensatory payments to resolve, or legal action. The usual legal action again will carry with it monetary requirements where there is the need for advice about a dispute, preparation and some cursory contact with the other party or parties. There may also be technical aspects to the dispute; there may also be aspects of interpretation of process and structure or the need for advice about the legality of actions and compliance with agreements. All these aspects occur prior to the decision to take what is generically, legal action. At the point of identifying there is a dispute, the issues are raw and the parties are close to the intertwined issues forming the dispute. The first step in dealing with the issues usually revolves around communication. The fact of communication does not always advance a resolution. At times communication assumptions may arise where there is no contact or where it is negative communication further increasing the conflict. Where there is an attempt at

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3 Hilary Astor & Christine Chinkin, Dispute Resolution in Australia (LexisNexis Butterworths 2nd Ed 2002); Tania Sourdin, Alternative Dispute Resolution Thomson Reuters, Sydney 2012.
4 Ibid above n 367.
5 Ibid 67.
6 Ibid 68.
7 Ibid.
8 Supreme Court of NSW, Supreme Court Practice Not SC CL 5, Supreme Court Act 1970 (NSW).
resolution which fails, there can be an added layer of mistrust and increased misapprehension by each party as to what will happen next. At this time decisions are made by each party which will then determine the nature of the dispute and the steps in resolution or recourse. This is the fork in the road where parties turn to advisors outside their camp to tell them why they are right and what their legal rights are.

The legal process may at this time, begin with the usual reshaping of the issues and gathering of the evidence. This stage will usually be some time from the initial events which gave rise to the dispute and will often involve some sanctioned discovery of relevant material by one party. This may include access to another party’s documents and other subpoenaed materials. Continuing with the legal process brings inevitable delays and leads inexorably to the pre-hearing weeks. At this time the issues have been scrutinised by each party for some time with opposing understanding. The resulting arguments are based on the separate interpretations and arguments formed by each party.

In the case of a multi-party dispute there will be multiple legal opinions, all to be set before the Court for a determinative judgement on each issue. At times there will be some agreement on issues, however, this will not be identified until the matter proceeds in the Court process and the issues are addressed in the proceedings. Clearly there are two zones of understanding, the days immediately following an event and the days just prior to commencement of the hearing. The time between these two zones inevitably increases the intensity of the dispute.

It is obviously important for business participants to identify the need to act within the days following the events leading to the dispute and to utilise this understanding of the matters with an awareness of the subjective nature of raw feelings and information. These are the two elements not possible in the litigation model because of the adversarial nature of the process. We are therefore looking at the Third Generation of ADR Education which is independent of the law faculties of Australia. The duty to learn about alternative dispute resolution has reached law students who are seen as the second generation of ADR education after the solicitors.

Business students must be taught how to participate in the mediation process. The processes of ADR include using the past and present relationship of all parties for them to identify a way forward. The legal process will involve firming up a specific stand on each of the issues, which is inevitably the opposite of the other parties involved. Herein lies a further twist to the threads. With multiple parties involved there will be many issues that take on a different petina within one dispute. There will inevitably be multiple disputes between different parties and their legal advisors who have been set the task of documenting, analysing and advising each party from primary instructions.

By way of example, in scenarios involving a family held proprietary company where disputes arise from bequests by a deceased family shareholder, an accounting or business student who has not studied any company law would still be required to understand the need for reaching a solution without jeopardising the business entity even where the exact repercussions are not familiar. Any court action diminishes the value of the company and affects each family member.

III. ADR Skills Education in Business Schools

Dispute resolution has been included in law faculties in Australia and in New Zealand for some time. Dispute resolution is considered a law subject because it has risen from the principles of common law and equity. Many business schools may offer dispute resolution as an option.

14 Ibid 19.
15 Ibid.
16 Schmitz, above n 2, 16.
17 Ibid 17.
within postgraduate courses, with only a few offering it to undergraduate business students. The use of the best alternative to a negotiated agreement (BATNA) and coaching participants in dispute resolution must be seen as business based and more appropriately delivered within the overlapping education environment. Laurie Coltri has identified these zones of understanding. These zones describe the stages of dealing with a dispute. The Zones identify the approach each party in a dispute will take by reference to a distorted perception of events and issues arising from escalated conflict.

For an Australian business student today, tertiary subjects provide knowledge in business ethics and the technical aspects of business. Ethics and conduct within enterprise are mandatory subjects and it is submitted that dispute resolution techniques should form a part of the graduate attributes required of undergraduate business students. There are subjects provided in accounting, human resources and also in law as they relate to doing business and to instructing legal professionals. Students are expected to graduate with the skills needed to identify and address issues relating to all of these aspects. Legal education for business students is limited to the creation and managing of relationships. Relationships of employment, service, products and advice are addressed broadly. Students are expected to understand binding obligations and legislative requirements in dealing with a business and with maintaining a place of business and staff, however, to date Australian business students have only been presented with one form of dispute resolution attached to these obligations. We provide instruction about the Australian legal system, contract and tort law, legislation and crime. Within the material presented there is identification of the adversarial process and the fact of alternative dispute resolution is presented. There is also an identification of the correct forum for seeking a remedy where a contract is breached, an injury is sustained or a statute breached.

In many international dealings involving commercial activity there is usually some tailored mechanism for dispute resolution, for example, those established through contractual provisions. However where such provision is overlooked, the only suitable way to avoid jurisdiction dictated litigation will be private mediation or conciliation. All dispute resolution has the potential to succeed and the legal systems involved may be very divergent on many aspects of litigious process.

As technology advances and communication takes on abbreviated, mass audience and increasingly personal modes, the conflicts will become more complex, the issues more divergent and those issues will be seen through multiple perception filters. Where once there may have been a breach of a term of a contract for supply, there may be a breach of three contracts leading to a domino effect, culminating in defamatory comments, property damage, breakdown of trust and confidence between parties, internal administration, even corporate governance failures, compliance inadequacies and potential business failure. Not to overstate the effects, there is a need for recognition that the future of business must involve methods of dealing with disputes which will allow the parties to manage the issues themselves either pre-emptively or within a process they will feel empowered to participate in. The process is intended to allow the participants the opportunity of creating a way forward for the parties. This fundamental difference of process between the litigation based approach and the dispute resolution approach selection needs to be presented to students at the formative stage of their careers, not left to chance and good contract drafting at a future time.

19 Coltri, above n 12, 20.
20 Ibid 21.
21 Ibid.
23 Ibid.
24 Ibid.
25 Schmitz, above n 2.
Business students need to be exposed to the concepts and benefits of ADR in their different forms at undergraduate level. The dispute resolution subject would need to focus on the processes of ADR and to enable students to identify the key attributes of ADR and in particular, the mediation process. For students to gain the necessary skills to determine where ADR may benefit a business they will need to analyse and research the different methods and this would also build on the material delivered in introductory law subjects where, for example, a link can be made to the inclusion of a mediation clause in a contract. The learning objectives within the subject would then include identification of ADR methods other than mediation propelled by breakdown in the contract entirely. It may be appropriate to appoint a conciliator to a particular contractual relationship, in the form of ongoing references that as issues arise, matters can be dealt with before they escalate to an identifiable breach of a condition of contract and multiple, ostensibly impassable, position based conflicts.

Where a mediation provision is included in a commercial agreement, parties are required to attend the mediation and take part in the process. Mediation remains an event within the constraints of our system of law and as such commercial endeavors are more likely to be coloured by the concepts of ADR in some form. The case law in Australia has now begun to reflect the international trend in some jurisdictions for litigation about dispute resolution leaving mediators, parties and lawyers swimming in a relative sea of ambiguity. Our business students require education in all aspects of the commercial environment to adequately deal with current practices. As educators we ignore at our student’s peril, the use of and the issues surrounding ADR and in particular, mediation.

Parties involved in commercial transactions are more likely to require understanding about ADR than ever before. Commercial transactions will more often involve inclusion of ADR terms to be activated in the face of breaches and potential breaches of agreements. The duty of commercial parties to participate in mediation in good faith may be implied in the terms of the contract and in some cases a term may set out a requirement for parties to make ‘diligent and good faith efforts to resolve all disputes in accordance with the provisions ... before either party commences mediation, legal action or the expert Resolution Process, as the case may be.” This judicial comment from the New South Wales Supreme Court presents an example of the requirement for disputing parties to attempt a mediated settlement prior to a court hearing and the model of ADR utilised is determined either by the Court rules or may be determined by the Judge hearing the matter.

Most recent changes in court requirements is the Commonwealth Civil Dispute Resolution Act (Cth), passed 27 March 2011. The legislation, once in effect, will require disputing parties to lodge a statement outlining “genuine steps” taken prior to filing any process to commence litigation. The steps are to remain broadly defined and may be as simple as notifying the other party of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute. This is reflected in amendments to the Civil Procedure Act 2005 (NSW) which require parties to take “reasonable steps” to resolve, or at least narrow the issues in dispute before commencing proceedings.

26 David Ardagh for Charles Sturt University, Skills of Conflict Resolution, HRM 545, Charles Sturt University Wagga Wagga 2012.
28 Cohen and Thompson above n 27, 144.
31 Commonwealth Civil Dispute Resolution Act 2011 (Cth).
33 Civil Procedure Act 2005 (NSW).
IV. ADR SKILLS IN BUSINESS

With all Australian jurisdictions requiring some level of dispute resolution other than litigation it is clear all business enterprise will be affected whether in the situation of conflict or in the creation of legal relationships, such as commercial contracts. The requirement for alternative dispute resolution may further be put to the scrutiny of the courts in determining disputes arising from the processes.

Where a dispute resolution clause is provided in a contract the courts have interpreted dispute resolution clauses broadly Chief Justice Gleeson (as he then was) identified that, ‘where parties enter into a contract requiring mediation the clauses are to be read widely’34. Where there is no provision for dispute resolution in the terms of a contract the amendments in NSW may be read with the purpose of promoting real and meaningful attempts at dispute resolution outside the litigation model35. As for the new Commonwealth legislation there is a requirement for both parties to take ‘genuine steps to resolve a dispute” and to then file a “genuine steps statement”36, akin to a Legal Practitioner’s statement as to “genuineness of claim” when filing to commence an action.

There have been some form of ADR procedures in the United States since the 1970’s37 and an important model for ADR in the United States emerged from the Harvard Negotiation Project, founded in 1980 at the Harvard Law School under the supervision of Roscoe Pound38. The Project enunciated the core concepts of mediation and participant control and led to the establishment of The Program on Negotiation at Harvard which today has a strong focus on providing guidance to private enterprise with recent courses introduced to train corporate attorneys and company executives in the “techniques and perspectives of mediation”39. This is a clear example of the need for business graduates to have the ability to identify the most efficient means of dealing with conflict in commerce.

In 1999 Dany Ertel40 described the emerging co-ordinated approach to negotiation, including disputes, being developed by certain corporations in the United States and Mexico.41 Ertel observed how these corporations, rather than viewing each negotiation as a separate situation, identified successful dispute negotiation practices and formed negotiation protocols and training programs for staff.41 Not only does the inclusion of dispute resolution processes in business improve negotiations it often improves business relationships also. Seeking “business-oriented solutions not constrained by conventional legal frameworks” can further transcend trans-jurisdictional issues.43

The judicature in the United States of America provides a disparate model of court process and judicial officers, however, this allows varied models of dispute resolution to evolve within each state. One such model is utilised in the District Court of New South Wales. The New South Wales District Court uses the Philadelphia Scheme which is named after a similar scheme

35 Interpretation Act 1987 NSW.
36 Commonwealth Civil Dispute Resolution Act (Cth) 2011 s. 4(1A).
38 Coltri, above n 12, 65.
41 Ibid.
42 Grupo Financiero Serfin, a Large Mexican Bank, introduced a requirement that negotiation considerations be incorporated into the initial financial analysis of each loan application.
in Philadelphia, Pennsylvania. This scheme uses a number of arbitrators who are rostered to attend court where support services are provided. The number of matters actually sent to arbitrators has decreased since inception in 2005 which indicates the increase in use of alternative methods of resolution, as much as an increase in the unsuitability of matters for arbitration, leading to litigation.

Current trends in specific states within America show an increase in cases settled by mediation. An example of this is seen in the statistics for Alternative Dispute Resolution in the United States District Court, Eastern District of New York, for the year to 30 June 2010. Of the 140 cases referred to mediation, 54 cases were either reported settled as a result of mediation or returned to the assigned Judge. This report noted that frequently, cases may settle after they had been returned to the court and also noted the demonstrated effectiveness of alternative dispute resolution options. The report noted these factors, along with the increase in case filings, strongly suggested greater consideration of mediation for constructively resolving civil cases was needed. This use of the mediation process at District Court level reflects the Australian experience and identifies the extent to which methods of resolving disputes within government established systems has taken on aspects of private negotiation concepts where conflict exists. In 2011 the Sydney District Court referred 786 matters to mediation. Of those 670 were referred to private mediation and 116 to court provided mediation with approximately 52% of the matters referred to court provided mediation settling.

Where many states in the United States of America have introduced a level of conflict resolution preliminary to litigation, the more homogenous example seen in the United Kingdom rests upon Practice Rules which have been changed to incorporate a professional obligation for a legal practitioner to advise a client about the possibility of mediation. For the European Union nations the process of introducing some form of alternative dispute resolution is moving slowly, however, the discussions are well underway. The focus is on the use of mutually agreed methods for inter-nation disputes. Each member nation has, to a varying degree, a process of non-adversarial dispute resolution. Where a civil system of law is in place the concepts are more familiar and the processes already incorporate what we recognise as an inquisitorial judicature. Even here the participants are now prevailed upon to resolve disputes without recourse to the adversarial system. The models for dispute resolution have been built within law schools and are commonly implemented within many of the world’s legal systems. Most particularly, for the purposes of this paper, are the common law systems where dispute resolution process is seen within the judicature itself and within certain government departments. The Australian

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45 Ibid.
46 Ibid.
48 Ibid.
49 Ibid 8.
50 NSW Department of the Attorney General and Justice above n. 44.
51 Ibid.
52 Ibid.
54 United Kingdom Ministry of Justice, Practice Direction 8, UK Ministry of Justice web page www.justice.gov.uk.
55 Civil Dispute Resolution Act 2011(Cth) s 6.
Community Justice programs are but one example of the alternative dispute resolution process in use in a local government setting. Slowly the state and federal executive governments have introduced tailored dispute resolution processes within departments and tribunals. The concept of alternative dispute resolution has moved from the realms of neighbours in conflict to family disputes to the current litigation models supported by legislation.

In Australia, Court processes now usually require an attempt at alternative dispute resolution, as noted previously. While the statistics as to success of mediation within the courts of each state and territory are varied, the requirement is common and business disputants must be prepared to attempt mediation wherever considered appropriate by the Registrars within the courts of Australia. There are also very strong indicators the participants will choose a private mediator at the preliminary hearing stage of referral by the Court. This fact alone indicates the need for business students intending to participate in business to appreciate the dramatic difference in approach the judicature takes to commercial matters in the current era of self-protection and keeping a look out for one’s own well-being.

V. CONCLUSION

The negotiators of future business relationships need to be prepared for the use of ADR. Training is required in dispute resolution methods and participation, including pre-emptive methods prior to engaging in agreements to trade or provide services. Law faculties provide optional tutoring in the methods of mediation as well as in the theory for future lawyers. Many of the faculties teaching non-law students have optional dispute resolution subjects which are quite often at post graduate level. The imbalance must be addressed in order that business students of tomorrow are prepared, early in their career, to confront the very real issue of conflict, to prepare for this and, in the event of an actual conflict, to have the courage to deal with it. These future business participants must be empowered to conduct business in a frame which includes dispute resolution methods outside litigation. Business today requires a skills set to deal with conflict in business whether by negotiating in accordance with prior agreed methods, or which may be presented to the other party at the very time of dispute. All current undergraduate business courses should include an ADR subject. Where our students are unprepared to deal with disputes once they are in business we set them up to fail. The spectre of costly litigation hangs over all of them in the post global economic crisis and that fear must surely eat at the very core of commercial decision making practices.

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57 In NSW the Community Justice Centres assisted parties to reach an agreement in 1,363 of the 1,731 mediations held during 2011, Attorney General & Justice 2011 Community Justice Centres Year in Review 2010-2011.
58 NSW Department of the Attorney General and Justice above n 44.
59 Civil Dispute Resolution Act 2011 (Cth) and Spencer, above n 30.
60 Attorney General’s Department of NSW In NSW District Court, of 592 matter referred to mediation in 2009, 458 were referred to private mediation and 134 to court provided mediation: NSW Department of the Attorney General and Justice (2010) The District Court of New South Wales Annual Review 2009 and in 2011 786 referred with 116 court appointed.
61 Civil Liability Act 2002 (NSW) and Civil Liability Amendment (Personal Responsibility) Act 2003 (NSW): requirements promoting personal responsibility in relation to individuals claiming civil wrongs.
62 David Ardagh for Charles Sturt University, above n 26.
63 Amanda Carrigan ‘Dispute Resolution Skills are essential for Business Students’ (Paper presented at the Australian Law Teachers Association Conference 4-6 July 2011).
A NEW CURRICULUM FOR BUSINESS LAW:
THE ‘BUSINESS-FACING’ MODEL

JENNIFER IRELAND*

ABSTRACT

The School of Law at the University of Western Sydney (‘UWS’) recently completed a project to convert Introduction to Business Law (‘IBL’) into a blended learning unit. There were several stages in the project, culminating in development of a suite of online resources to support the blended delivery. The first stage of the project was a curriculum review, the outcome of which is the subject of this paper. The review provided an opportunity not just to prepare for future blended delivery, but also to redefine the overall direction of the unit’s curriculum. The result was a move away from the traditional ‘law-facing’ curriculum to a new curriculum that is specially designed to be more engaging and relevant to business students: the ‘business-facing’ model. There is clear support in the literature, particularly in the United States and the United Kingdom, for the adoption of this type of approach to teaching business law but, to date, there have been very few reports of actual implementation of a ‘business-facing’ curriculum such as this one. This concept paper explores this theme in the literature, introduces the key features of the new IBL curriculum and explains the changes that have made it inherently ‘business-facing’ rather than ‘law-facing’.

I. INTRODUCTION

Introduction to Business Law (‘IBL’) is a compulsory subject for business students at the University of Western Sydney (‘UWS’). Around 3000 students attempt the subject each year. Prior to 2011, IBL was a ‘traditional’ business law offering, taught in a face-to-face lecture / tutorial mode. The overall pitch of the unit might fairly be described as ‘law-facing’, with an emphasis on primary legal authority, legal terminology and instruction in basic legal research. Overall student results as well as formal and informal student feedback, indicated that some aspects of the existing approach to IBL were not meeting the needs or expectations of our business students. A pattern of poor student attendance had developed, particularly at lectures, and below average results were linked with this pattern. In response to this situation, a decision was made in 2010 to convert IBL into a blended learning unit to allow students more flexibility in their attendance patterns. As an essential first step in the project the curriculum was revised and rebuilt from the ground up. It was clear from the outset of the project that the curriculum review was also an opportunity to move away from a traditional ‘law-facing’ focus and embrace

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1 Although the term ‘business law’ is used throughout this paper, in line with the terminology commonly used in Australian courses, it is acknowledged that at least from the United States’ perspective, the course described here probably has most in common with the content of a ‘legal environment’ course. See further notes 30, 31, below.

2 What became known as the ‘IBL Online’ project had two core aspects: first, a full revision and renewal of the curriculum and, second, development of a suite of on-line learning resources that use a combination of text, podcasts and videos to deliver the Unit’s new content. These online resources provide students with greater flexibility by providing the option of accessing media-rich online content equivalent to the face-to-face lectures, although both forms of delivery are available, with many students now doing both. For a sample module see <http://www.baileyandireland.com.au>.

a new ‘business-facing’ model for the unit. We needed to translate law into business — to bring the curriculum to life and tell the story from the business person’s perspective, not the lawyer’s. The business-facing model is designed to achieve this and, with it, to improve student engagement, motivation and results.

This concept paper examines the support in the literature on business law education for wider implementation of a ‘business-facing’ approach, and explains how the new IBL curriculum responds to that call. The business-facing curriculum was implemented in Autumn 2011 and, although evaluation of the new model’s effectiveness was still under way at the time of writing, early indications are very encouraging. There has been a significant reduction in the failure rates in all three sessions compared to previous offerings, as well as positive student feedback in both formal and informal evaluations.

II. A CRITIQUE OF THE TRADITIONAL ‘LAW-FACING’ BUSINESS LAW CURRICULUM

The literature reports a range of problems associated with business law courses taught according to the ‘traditional’ curriculum. Poor engagement and motivation, frequently combined with feelings of apprehension about having to take business law units, particularly at the start of the degree, are often reported by students in these courses:

students in the focus group discussions commonly described feeling daunted and apprehensive or even fearful of law as a subject, its perceived specialist nature and its technical jargon.

At least part of the reason for this situation is that the traditional business law curriculum does not make it clear to students how the law subject relates to the rest of their degree, or how important an understanding of law will be to them in their later business careers. It must also be acknowledged that students often see the subject matter as boring, or too difficult, or both:

students, like laymen in general, regard law as a dry subject composed of a huge body of rules, fine points, and technicalities.

Traditional business law courses are almost invariably structured according to legal topics - that is, from the perspective of a lawyer and how she or he would approach the subject matter. There are several reasons for this. Set texts for business law courses usually reflect and reinforce
A NEW CURRICULUM FOR BUSINESS LAW

this perspective and in turn influence, or even dictate, a traditional style of delivery.\textsuperscript{12} There is naturally also some reluctance among those teaching business law to ‘wean ourselves from traditional law school pedagogy’\textsuperscript{13} in favour of ‘new ideas and directions’.\textsuperscript{14} Additionally, the content is usually presented and assessed as an abbreviated version of the black letter content typically taught in undergraduate law degrees (the ‘LLB’), with business students required to learn legal terminology, names of cases and sections of Acts, and to do legal research and problem-solving as components of their assessments.

There is a strong line of criticism running through the literature of the law-facing approach. It is variably referred to as a ‘watered down law course borrowed from a law school’,\textsuperscript{15} a ‘mini law school’\textsuperscript{16} approach or ‘law school lite’,\textsuperscript{17} just to sample a few of the less flattering descriptions. Perhaps the most telling description is of a ‘traditional, conservative, “rules and cases”, “black letter law” approach’ which should be rejected because ‘[m]anagement educators are not preparing lawyers for admission to practice, they are providing managers [with] information to assist in their decision-making. Managers simply do not need volumes of “lawyers’ law”’.\textsuperscript{18} The view that there has been a tendency to give black letter law ‘undue emphasis’\textsuperscript{19} is also commonly aired.

It is axiomatic that if students don’t find the content of a course engaging or relevant to their careers they won’t be motivated to study and will not do well.\textsuperscript{20} One of the main reasons for a lack of engagement and motivation among students of business law is that they do not appreciate the relevance of the legal component of their course to their overall business studies or to their future careers. The literature, although somewhat sparse, does provide support for the claim that students see the business law course as less important, at least at the start of the course,\textsuperscript{21} although some researchers have reported an improvement in perception of the importance of legal studies by the end of the course.\textsuperscript{22}

The teacher of business law starts off with a handicap because his (sic) subject in itself does not have student appeal. There are many students of accounting, advertising, management, and

\begin{thebibliography}{99}
\bibitem{14} Lampe, above n 12, 9.
\bibitem{17} Lampe, above n 12, 3.
\bibitem{22} Petty and Mandel, above n 10, 206; Ridley, above n 21, 282-3.
\end{thebibliography}
marketing who look on business law as off the main line. Their attitude is that they are not going to be lawyers and so why should they bother with the study of law.\textsuperscript{23}

This situation is despite almost universal acknowledgement among academics and business alumni of the importance of the law subject within the business degree.\textsuperscript{24} Observations that ‘almost every management decision has a legal dimension’,\textsuperscript{25} that ‘legal questions arise in practically every business decision’\textsuperscript{26} and that ‘[t]he commercial arena is underpinned, some would say totally dominated by, legal requirements’\textsuperscript{27} fill the literature in this discipline.\textsuperscript{28} It follows that students should ‘learn to inject legal thought into the business decision making process’\textsuperscript{29} from the outset. However, although these points would almost go without saying for lawyers and teachers dealing regularly with business law, they seem far from obvious to the students. Making the ‘reason for the course’\textsuperscript{30} and its importance to future business careers much clearer to students was therefore one of the key drivers for change to the IBL curriculum.\textsuperscript{31} The specific features of the business-facing model, described further below, make it an ideal vehicle for more effective communication of this important message.

\textbf{III. Alternative Models for Business Law}

There are a number of non-traditional models and approaches to teaching business law described in the literature. For example, there is a long-running debate in the United States, and to some extent also in the United Kingdom, over the differences and respective merits of ‘business law’,\textsuperscript{32}

\begin{thebibliography}{9}

\bibitem{23} Bergh, above n 11, 85.
\bibitem{24} Business alumni, who are of course often the employers, consider it to be highly important and, in fact, that there should even be more law taught in the business degree: John Tanner, Anne Keaty and Christopher Major, ‘A Survey of Business Alumni: Evidence of the Continuing Need for a Law Course in Business Curricula’ (2004) 21(2) \textit{Journal of Legal Studies Education} 203, 205 (notably, 75\% of those surveyed thought there should be more law in the business degree). As to academic support see, eg, Lampe, above n 12, 7 and notes 25 and 26, below, for selected references.
\bibitem{25} Cartan and Vilkinas, above n 18, 246.
\bibitem{27} Cartan and Vilkinas, above n 18, 246.
\bibitem{28} See further O Lee Reed, Virginia G Maurer, Michael J O’Hara, J David Reitzel and Marcia J Staff, \textit{The Status of Law in Academic Business Study: 1998 Report of the President’s Task Force}, Academy of Legal Studies in Business, available at \url{<http://cba.unomaha.edu/faculty/mohara/web/ALSBsta8.htm>} (law is an ‘inescapable and omnipresent’ reality in business); Morgan, above n 16, 285-6; Robert C Elliot, ‘The Teaching of Law to Non-Lawyers’ (1973) 7(2) \textit{The Law Teacher} 81, 81 (‘the ever-increasing importance of law in nearly every aspect of our society’).
\bibitem{29} Dobray and Steinman, above n 26, 86.
\bibitem{30} Gerber, above n 15, 180, 181.
\bibitem{32} In the United States, ‘business law’ is the term used to refer to the more traditional type of course that has quite a heavy focus on contracts and what is referred to as ‘private law’ aspects, being law that governs relations between businesses: see, eg, Carol J Miller and Susan A Crain, ‘Legal Environment v Business Law: A Distinction without a Difference?’ (2011) 28(2) \textit{Journal of Legal Studies Education} 149, 156, 193.
\end{thebibliography}
as opposed to ‘environmental’, syllabi for these courses, although the practical significance of this distinction appears to be waning nowadays. This paper does not reiterate the background and historical development of the different models, as these have already been reported in detail elsewhere. For present purposes, what can be said of those debates is that they are primarily about the syllabus or content of the course — what topics it should cover.

Several arrangements that depart from the traditional structure have also been described in the literature, including McGuire’s suggestion of structuring the course around the relationships a business may enter into (both internally and externally). Similarly, Cartan and Vilkinas invite us to ‘consider the following everyday managerial activities: advertising, hiring staff, purchasing raw materials, selling goods, writing cheques, reprimanding employees, paying taxes, etc [and observe that the law] embraces all these operations.’ Other suggested models include developmental, hybrid, and a structure based around specific ‘forces’ that operate on the business manager, being ‘litigation, regulation, globalization, entrepreneurship, technology and compliance.’ It is submitted that these models focus primarily on the structure of the course — how the topics should be arranged.

The models, and categories, described above remain essentially ‘law-facing’ in their approach, even though they do present alternatives to the traditional curriculum. The curricular change reported in this paper engages with another, conceptually different, theme that also emerges from the literature, but which transcends debate over what content should be included in each type of course or how it should be structured. This is the call, perhaps most clearly articulated by Marc Lampe, but shared by several others, for business law courses (however named and regardless of their actual content or structure), to move away from a ‘mini law school’ approach, towards an approach that explains the law from the business person’s perspective, not the lawyer’s. The ‘business-facing’ concept was developed in response to that call. The move away from the ‘law-facing’ approach that it represents is essentially about the perspective from which such courses should be taught, not strictly about what content should be included in the syllabus or how the content should be arranged. As noted above, despite clear support for this ‘business-facing’ approach, there are as yet very few reports of actual implementation of such a model.

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33 ‘Legal environment’ courses have a broader curriculum that includes more regulatory and ‘public law’ (legal aspects of the relationship between business and the public) content: Miller and Crain, above n 32, 181, 183, 185-6, 193, 200 (‘regulatory’ is described at 183 as including employment, antitrust, environment or securities regulations). Legal environment courses are also much more likely to include ethical and social responsibility (ibid 200), as well as historical, sociological, economic and political dimensions: Cartan and Vilkinas, above n 18, 248; Reitzel, above n 19, 213; Morgan, above n 16, 288.
34 Miller and Crain, above n 32; Reitzel, above n 19, 213-4.
35 For useful summaries of the background and history see Tanner, Keaty and Major, above n 24, 205-9; Morgan, above n 16, 287; Miller and Crain, above n 32, 154-6.
37 Cartan and Vilkinas, above n 18.
38 Morgan, above n 16; Reitzel, above n 19, 213 (acknowledging that law as a process ‘has a future as well as a past and a present’).
39 Cartan and Vilkinas, above n 18, 246.
41 Lampe, above n 12.
42 Morgan, above n 16, 288.
43 Cartan and Vilkinas, above n 18, 249.
IV. The ‘Business-Facing’ Model

It has long been recognised, at least in the literature, that business law should not be taught in the same way as LLB subjects.44 Business law is, after all, part of the business degree, not the law degree. We are not, or at least we should not be, ‘training non-law students to “think like lawyers”’.45 Consistent with this, it is appropriate to move away from teaching ‘outlines of settled law’46 or ‘overviews of the law as taught in law schools’.47 As Skwarok observes:

[T]he main objective of business legal education is to prepare students for the business world. Graduates should be able to operate a business within the parameters of the law, consider the legal implications and risks inherent in business decisions and identify legal issues at a preliminary stage. A person involved in business should not only be able to suggest possible solutions to disputes but also to distinguish circumstances in which it would be more appropriate to seek professional legal advice.48

The new ‘business-facing’ approach to IBL has an entirely different focus from the traditional ‘law-school lite’ approach. Much like the ‘new paradigm’ Lampe proposes,49 it concentrates primarily on identification and prevention of legal risks and the formulation of business responses to those risks,50 rather than on legal research or purely legal problem-solving. It also draws on the philosophy behind ‘legal environment’ courses and their goal of ‘help[ing] businesspersons recognize legal issues, prevent and resolve legal disputes, and function within the parameters of government regulations’.51 This approach allows for much greater attention to be given to the ‘ways the law encourages commercial enterprise, how it limits such activities and how the legal and business systems adjust to each other’.52

The following sections examine the features of the new IBL curriculum that distinguish it from traditional models and explains why these features make it a ‘business-facing’ rather than a ‘law-facing’ model.

A. ‘Business Life Cycle’ Structure

The IBL re-structure started from the premise that it should avoid a presentation of the topics that would seem, from a business student’s perspective, to consist of unrelated ‘bits and pieces’ of law. While a lawyer will understand the legal categories, to the business person (or student) the ‘traditional legal subject labels’53 can seem like ‘a series of disjointed, seemingly independent, topics which are an abridged version of those from the law school.’54 To illustrate, take the relationship between contracts, negligence and consumer protection: lawyers, at least those in commercial law, understand how they interact. However, business people can find it challenging to identify which area of the law applies, and they may well think that certain aspects overlap or worse, seem to contradict each other. Legal classification should be transparent within a business law course structure but it must also be coherent from a business perspective. For
business people ‘[p]revention is the quintessential rationale’\textsuperscript{55} — their focus should be on the
conduct they need to adopt or to avoid, not on identifying which part of the law is involved.

IBL is divided into ten modules, each consisting of 5-7 chapters or topics.\textsuperscript{56} The modules
are arranged from a business point of view, taking the ‘life-cycle’ of a typical business as the
pattern. These modules tell the story of the business from start to finish. The rationale is to
present the topics in an order that would be both approachable and meaningful to the business
student or the business person, even if not necessarily so to the lawyer.\textsuperscript{57} The business ‘life
cycle’ structure of IBL is as follows:

• Australian legal system;\textsuperscript{58}
• Starting a business;\textsuperscript{59}
• Running a business: legal and compliance issues;\textsuperscript{60}
• Negligence: liability for harm caused by or to the business;
• Contracts: purchase and sale of goods or services and business negotiations;
• Making valid sales within the \textit{Australian Consumer Law};\textsuperscript{61}
• Responsibility for faulty or dangerous consumer products or services;
• Prohibited business conduct, including corporate crimes and breaches of directors duties;
• Dealing with competitors within the law;
• Ending the business, whether in favourable (selling) or unfavourable (bankruptcy and
winding up) circumstances.

The reader will have noticed there is still a sense of the traditional legal topics at the ‘module’
level of this structure. There is further scope to break further away from the ‘arrangement by legal
topic’ approach to a more strictly business focus. In this respect, the transformation is arguably
not yet complete. For example rather than dealing with all aspects of consumer sales methods
together, the coverage of pyramid schemes could be moved to the earlier topic on business
structures. Although to a lawyer, this is a consumer law issue and the lawyer would classify it as
a prohibited sales method, the business person needs to give it much earlier consideration. The
legal classification is less important to the business person than knowing not to adopt a pyramid
scheme when first starting up a business. Further, more detailed re-arrangement of the subject
matter at the ‘topic’ level, or below, is planned for the future. For the present, the business life-
cycle structure allows students to see straight away where the legal aspects fit into the business
context, or the stage of the business’s ‘life cycle’, which also helps them see the relevance of
the content.

\textsuperscript{55} Robert J Morris, ‘Improving curriculum theory and design for teaching law to non-lawyers in built

\textsuperscript{56} A full outline of the unit structure and a sample module are available at <http://www.

\textsuperscript{57} For a course for engineering students structured to follow the steps of a typical tendering process see
Gerber, above n 15, 181.

\textsuperscript{58} The first module, ‘Australian Legal System’, provides a foundation for the unit by introducing students
to key common law legal concepts such as precedent, as well as explaining the court structure and
how cases are conducted, how legislation is made and (potentially) challenged, the different arms
of government, and alternative methods of dispute resolution. Importantly, this module also contains a
new section entitled ‘You and your lawyer’ that explains the nature of legal work as well as providing
tips on locating, hiring and managing lawyers.

\textsuperscript{59} The module covers business structures, including web-based businesses and franchises, business
premises, registrations and licences, business names and a selection of intellectual property issues.

\textsuperscript{60} The module covers taxation, insurance, the employment relationship, workplace health and safety
and discrimination.

\textsuperscript{61} The module draws together misleading or deceptive conduct, misrepresentations, and sales that may
be invalid under the new regulations on standard form contracts or due to use of prohibited sales
methods,
B. Business Responses to Legal Issues

There is an important difference between business law and subjects taught in the LLB that might almost be seen as chronological. It would generally be accepted that LLB subjects tend to focus on what to do after a problem has already arisen, and on how to resolve it in terms of the existing, often appellate, law. On the other hand, business law subjects should focus on how to avoid legal problems occurring in the first place, to identify problems when they do occur, and on knowing when to seek help from a legal practitioner. The emphasis in business law courses should be on prevention, not cure. The new IBL curriculum implements this approach in two ways: first, by emphasizing the identification of actual or potential legal issues, rather than their resolution, and second, by focusing on how to avoid legal problems, or how to stop those that do occur from getting worse. Removal of the legal research and legal problem solving requirements from the course allowed it to focus on business responses, rather than legal solutions, to common legal issues that arise in business. Students also develop a sense of when to call in a lawyer rather than trying to be one’s own lawyer. These changes are explored further in the following sections.

1. Business Students Should Not Be Required To Do Legal Research

[N]on-law students should not be expected to be able to research law or write legal papers. Similarly, ‘the day to day atmosphere in which business people operate [does not] depend on their being able to distinguish between ratio decidendi and obiter dicta in a case’ and that it would therefore not be reasonable to expect business students to ‘comprehend the vagaries of legal reasoning’. These are only a couple of many such statements to be found in the literature. Many will find them controversial — others may find them refreshing. Either way, it is acknowledged that they represent a significant departure from the traditional approach to teaching business law. Removing the requirement for students to learn legal research methods and do legal problem-solving, was probably the central change to the IBL curriculum. Importantly, the legal research component has been moved to later compulsory accounting units, as these students are the only ones in the business law cohort who are required to do direct legal research as part of their degree. The focus in IBL is now on what the business can do within the law. Students are required to formulate business responses based on the legal principles we have already provided to them, not to go out and research the law for themselves. Students are still required to demonstrate an accurate understanding of the law we have given them, but they do that primarily by explaining what businesses should and should not do within the law. They are not required to provide us with the legal argumentation and the analysis and citation of primary authorities, that would be expected from a law student.

Inclusion of the legal research component is often justified for business students, even though it is unlikely to be something they will do as part of their future careers, on the basis that it

62 Lampe, above n 12, 12.
63 Ibid, 5; Morris, above n 55, 284.
64 Gerber, above n 15, 180.
65 Skwarok, above n 7, 191.
66 Lampe, above n 12, 2 (‘Accounting students … should not dictate class coverage for the introductory law course’). See also Ridley, above n 21.
67 Students who want to go further and provide some ‘LLB-style’ analysis in addition to the business perspective are certainly not discouraged from doing so and will earn higher marks if they do this accurately, but students are no longer required to demonstrate an ability to do legal research, legal problem-solving or provide primary citations in order to pass the unit.
68 Lampe, above n 12, 2.
develops critical thinking skills. Our argument by way of response is that business leaders need critical business thinking skills, not critical legal problem-solving skills. Legal research and problem-solving are more appropriately covered in later year business law subjects or even at postgraduate level, than in a general first year course. Critical thinking skills can still be gained while keeping the focus on business responses to legal problems, rather than having students work out legal solutions or do legal problem-solving per se.

2 Knowing When to Seek Legal Advice as Opposed To Trying to be One’s Own Lawyer

[M]ost of all they need to know enough to know when to seek professional legal help. The analogy is often made to that of a patient and doctor: the patient needs to know enough about health and medicine to practice preventive medicine, to know when to take an aspirin, and when to visit the doctor - all because it is cheaper and easier to stay well.

There is a further dimension to the point made earlier about business people needing to be able to identify legal problems. Some care should be taken that students do not complete their business law course thinking that they can now do their own legal work, whether for convenience or cost-saving or for some other reason. Teachers of business students need to emphasise that only lawyers have the specialised training to do legal research and problem-solving and to maintain currency in their field. They are paid for this expertise and, very importantly, they carry professional indemnity insurance in the event of a problem with their work. We need to ensure that business students are made aware of the risk of trying to be their own, uninsured, ‘bush lawyer’. The following observations, made over 40 years ago, remain true:

The little law that he (sic) has been taught will be forgotten [or will change anyway], he will almost always consult with his lawyers on any important matter involving legal aspects; and of course there are law books which state the rules of law. Secondly, the adage that “a little knowledge is worse than none” certainly applies to the “layman-lawyer” operating in the business community.

It follows that not only is legal research and problem-solving not necessary to a business person’s education about the law, there might even be a risk of engendering overconfidence in students by including it in the business law curriculum. In IBL, a brief description of legal research and problem-solving is included at the start of the unit for the purpose of conveying the complexity of the lawyer’s work, the need to maintain currency, and the specialised nature of the skills required as well as something of a ‘don’t try this at home’ message. The focus of this discussion, for the business students, is therefore kept on how to deal with lawyers and how to

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71 Morris, above n 55, 284.
72 Gerber, above n 15, at 179-180 (‘learning just a small amount about a given topic can lead people to think they have more expertise than they really do. When it comes to legal problems, this can potentially result in engineers, architects, and contractors making a problem worse because they fail to promptly seek legal advice, erroneously believing that they have sufficient legal knowledge, from their construction law studies, to handle the problem themselves. Furthermore, construction students may not keep up with changes in the law after they graduate, and thus may seek to resolve legal problems by applying outdated legal knowledge’). Compare Lampe, above n 12, 34-35 (on ‘self-help law’).
74 Lampe, above n 12, 11; Ingulli, above n 12, 625-6.
manage the relationship with a lawyer,\textsuperscript{75} just as one would manage any other valuable business relationship or resource:

Business school law classes should help students become knowledgeable and critical consumers of legal services.\textsuperscript{76}

\textbf{C. A ‘Business Advice’ Approach}

One of the most important shifts that needed to be made in the move to a business-facing curriculum occurred at a more ‘micro’ level, in the style of presentation of the content, both in face-to-face teaching and in the online resources. What we labelled a ‘business advice’ approach is key to the new IBL curriculum. Essentially it means explaining the content in a similar manner to a practitioner advising a client, rather than presenting the issues as one would when teaching LLB students, or talking to another lawyer. This makes sense from a business perspective — after all a legal practitioner wouldn’t go through all the primary authorities when advising a client. What the business person really needs to know is what to do and what not to do in order to comply with the law. He or she doesn’t need to know the fine details of what the law is, or how to locate it — only ‘how to identify when there is a legal dimension to an issue and, if there is, how to deal with that legal aspect.’\textsuperscript{77} The distinction can be likened to that between a mechanic (the lawyer) who understands how all the parts of a car work together as well as how to repair a problem, and the car’s owner (the business person) who just wants the car to work.\textsuperscript{78}

For example, it doesn’t really matter to the business person that sections 36 and 101 of the Copyright Act 1968 (Cth) are the main statutory prohibitions on copyright infringement. What the business person needs to know is broadly what types of material copyright protects and not to copy those materials without a licence or consent. The actual Acts and section numbers are the lawyers’ tools. What business people are concerned with is installing checks and balances into their business practices such that they, or their staff, do not fall foul of the law.

In line with this reasoning, the use of legal terminology is limited in the IBL curriculum to key terms that lawyers might use and which business people would benefit from understanding. Plain English terminology is otherwise used wherever possible and explanations of legal terms are also provided where these are used. The names of the modules and topics themselves also reflect this approach with labels that are relevant to business rather than law, being used where possible.\textsuperscript{79} Approaching the content in this way allows the course to operate almost as an extended opportunity for students to have a lawyer (the teacher) take them through basic legal issues they should be aware of in business, explain those issues in lay terms and address their questions. Teachers in the unit are therefore encouraged to deal with their classes almost as an advising session with a client. It can be a good opportunity for students to gather key legal advice directly from a real lawyer as well.

The business advice approach is also central to the approach to case studies developed for IBL, as explained further below.


\textsuperscript{76} Lampe, above n 12, 21 (emphasis added).

\textsuperscript{77} Gerber, above n 15, 181.

\textsuperscript{78} For a similar analogy, explored in more detail, see Doorey, above n 19.

\textsuperscript{79} To illustrate, the consumer law modules are divided into two modules that reflect business, rather than legal classifications. The first module ‘Making Sales’, covers legal aspects impacting on the sales process such as misleading or deceptive conduct, false or misleading representations, unfair or otherwise invalid contracts or terms and a selection of prohibited sales methods (such as bait advertising). The second module, ‘Products and Services’, deals with faulty or dangerous goods or services and includes: the consumer guarantees, consumer rights (or business obligations) in relation to refunds and replacements, product safety standards, bans and recalls and liability for goods with safety defects.
A new curriculum for business law

D. Business Law Case Studies

A businessman’s law course should not be simply a superficial law course. If it is infinitely smaller than the law-school curriculum in some respects, it should be larger in other respects. We must get at the law in the cases, and dig deeper for the business experience embodied in them.80

The above observation was made in 1920. Picking up on Isaacs’ call to ‘dig deeper’ into the cases for the ‘business experience’ they contain, the new IBL curriculum and the online resources that support it take quite a different approach to the treatment of cases than is usual in business law courses or texts. First, significantly fewer cases are included81 but each is dealt with in much more depth and with much greater attention to what they mean for businesses than is usual in business law courses. Consistent with the ‘business advice’ approach described above, the case treatments focus on how businesses can adapt their practices to avoid similar problems. As far back as 1973 there was a call for more ‘background information’ to be provided on selected cases than was, and still is, usually given in texts aimed at law students. This would allow an ‘in-depth examination of the wider background of leading cases’82 in order for business students to be able to see the ‘business’ parts of the situation, not just the legal principles. There is an important difference between the LLB approach to cases and the case method used in business. Put simply, when studying cases, the ‘take-away’ for law students is the ratio of the case — the principles and legal reasoning to be applied to later similar situations. LLB teaching methods and texts naturally reinforce this. By comparison, the ‘take-away’ for business students or business people, looking at a legal case should be an understanding of the conduct that led to the matter ending up in court, and how conducting business differently might have avoided the situation. The tendency in traditional business law curricula and in most textbooks to provide very short summaries of the principles arising from a large number of cases is understandable if the aim is to provide an abbreviated version of law topics, but it also means that ‘[w]e miss the element of impact: what was the result to the business or the individual involved’.83

Instead of reducing cases to very short summaries, and adding more and more of them, the new IBL curriculum has gone the other way, adopting a treatment of cases that shares some aspects of the storytelling approach gathering favour in some areas of LLB teaching,84 but which draws primarily on the case study method used in other business courses. In business, cases involving real situations, as opposed to fictional scenarios, sometimes called ‘armchair cases’, are generally preferred and the consensus is that ‘ideal’ cases for business study should also be reasonably complex and have a ‘decision focus’.85 Real legal cases exhibit these qualities and are therefore naturally well suited for presentation in this style.

The online resources for IBL, and the lecture coverage, now contain approximately 40 carefully selected and quite detailed case studies. There are approximately 4 case studies per module, presented in a hybrid ‘business law case study’ style which combines real legal cases

81 Doorey, above n 19, 119 (‘we should avoid assigning to non-law students the heavy load of case-law typically assigned to LLB students’). Compare Lampe, above n 12, 37.
82 Elliot, above n 28, 83.
with the business case study method. In this style, much more detail is given to both the facts and the results as well as to the ‘aftermath’ of the case, than would be given in an LLB presentation of the same case. This style is much more immediately relevant and familiar to business students, and has the added advantage of maintaining consistency with an approach used elsewhere in the business degree. It is also intended to promote deeper learning of fewer but more targeted case studies, rather than a superficial understanding of a larger number of briefly summarised examples.

Each case was carefully selected for factual and legal relevance, as well as for its potential to engage students by reason of its story, currency, real-world relevance, or preferably all three. Particular effort was made to select cases involving conduct that might otherwise seem like a good idea from a purely business perspective — such as a way of increasing sales, moving into a new market or competing better within an existing one, or that might look like a short cut or a cost saving — but where the conduct could actually have serious legal implications for the unwary business person. This is not to suggest that all aspects of the law’s impact on business are negative. Cases have also been selected to demonstrate the potential benefits an awareness of certain legal rights, or of the timely involvement of lawyers in negotiating transactions, can afford to business.

The centrepiece of the ‘business law case study’ approach is a special section that appears at the end of each case selected for IBL. This ‘business advice’ section explains what businesses should and should not do as a result of the case, much as a legal practitioner might do with a client. The business advice section is intended to ‘translate’ the case outcome into statements of appropriate business conduct or responses to real world situations that a business student can take into his or her future career. For example, the Duff Beer case was chosen to illustrate the pitfalls in character merchandising and the importance of ensuring all promotional uses of famous names, images or other likenesses are licensed. Making a real life version of a fictional product from The Simpsons television show sounds on its face like a great business idea, unless you consider the producers’ rights. Although the brewers in this case attempted to make their product different enough from the one in the show to avoid liability, they failed. Rather than having a successful product, they ended up in court and significant sums already spent on advertising and producing the actual product were also lost as a result. The business advice arising from this case is that negotiating a licence would have been a far better approach, rather than trying to save the licence fee but at the same time escape liability by attempting to differentiate their product from the fictional product sufficiently to avoid misleading consumers.

Ultimately, what IBL aims to teach students through these case studies, and particularly through the Business Advice section, is that ‘all legal problems have not only a ‘legal’ but a ‘business’ solution and that issues of business relations, business reputation and other costs of disputes should be considered.’

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86 Stephanie R Sipe, ‘Maximizing Student Learning Through Enron: The Ultimate B-Law Case Study’ (2007) 24(2) Journal of Legal Studies Education 325, 327 (‘a business law course that uses a case study approach, supplemented with various multimedia presentations, is likely to create a positive and successful learning experience for its participants’).
87 Dobray and Steinman, above n 26, 89.
88 Bergh, above n 11, 85.
89 Petty and Mandel, above n 10.
90 Gerber, above n 15, 180.
91 Twentieth Century Fox Film Corp v South Australian Brewing Co Ltd (1996) 66 FCR 451; (1996) 34 IPR 225.
92 Skwarok, above n 5, 193.
V. CONCLUSION

Business students need not and perhaps should not be taught law in the same manner as LLB students. The teaching of law to business students involves facing challenges and meeting needs which are unique to this field of study.93

In closing, it should be acknowledged that it is a challenge to law teachers to teach their own discipline from the perspective of another. The changes advocated in this paper, particularly adopting the stance of a legal practitioner advising a client (the ‘business advice’ approach), is challenging to many, perhaps even most, academic lawyers.94 These changes also require us to accept that less black letter law in a business course does not automatically mean the course is too easy. What it can and should mean is that the course has simply been made more relevant to the discipline for which it has been designed. IBL is not a course for students studying to be lawyers. Removing aspects such as legal research and legal problem-solving, only takes out parts that are irrelevant to business students’ future careers. What students of business law need instead is legal awareness: not ‘law school lite’. The significant improvements in results from the first semesters under the new IBL curriculum suggest it is now providing students with that awareness in a format that is more approachable and relevant to students’ future careers than traditional law-facing courses.

93 Ibid 189.
94 Lampe, above n 12, 3-4, 9, 37, 41-42.
I. Introduction

In the modern era of legal education no common law jurisdiction for the training of lawyers can ignore what is happening within other common law jurisdictions. This would include innovations in teaching, training of law students and the changing patterns or redevelopment of law schools. The object of this study is to explore the contemporary nature of these innovations and the policy decisions which arose from them. In making these considerations account has been taken of the fact that one of the major influences on Australian legal education has been that of legal education in England and Wales (for the sake of brevity to be described as England or the English legal system).

Within the context of this paper it is the intention only to comment and analyse those recent reviews and reports which could have an effect on the future of English legal education and if appropriate to compare them with the current situation or practices taking place within the Australian context.

In 2005 at the Commonwealth Law Conference I gave a paper which involved a comparison of legal education between Australia and England. At that time it was still acceptable to quote the Ormrod Review of 1971 and the Benson Report on Legal Services of 1979. In 1988 the Marre Committee had criticised legal education for not providing an adequate knowledge of the ‘core subject’, for failing to give students the basic skills of being able to present written arguments, to conduct research, and present oral arguments, and for not placing law in its social, commercial and European contexts.

It was during this period that the Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC) was established in April 1991 under the Courts and Legal Services Act 1990. Its review of legal education commenced in 1992 with the First Report on Legal Education and Training being published in April 1996, followed in 1997 by a Second Report Continuing professional development for solicitors and barristers. These reports were succeeded by a number of further reports until the Committee was disbanded in 1999 and replaced by the Legal Services Board. The reports selected for review within this context are those which were directly related to legal education. The Advisory Committee was also concerned with professional conduct and much of its work through the decade 1990 to until its demise in 1990 was concerned with rights of audience in the superior courts particularly in respect of solicitors and employed barristers.

* PhD Student at Macquarie University, Emeritus Professor at the University of Technology, Sydney.
6 Courts and Legal Services Act 1990 (UK) c41.
II. Legal Education Aspects: The English Context

A starting point to such an account would have to be the reforms brought about by the *Legal Services Act 2007* (UK)\(^8\) which has been described by Professor Leighton, a leading law academic and commentator, as; ‘The most radical piece of legislation for a very long time in terms of both the structure and the role of the existing legal profession and for legal education.’\(^9\)

In the view of Patricia Leighton’s comment, this legislation also gave rise to the setting up of the ‘Legal Education and Training Review (LET), 2011-2012 (which was previously described as ‘The Review 2020’) which was an initiative of: the Solicitors Regulation Authority (SRA), The Bar Standards Board (BSB), and the Institute of Legal Executives Professional Standards (IPS).\(^10\) The brief for the Review was to: report on the main challenges and changes that will influence the shape of the future legal services sector and determine the legal services education and training system(s) necessary to underpin the structure.’\(^11\)

The cautionary note mentioned in the article by Patricia Leighton, as to the lack of effect of previous reviews involving legal education in England (other than the Ormrod Review), should be heeded, particularly in the light of a recent internet report (17 October 2011)\(^12\) which stated that: ‘Speaking at a debate on legal education London last week, former Appeal Court Judge Sir Mark Potter, who with Dame Janet Gaymer chairs the LETR’S consultation steering panel, said his panel had met just once so far in a *purely introductory exercise* and would meet again next month’. On the LETR’s likely finish date, Sir Mark hinted that it could slip into 2013. He was still hopeful it could meet the end-of-2012 deadline, but warned: ‘That may be somewhat ambitious’.\(^13\)

In this respect the sense of the ongoing discussions would suggest that all parties have a concern with regard to the effectiveness of the role of the Qualifying Degree and the lack of availability of training contracts either with a firm of solicitors or the equivalence of pupillage within barristers’ chambers.

The Law Society of England and Wales (‘Law Society’) also recognised the impact of this legislation by describing it as: ‘Implementing the biggest reform of the regulation of legal services in England and Wales for a generation’.\(^14\) It actually incorporates the recommendations made by Sir David Clementi in his 2004 independent review of the regulatory legal framework in England and Wales relating to the creation of: ‘A single supervisory body, the LSB, to oversee the approved regulators such as the Law Society and the Bar Council.’ It also: ‘Requires professional bodies to separate their regulatory and representative functions’ and: ‘Creates statutory objectives and duties for all regulatory bodies.’ This means in effect that under its authority granted by the Act the Legal Services Board may delegate various aspects of legal education and training to the SRA. This authority was established to achieve that part of the legislation which required the Law Society to divide its representative and regulatory functions with the latter day-to-day regulation of solicitors being delegated to the SRA, which although is functionally separate, is still funded by the Law Society.

It could be argued that the result of this legislation was that it effectively dealt with some of the core issues faced by the English legal profession and provided a framework for future reforms which were then urgently needed within English legal education. One of the major outcomes of the *Legal Services Act 2007* (UK) was fulfilment of the requirement as stated in the objectives of the Legal Services Board that: ‘An effective legal profession

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8 *Legal Services Act 2007* (UK) c29.
10 Ibid.
13 Ibid.
is one that is able to meet the changing need of consumers and contribute to the meeting of the regulatory objectives. The profession’s effectiveness is as much defined by consumers’ expectations as it is by the professions and covers quality, access and value. We consider that quality comes from having appropriate education, training and quality assurance mechanisms as well as a consumer driven, competitive market.”15 This prompted a review of legal education.

III. THE ENGLISH LEGAL EDUCATION AND TRAINING REVIEW

It is accepted that the major reason for the Review was the Legal Services Act 2007 (UK). This has been explained in the context of: ‘The deregulatory and consumerist thrust of the Act has major implications for nature and delivery of legal skills and the mechanisms through which they are delivered.’16

Patricia Leighton, in giving this explanation also commented that: ‘There is a sense, therefore, that a reformed system of education and training will have to respond to a far more complex and competitive world, and that many of our traditional norms and expectations are under challenge.’17 Leighton also said that: ‘Turning to legal education itself, the interest will be not just in the future of the law degree and of traditional legal skills but in questions such as who are we educating and for what career?’18

One of the first actions taken in respect of the Review was by the SRA, which in acting on behalf of the BSB and the ILEPS, commissioned a contractor to undertake research into: ‘Legal education and training in England and Wales and internationally as well as systems in other sectors and professions.’19 The successful contractors were also required: ‘To examine the educational requirements placed upon individuals entering the sector; the requirements for continuing education for individuals and entities; and the requirement placed upon those educating individuals and entities.’ In this respect the successful contractors were the United Kingdom Centre for Legal Education based at the University of Warwick under the leadership of Professor Julian Webb, the Director of the Centre.

The choice of selecting a contractor to undertake this research was in itself unusual, particularly as the University of Warwick’s United Kingdom Centre for Legal Education had had its Government funding withdrawn at the end of the 2011, effectively bringing to a close its recognition as a research centre. However its previous Director, Professor Julian Webb, is a highly regarded expert in legal education and no-one would question his effectiveness in the role of leading a team of experts in complying with the requirements of the Review.

The Consultation Steering Panel under the Joint Chairs, Dame Janet Gaymer and Sir Mark Potter is deputed to provide advice and information to the research team and to the regulators, whilst also being required to form strategic relationships across the sector and to promote the review outcome to the widest possible audience. It could be questioned as to whether the informal nature of these requirements could lead to a lack of control over the activities of the research team but such are the reputations of the Joint Chairs in their respective fields of expertise that this outcome is considered unlikely. In this respect there is much to be gained from both the Joint Chairs and the Consultation Steering Panel developing contacts within the legal and wider public community.

16 Leighton, above n 10
17 Ibid 363.
18 Ibid.
Some commentators believe that - in the words of Neil Rose of the Guardian Newspaper: ‘This legal education review will transform the legal market.’ Rose went on to say that: ‘The problems of the legal education and training system have been well documented over recent months, dominated in particular by too many law students chasing too few jobs, the debt they accumulate in the process and the impact on diversity.’ Rose also said that whilst: ‘It is too early to predict what will come out of the review it seems likely to embrace the wider emerging trends in the regulation of lawyers.’

In addition Rose forecasted:

So everything is up for grabs, such as: the possibility of national assessments at the point of entry to the profession; common training of would-be solicitors and barristers; replacing the training contract/pupillage with a more flexible period of supervised practice; fewer linear breaks and distinctions between vocational courses and work-based learning; and a new approach to post-qualification continuing professional development that focuses on ensuring ongoing competence rather than the current system of simply counting how many hours of course, lawyers have been on.

Rose concluded that: ‘So this means an end to the professional monopoly: the right to practise will be separated from having a title such as solicitor or barrister. That doesn’t mean the titles will become unimportant but there will be multiple routes to becoming a lawyer’. It will be instructive to see if the outcomes are as drastic as predicted by this and other commentators.

Neil Rose does, of course, describe the real problems facing the legal profession and the legal community generally and which it is hoped that the Review will solve. Whilst it is commonly accepted that approximately one half of law graduates do not enter the legal profession, for the other half who do wish to enter legal practice there is the restriction based on the unavailability of enough training contracts for both potential solicitors and barristers. As one commentator has noted: ‘In response to growing concern within the profession about unrealistic and uninformed student aspirations about the ease with which training contracts can be secured, the Law Society campaigned in 2009 to bring these issues to greater prominence.’

A recent legal education conference convened by the Society of Legal Scholars, in June 2012, had the theme ‘Reviewing Legal Education: The Way Forward.’ This conference could be regarded as a good barometer of current thinking regarding future policy and the possible outcomes of the Review as it included the presentation of a number of papers which reflected the views and opinions of a broad cross-section of the legal community. However it would have to be acknowledged that there was nothing really new in the topics covered at the Conference, and that the views expressed reinforced the views of those which had already been expounded on previous occasions.

A major criticism of this approach would be that the conference offered an ideal opportunity to its participants to analyse and consider potential reforms to the current English legal education system and its effect on the future of the legal profession and ultimately its influence on the legal community. It also afforded the participants a chance to stake a claim in its future directions. However any detailed analysis of the papers presented at the conference would discover a refusal on the part of the presenters to adopt any policy for progressive change. This would include either the progress in technological advancements in legal education, or the philosophical underpinning of developments in teaching and learning which are currently taking place within the legal education environment.

20 Neil Rose, ‘Forget Tesco law, this legal education review will transform the legal market’, Guardian.co.uk (19 March 2012) <http://www.guardian.co.uk/law/2012/mar/19/review-legal-education-change-market>.

21 Ibid.

22 Ibid.

23 Ibid.

24 Andrew Francis, At the Edge of Law (Ashgate, 2011) 4.
‘Winds of Change’: Recent Legal Education Reforms in England and Wales

What did come out of the discussion which is pertinent to consider within the terms of the whole debate regarding the future of legal education, was the questioning of the role of the Qualifying Law Degree (QLD) in the academic stage of legal education generally. Again this raised the ever present problem for legal educators as to whether the QLD was to be: the preparation for a career in law, a liberal arts degree or a combination of both? The fact that these questions were raised by both Tony King, the Chair of the Education and Training Committee of the Law Society and Baroness Ruth Deeth, the Chair of the Bar Standards Board obviously means that they will not be easily dismissed by the Review Committee. It is worth noting that in Baroness Deeth stated in her presentation that LETR has queried the need for the QLD at all. However she also recognised that in its present form, the LETR does guarantee a commonality with regard to the preparation for the next stage of professional legal training.

Certainly it does the raise the question as to whether the foundation subjects still provide a sufficient knowledge base. In this respect the matters raised by Baroness Deeth’s paper as to whether new areas such as ethics, interpersonal skills, client care, international law or management, should be added or substituted are worthy of future consideration.

It would seem that the tenor of the papers presented at this conference, and in particular that of Baroness Ruth Deeth, reflect the views of commentators and others involved with the Review who have already observed that there could be some radical changes recommended with respect to the Qualifying Law Degree curriculum and the structure of the training program for both the Bar Practice Training course and the Law Practice course. There could also be a widening of the concept of the definition of the term ‘lawyer’ with less emphasis on the use of the terminology of barrister or solicitor.

As another of the other presenters commented when advocating change to legal education, one of the problems is that: ‘Lawyers, law students and legal academics, in fact anyone involved with the law hold tenaciously, even furiously, to their opinions about legal education.’ However as a keen observer of legal education, my view is that reform of the legal profession has already been greatly progressed in England and Wales over the last decade and there is no reason why this should not in occur in legal education as well.

B. The Cost Of Legal Education Funding In England

Before discussing the Australian context, a note on the cost of legal education is necessary. The Browne Review of Higher Education Funding recommended that the cap of £3,290 ($5,222) tuition fees per year charged by universities in England and Wales should be removed, that the point at which tuition fees loans should be paid back be raised from £15,000 ($23,805) per year to £21,000 ($33,327), that the repayment loans scheme provide that loans be paid back at 9% with respect to any income earned over £21,000 ($33,327) and that part-time students should have an equal entitlement to tuition under the Student Finance Plan. These recommendations were mainly accepted by the United Kingdom Government except that they rejected the proposal to completely remove the tuition fees cap but raised it to £9,000 ($14,283) whilst adjusting the rate of interest with respect to the paying back of the interest on student loans.

In the view of law academic Andrew Francis: ‘Part-time law students are more broadly marginalized in their experience of legal education.’\(^ {29}\) This proposal ‘to move towards greater equalization of the fee regime of part-time and full-time students, is to be welcomed.’\(^ {30}\) It will have to be seen as to whether the raising of fees for tertiary education will have any effect on those enrolling in law programs. Whilst law remains the top subject choice, the total number of applications for law as at 15 January 2012 was down by 3.8%, but this was in comparison to an overall drop in applications for all subject areas of 7%\(^ {31}\).

C. Legal Education Reforms: The Australian Context

Over the period of the last five years of ALTA Conferences the author of this paper has examined a number of reviews mainly carried out by or on behalf of the Council of Australian Law Deans (CALD) in their own capacity or sometimes in collaboration with the former Australian Learning and Teaching Council (ALTC). These have included: Christopher Roper, \textit{Standards for Australian Law Schools}, CALD (2008); Susanne Owen and Garry Davis, \textit{Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment}, ALTC and CALD (2009); and Mark Israel and Sally Kift, ‘Bachelor of Law Standards’, \textit{Learning and Teaching Academic Standards Projects}, ALTC (2010). These three key reports are discussed below:

D. Standards for Australian Law Schools

This move has been towards having minimum standards for legal education in Australia. This attempt is not new. In Chapter 2 of the Australian Law Reform Commission’s Report in 2000 titled \textit{Managing Justice}, there is an interesting account of a previous attempt by the Law Council of Australia in 1994 to establish a National Appraisal and Standards Committee to accredit law schools with an explanation of the reason why it failed.\(^ {32}\) Some 23 years later in 2007, following a meeting in 2007 with all the relevant parties at the Law Convention in Sydney, the Law Council of Australia established a Legal Education Committee which included representatives from CALD, ALTA, APLEC and ALSA to discuss mutual problems and developments relating to legal education.

At the same time greater co-operation within CALD itself led to the establishment of a CALD Standing Committee on Standards and Accreditation (‘Committee’). The Committee sought the assistance of Christopher Roper, AM, a former Head of both the Leo Cussen Institute in Melbourne and the College of Law in Sydney, in drafting of a document: ‘\textit{Standards for Australian Law Schools}.’\(^ {33}\)

A brief history of the standards project had been drafted by Professor Michael Coper, the then Chair of the Standards Committee, and was published on 9 March 2008.\(^ {34}\) This brief history is a useful explanation of the main standards project document. The most significant statement within this account is the paragraph declaring: ‘It should be said immediately that the overwhelming purpose of the CALD standards project is to enhance the quality of Australian law schools in all of their diverse endeavours, and to do so by assisting all Australian law schools to strive for and to reach a clearly articulated set of standards.’\(^ {35}\) The paragraph concludes: ‘The point is that the standards are intended to be beneficial, not punitive, they are written largely in general rather than tightly prescriptive terms, and allow for diversity in the different ways in

\(^{29}\) Andrew Francis above n 13, 43.
\(^{30}\) Ibid.
\(^{31}\) Anthony Bradney above n 16.
\(^{34}\) Michael Coper, \textit{A Brief History of the CALD Standards Project} (March 2008).
which law schools might seek to fulfil their particular missions. The object is to lift the quality of our various contributions to the discipline of law as a whole, and work together to do so.\textsuperscript{36}

As to the standards themselves, their relevance is incorporated in a unanimous resolution adopted by CALD at its first meeting on 4 March 2008 at the University of New South Wales, Faculty of Law Conference Centre at Coogee Sands. The meeting is titled the ‘Coogee Sands’ Resolution due to the conference location.\textsuperscript{37} This was a notable triumph for CALD and ensured that not only was the agreement inclusive of all Australian law schools, but confirmed that by approaching the initiative in this way it forestalled any outside official body or institution from imposing any unacceptable or draconian forms of standards on the law schools.

E. Learning and Teaching in the Discipline of Law

Building on the success of their major Report in 2008 titled \textit{Standards for Australian Law Schools}, a complementary related project was finalised by CALD in 2009 titled: \textit{Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment}\textsuperscript{38} it was funded by the former Australian Learning and Teaching council (ALTC). The contents of this Report (CALD/ALTC Report) are also the subject of this paper (subsequently referred to as the ‘CALD Project/Report’).

The predecessor which formed the basis for this current 2009 project was a former Australian Universities Teaching (Committee) AUTC funded project titled ‘Learning Outcomes and Curriculum Development in Law’\textsuperscript{39} launched at the 2003 Commonwealth Law Conference in Melbourne. This Project was a highly sophisticated exercise which involved some detailed consideration of aspects of legal education which CALD had previously left to individual law schools or research centres to research or resolve. The project incorporated:

1. Scoping and Methodologies

This included a stock-take of legal education developments in Australia which had taken place over the past 20 years,\textsuperscript{40} including diversity, fast tracking of degrees and diverse modes of legal study.\textsuperscript{41} Methodologies incorporated updating workshops, regional roundtables and the mapping of current practices, together with student surveys relating to mental health issues and academic surveys on ethics and professionalism.\textsuperscript{42} In its summary to this part of the project, chapter 4, it stated that there was a need for more engaging approaches and the production of more fully rounded law graduates.\textsuperscript{43}

2. Graduate Attributes

Due to the greater pressure on Universities to produce graduates who are to become future members of the profession, the Report emphasised the need to focus on aspects such as knowledge, skills and personal attributes.\textsuperscript{44} The Report also stated that not only is legal education expected to take cognisance of these broader based university-specified Graduate Attributes, but that the law curriculum should also be expected to meet the legal profession’s accreditation standards. In

\textsuperscript{36} Ibid 2.
\textsuperscript{37} CALD Meeting, \textit{Special Resolution 2008/1 – Standards (2008)} (‘the Coogee Sands’ Resolution).
\textsuperscript{40} CALD/ALTC Report, above n 29, 7.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid, 12.
\textsuperscript{43} Ibid, 51.
\textsuperscript{44} CALD/ALTC Report, above n 29, 54.
this respect there was a need to take note of the concerns expressed with regard to the creation of a dichotomy between the focus on content as required by the professional accreditation process versus the expectation of enlightened members of the legal community that there should be an emphasis on skills and values, as reiterated in the Australian law Reform Commission (ALRC) Report, Managing Justice (2000), that: ‘Legal education [should be] around what lawyers need to be able to do [rather than] what lawyers need know.’

3. Ethics, Professionalism and Service

The account in this part of the Project reflects some of the confusion that has arisen in recent years as to the context for the teaching of ethics in the LL.B curriculum (Quoting the AUTC Learning Outcomes Report). The latter part of this Project Chapter relates to the ongoing debate of the role of ‘pro bono legal service’ – as to whether it should be a compulsory part of the law degree curriculum – reflecting that CALD had made no formal decision as to its role. This ongoing reluctance by CALD to adopt a formal policy whereby all law students in Australia would have to become involved in pro bono programs as part of their legal training was adversely commented upon by the Hon. Michael Kirby, the former Justice of the High Court of Australia, in his forward to the text Community Engagement in Contemporary Legal Education.

4. Legal Education And The Mental Wellbeing Of Australian Law Students

One of the goals of the CALD Project was the development of a: ‘Baseline data regarding the mental wellbeing of law students including their understanding of relevant issues, personal experiences and knowledge of assistance mechanisms which are in place’. This incorporated a study undertaken by the Brain and Mind Research Institute at the University of Sydney.

5. Infrastructure, Linkages and the Future Legal/Legal Education within wider Higher Education and Context

The titles of the final two chapters of the CALD Project Report provide a good lead into an evaluation and appropriateness of the Project and its relevance to the future development of Australian legal education. Within the former chapter Infrastructure Linkages and the Future, there is an identification of a workable infrastructure for current and ongoing consultation and engagement by CALD with key stakeholders in legal education.

One of the heartening aspects of this Project was that it broke down the barriers between the respective law schools and encouraged greater co-operation between them. The Report said: ‘This has involved sharing ideas about various law schools’ directions and achievements in relation to Graduate Attributes and Assessment Topics through involving law academics in workshops and regional round tables to develop collaborative ideas and materials.’ It also points the way for the future development of Australian legal education with the highlighting of factors which can lead to its success. These include: ‘The need for a clear and focussed plan and project management, including ongoing formative evaluation processes to ensure working systematically towards outcomes delete space here and deliverables’ and

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46 Johnstone and Vignaendra, above n 30, 122.
48 CALD/ALTC Report, above n 29, 119.
49 Ibid.
50 Ibid 135.
51 Ibid 147.
52 Ibid 148.
Raising awareness of innovations and building skills for individuals and across law schools, through working together and sharing materials across universities … wider dissemination communication occurs through materials development and within conferences and other accessible publications and this has the potential to improve programs within the discipline on an Australia basis.53

There is an expectation that these outcomes and aspirations of the Project Report will form a firm basis for the increasing development of contemporary legal education in Australia.

F. The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws (LLB) Degree54

The Learning and Teaching Academic Standards (LTAS) project in Law and in particular the set of six Threshold Learning Outcomes (TLOs) for the Bachelor of Laws degree will obviously have a wide effect on the future outcomes of the LLB in representing what a Bachelor of Laws graduate is expected ‘[t]o know, understand and be able to do as a result of learning.’55

The TLOs cover six aspects of expected standards to be incorporated within the LLB degree program. The intention of the project is that the TLOs will assist law schools in their implementation to enable demonstration of the learning outcomes at the requisite qualification level.56 The TLOs:

TLO 1: Knowledge.
TLO 2: Ethics and professional responsibility.
TLO 3: Thinking skills.
TLO 4: Research skills.
TLO 5: Communication and collaboration.
TLO 6: Self-management.57

The relevance of the TLOs and their application to elements of the LLB are explained in the detailed notes on the: Threshold Learning Outcomes for the Bachelor of Laws,58 The accompanying notes explain that they are: ‘Intended to offer non-prescriptive guidance on how to interpret the TLOs.’59 It is not the role of the LTAS project to tell law schools how they should go about the learning, teaching or assessment of their students.60

In my view the TLOs have to be seen in the context of that which academic and legal author John Bell has stated to be:

The core of legal education…lies in a distinct subject-matter and distinct methods of dealing with it. [That] legal education is not just the study of law, but a study which also inculcates the ability to make use of law, to analyse it, and to criticize it as a member of the legal community’.61

This leads the discussion on to the future influence of TLOs on the law degree. In this respect the final comment may be left to Professor Jill McKeough formerly the Chairperson of the

53 Ibid 149.
54 Sally Kift and Mark Israel, Learning and Teaching Academic Standards Project, ‘Bachelor of Laws,’ Learning and Teaching Academic Standards Statement, Australian Learning and Teaching Council (2010).
55 Kift and Israel above n 46, 1.
56 Ibid 9.
57 Ibid 10.
58 Ibid 11.
59 Ibid.
60 Ibid.
Council of Australian Law Deans who stated in a letter to the Higher Education Supplement of The Australian newspaper that:

The Legal Admissions Consultative Committee has recommended these TLOs as requirements for admission to legal practice. Embedding and assessing the TLOs will be a challenge for some institutions producing law graduates, but will lead to a closer match between graduates of university law schools and the needs of our society and economy. The professionalism and competence of a sound and ethical lawyer with the threshold skills the TLOs enshrine add value and is an important investment in Australia’s future. 62

IV. CONCLUSION

The conclusion that a reviewer could come to in comparing the reports and recommendations for reforms within the two respective jurisdictions of England (and Wales) and Australia would be that the former have been generated by organisations outside the law schools or law academic associations whereas the latter have been initiatives developed mostly by the law schools or their representative associations.

In this respect it is appropriate to restate a view recently expressed in a similar paper that law academics are conscious that many of the criticisms and expressed dissatisfaction with the legal profession and its low standing within the community are often referred back to perceived inefficiencies in legal education and consequently reflect poorly on the status of academic lawyers. However in countering this view it is necessary to identify the most significant challenges faced by legal educators in order to respond in a positive way. Andrew Francis has identified these major challenges as; ‘Core legal knowledge, forming the foundation of a collective project of legal professionalism, in an age of multi-disciplinary and cross-jurisdictional practice.’63 To these could be added the influence of globalisation and the interconnectedness of law teaching across the common law jurisdictions particularly the two identified in this paper, England and Australia.

63 Andrew Francis above n 13, 53.
THE OO FILES: PROVIDING ONLINE FORMATIVE FEEDBACK ON CONTRACT LAW LEARNING IN A NARRATIVE SETTING

Des Butler*

ABSTRACT

Feedback, both formative and summative, enables students to reflect on their understandings and to restructure their thinking to develop their capabilities. It can also encourage positive motivation and help boost self-esteem. Online multiple choice questions can be an efficient and effective means of providing timely formative feedback. At the same time, locating learning in a narrative environment can facilitate engaging and effective learning experiences. Narratives can help learners to navigate through information and support cognitive and imaginative engagement. This article will discuss The OO Files, an online suite of modules containing multiple choice questions situated in the narrative of a fictional law firm. It notes student responses to the program and discusses lessons that may be learnt from its development which may be of assistance to academics considering the development of similar programs for their courses.

I. INTRODUCTION

Feedback is an essential element in informing the learning process and student progress.1 Research has shown that feedback is one of the most powerful influences on student achievement.2 Feedback, both formative and summative, enables students to reflect on their understandings and to restructure their thinking to develop their capabilities. It can also encourage positive motivation and help boost self-esteem.3 However, it is important for such feedback to be timely. As Ramsden observed ‘students find timely feedback more useful than delayed comment’.4

Multiple choice questions have attracted wide support as ‘an excellent opportunity to offer feedback in an efficient form’.5 However multiple choice questions are not without their critics. Some of that criticism seems to be based on the suggestion that they encourage only surface learning6 while others claim that they are less intellectually rigorous than essay questions and less realistic than other learning activities in their relationship to legal practice.7

* Professor of Law, Faculty of Law, Queensland University of Technology.
4 Ramsden, n 1, 187.
5 Ramsden, n 1, 188. See also, for example, John Biggs and Catherine Tang, Teaching for Quality Learning at University: What the Student Does (Open University Press, 208), 204; John Selby, Patricia Blazej and Michael Quilter, ‘The Relevance of Multiple Choice Assessment in Large Cohort Business Law Units’ (2008) 1(1-2) Journal of the Australasian Law Teachers Association 203; Greg Allen, ‘The Use of Multiple-Choice Questions as a Form of Formative Assessment on an Undergraduate Law Module’ (2008) 42(2) The Law Teacher 180.
6 See, for example, Selby et al, n 5, 207; Allen, n 5, 182.
Locating learning in a narrative environment can facilitate engaging and effective learning experiences. They can help learners to navigate information and promote imaginative engagement. Narratives can help learners gain an appreciation of the relevance of the material they are studying to real world practice. The OO Files are a suite of modules containing multiple choice questions situated in the narrative of a fictional law firm, which provides formative feedback on understanding of contract law. This paper will describe The OO Files and briefly detail student reaction to the program. It will then canvass a range of lessons that may be learnt from the program’s development which may be assist other academics to consider the development of similar programs for their courses.

II. THE OO FILES

The OO Files are an optional component of a learning and teaching approach that was adopted for the two one semester Contract Law subjects (Contracts A and Contracts B) in the undergraduate law program at the Queensland University of Technology Faculty of Law in their current form in 2011, although they have a longer history dating as far back as 1990. That learning and teaching approach was designed to encourage independent student learning and to maximise the time spent by students in trying to understanding the course material rather than passively receiving course material by way of traditional lectures. The program includes video podcasts (which provide overviews of topics and explain difficult concepts, often through the use of animated diagrams); workbooks which summarise relevant principles of law with case and legislative authorities, provide prescribed readings and contain questions which are graduated in difficulty and reflect Bloom’s taxonomy; and weekly small group tutorials. The assessment regimes in the two subjects are also similar and include inter alia: a mid-semester online multiple choice quiz, and an end of semester open book examinations. The mid-semester multiple choice quiz includes a number of short problem questions of the same type that feature in The OO Files.

The OO Files are a suite of eight modules: six that focus on specific parts of the Contract Law course (formation, limits on enforcement, content, discharge, remedies and vitiation) and one at the end of each of the subjects which comprise topics drawn from across the semester and which are intended to assist examination preparation. The modules utilise Adobe Quizmaker software and are accessed via a Blackboard LMS (see Figure 1 below).

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The program comprises a total of 180 short fact scenario questions which follow the same format of allowing unlimited attempts and providing both detailed feedback on correct responses (including relevant case and legislative authorities) and feedback on incorrect responses (which explains why the response is incorrect and/or redirects the student’s attention to that part of the question that will yield the correct answer).

The eight modules are linked by a common theme of the student assisting the senior partner of a fictional law firm, Oscar Odin of Odin’s Lawyers. Each module focuses on the dealings of a different client of Oscar Odin (from whose initials the name of the program derives). These clients include a construction company, a billionaire industrialist, an innkeeper, a football stadium and a rock band. This enabled ‘story arcs’ of topics to be covered within modules; that is, storylines that developed over a number of questions. It also enabled variations of single scenarios to be explored across series of questions.

Each of the questions is illustrated by an image created using Linden Lab’s Second Life virtual environment (see Figure 2 below). In addition, a feature called ‘Oscar’s Tips’, a page of advice which appears at the end of each of the modules: points out connections between different topics, highlights common errors to avoid and gives general study tips.

10 This hypothetical law firm appears in other multimedia programs developed by the author for use at the QUT Faculty of Law: see, for example, Des Butler, ‘Contextualising the Learning of Legal Ethics through the Use of Second Life Machinima’ (2010) 20 Legal Education Review 87. The use of the hypothetical law firm provides continuity in a broader narrative that runs through these programs.
III. Student Response

A formal survey of student reaction to *The OO Files* was conducted for quality assurance purposes at the end of semester 2 in 2011. The survey was rendered in two ways: by way of paper instrument completed in class by internal students, and a Survey Monkey survey completed online by external students. Identical questions appeared in both versions of the survey and consisted of both Likert scale questions and open ended questions. The survey was completed by 263 students, which represented a response rate of 40% of the total cohort.

The survey found that 89% of the respondents regarded the program as a useful review tool for the mid-semester multiple choice quiz. Of these nearly 50% strongly agreed that the program had helped their preparations. Only 2% (5 respondents) disagreed with the proposition while 9% (25 respondents) neither agreed nor disagreed. The survey was conducted at a time after students had received their marks for the mid-semester multiple choice quiz, so it might be speculated that this may have had an influence on some of the results.

The survey also found that 95% of respondents agreed or strongly agreed (with 53% strongly agreeing), that the program would be a useful review tool for the open book end of the semester exam. Only 1 respondent disagreed with this proposition, while 5% (12 students) neither agreed nor disagreed. Since the survey was of *Contracts B* students and was conducted in semester 2, these students had already had the experience of undertaking the end of semester open book examination in *Contracts A* (which is a prerequisite to *Contracts B*). The 95% of respondents agreeing or strongly agreeing therefore may have seen greater value in the program as a learning tool than simply a preparation for the multiple-choice quizzes which contain some short fact scenario problems of a similar type to those in the program.

An explanation may be suggested by the 95% of respondents who agreed or strongly agreed with the proposition that ‘The OO Files assisted my understanding of contract law’. No respondents disagreed with this proposition while 4% (10 respondents) did not agree or
disagree. This high positive response may be due to the fact that feedback is provided to both correct and incorrect responses. A representative comment was:

The thorough explanation for both correct and incorrect answers was extremely helpful; rather than a simple ‘Wrong, try again’ that other online tests seem to have, the more detailed response allows for a better learning experience and less guess work.

A large number of respondents reported that they found the feedback on the incorrect responses just as valuable as that for correct responses. A typical observation was as follows:

I like the fact that explanations are given when a wrong answer is selected – in fact, I liked it so much that I would do one quiz properly then go back and do it again and select the wrong answers so I could see the explanation for why the correct answer was the most appropriate one on the facts.

It has been observed that students today commonly want the flexibility of accessing their study materials in their own time and in their own way.\textsuperscript{11} This flexibility enables them to juggle the competing time commitments of their work, study and social lives that are a common experience for many modern students.\textsuperscript{12} Another feature of \textit{The OO Files} that attracted favourable comment from a large number of respondents was the flexibility provided by the program in being able to access it at a time and in a place of their convenience, and that it could be undertaken at their own pace in a non-threatening environment. Various comments to this effect are reflected in the following:

The OO Files are an invaluable source of linking the theory to practical scenarios. They are self-paced and it was very useful to me to be able to use these at my own choice of time and to use as much time as I required, making notes along the way and looking up notes.

So far as these respondents were concerned therefore, \textit{The OO Files} program was a valuable aid to their learning, aiding their general understanding of the course material and a learning tool that was well suited to their needs in terms of flexibility. However the limitations of the survey instrument should be acknowledged. For example, these responses viewed against demographics such as age group, gender and mode of study would have illuminating. Nevertheless, even with these limitations the results are suggestive of a learning tool that can be a valuable addition to a learning and teaching approach.

\section*{IV. Lessons For Academics}

The author’s experience with development of \textit{The OO Files} yields a number of lessons outlined below, which may be useful for academics contemplating the development of similar formative exercises for their courses.

\textbf{A. Use of Narrative}

The eight modules in \textit{The OO Files} each focus on a different client and include ‘story arcs’ – that is storylines that develop across several different but connected fact scenarios. For example, one of the storylines within the module dealing with vitiation of contracts, which focuses on the various dealings of a rock band, involves the band: first being unpaid at one club, auditioning at a new club and then promoting and performing at that new club. This storyline develops across a series of questions. In other cases a fact scenario (such as the billionaire industrialist purchasing a yacht) may be followed by questions containing variations of the same facts (prefixed by, for


example: ‘Suppose instead …’), thereby allowing students to explore different nuances of the law that may be raised by the one fact scenario.

It has been suggested that such constructive learning is best achieved through use of authentic learning experiences which are based on real world problems and case studies. An authentic setting for learning can be created by a carefully crafted narrative. A narrative may help learners to ‘create meaning, reduce cognitive load involved in navigating through information, and support cognitive and imaginative engagement’. As Ferguson et al observed:

An appropriate story told in an appropriate setting not only conveys important information, but provides contextual cues that facilitate recall of that information in situations in which it is likely to be applicable.

Narratives have significant potential for enhancing student learning, potentially reinforcing learning objectives and ingrain subject matter. They are able to ‘draw students into plots and settings, thereby opening perceptual, emotional and motivational opportunities for learning.’

In the survey, a total of 68% of respondents (180 respondents) agreed or strongly agreed that the client storylines were a valuable aspect of The OO Files, compared with 5% (twelve respondents) who disagreed and 27% (71 respondents) who neither agreed nor disagreed. Most of those who agreed or strongly agreed were of the view that the storylines made the program engaging and made the scenarios more realistic. One respondent stated:

Following a client through a number of story lines really added to my enjoyment of the OO Files, I felt it helped me get an understanding of the variety of issues an attorney can encounter with a client during their professional relationship.

The storylines helped some students to access and remember the material by building on familiar facts. Their comments would appear to support the suggestion in the literature that storylines are able to provide contextual cues. As one remarked:

Story lines were easy to follow, particularly when it was the same ‘band’ or company being referred to and information could be recalled. Less hard to recall information about a situation when you are already familiar with it, and less confusing (sic).

Other respondent comments reflected the proposition that storylines facilitate cognitive processing and imaginative engagement. A typical response in this vein was:

[The client storylines were valuable] because they give real world examples. It can become a bit difficult at times studying abstract legal principles. Once I had completed some of the OO files, I then went back and reread some key cases in a different light as I had an example to apply it to. I identified the ratio and then had something to apply it against (that is the factual circumstances created in the OO files).

While 27% of the respondents indicated that they neither agreed nor disagreed that the storylines were a valuable aspect of the program, no clear reasons emerged for this not insignificant neutral

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response. Such diverse response to narratives as indicated by this limited study may therefore be worthy of further study.

B. Use of Images

Each of the questions in The OO Files is illustrated by an image created in Linden Lab’s Second Life virtual world. There were a number of reasons for doing so. First, it was hypothesised that the use of images in support of the narratives would be inclusive of a range of student learning styles, providing students with the opportunity to visualise ideas and concepts. Secondly, it was thought that the images would make the look of the program more appealing and attractive. Thirdly, the images can serve as a navigation aid since they can help a user who is reviewing the questions to quickly locate a particular point in a module.

In the survey a total of 54% agreed or strongly agreed that the images were valuable, compared with only 9% who did not value the images, while 37% of the respondents were uncommitted. Of those who agreed or strongly agreed with the proposition there was strong support for the first two reasons. Many visual learners identified themselves as such and expressed their appreciation of the images. One such comment was as follows:

Kinesthetic and visual learners appreciate interactive and graphic problem questions such as this.

Many of these students regarded the images as bringing the characters in the storylines alive. As one respondent stated:

It made the problems more realistic and helped me to view the law from a new perspective also helped me to empathise with the clients

Another observed to a similar effect:

Law is about people … the imagery gives the exercise character, context and a reminder that people are involved

There was also support for the images as making the program an interesting, attractive and engaging learning environment. A typical comment to this effect was:

The images helped because it helped me feel attached to the characters. On a purely aesthetic note – they make the module seem like something fun to do and not just more endless text (which we get enough of in this degree).

Having fun when studying has been recognised as both a motivator for being engaged and a powerful stimulus for effective learning. A similar comment reflected the view expressed by several respondents that the images reinforced the contextual cues provided by the narratives:

The images helped to make the scenarios interesting and helped [me] to remember key concepts.

Most of the students who either disagreed or were neutral regarding the images being a valuable aspect of the program, identified themselves as text-preference learners and indicated that they tended to concentrate on the text of the problems. These students indicated that they either did not pay any attention to the images or that they did not think that the images added any value to the program. Research has also shown that for a complex mix of personal and societal ideologies around play and learning, a small proportion of students will resist game-based design


18 The absence of support for the third reason may be due to this being the first time Quizmaker was used in the QUT Law Faculty. The use of the images as a useful navigation tool was not promoted in its first offering and may not have been feature fully appreciated by most students.

in learning activities. Some students may have regarded the addition of Second Life images in this light, and that may also account for some of the neutral and/or the small percentage of negative responses to the question of whether the images added value to the program. A deficiency of the survey as a research tool was that it did not, for example, ask students to self-identify their preferred learning style. A comparison of the results of such a question with those seeing value in the images, may have been insightful.

Second Life images were used in The OO Files because of the author’s familiarity with the virtual world, which he has used in other computer programs he has developed. However, Second Life need not be the source of relevant imagery. Other sources may be accessed for images, including collections that are available at no cost.

C. Cost

The relatively low government funding for Australian law schools has been recognised as a significant impediment to innovation in the development of curricula and resources. The software utilised by The OO Files – the Adobe Quizmaker – is proprietary software that may be licensed for a fee. At the time of writing, that fee was $600 for a single licence. Quizmaker allows the creation of twenty different types of questions including: multiple choice (single and multiple response), fill in the blank, drag and drop, short answer, essay response, Likert Scale and ranking exercises.

However Quizmaker is not the only software available that is capable of achieving similar results. Indeed Quizmaker is not the first software used to host The OO Files. Until 2011 the program utilised Hot Potatoes software. The Hot Potatoes suite of programs was produced by developers at the University of Victoria, British Columbia. Hot Potatoes is now freeware and allows users to create interactive: multiple-choice (single and multiple response), short-answer, jumbled-sentence, crossword, matching/ordering and gap-fill exercises for access via the internet.

In addition, a learning management system (‘LMS’) like Blackboard or Moodle typically includes its own quiz features which offer similar ranges of question types and functionality. However the appearance of the end product may not be as attractive and engaging as that which may be achieved using a program like Quizmaker. Nevertheless, the availability of these LMS features and the freeware programs like Hot Potatoes means that cost alone need not be seen as a barrier to the creation of such programs.

D. Technical Proficiency

Another commonly cited barrier to academics developing computer-based innovators is a lack of technical proficiency. Prensky postulated a divide between ‘digital natives’ and ‘digital

22 Images may be obtained for no cost using Creative Commons Search (<http://search.creativecommons.org/>) or sites such as Stock Xchng (<http://www.sxc.hu/>).
25 The program is available for download from <http://hotpot.uvic.ca/>.
immigrants’, although he has now suggested that as more people become immersed in modern day digital culture a better description for describing how effectively people use technologies is the concept of a difference in ‘digital wisdom’.27 There are still many academics today for whom the extent of their technical proficiency is represented by only the basic functions of Microsoft Word, Microsoft PowerPoint and a LMS like Blackboard or Moodle.

The modules in The OO Files are created in three steps. The content, the questions, answer options and feedback, were created using a table in Word (see Figure 3 below). Word tables are an efficient and organised approach to content creation. They also require no more than basic skills in using Word.

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as well as dot point and numbered lists. Users may insert images, shapes and/or video files (swf, flv or mp4 formats only), and resize and position them on the screen in the same fashion as composing a PowerPoint slide. The third step involves the click of a button to package all content into a standalone packaged module that can be uploaded into Blackboard or other LMS in the same way that an item like PowerPoint slides can be uploaded. Accordingly, an academic who is familiar with the basic functions of Word, PowerPoint and Blackboard or other LMS, has the necessary technical proficiency to create online modules like The OO Files using Quizmaker.

The process for creating modules using the freeware Hot Potatoes program is similar. Content is copied from Word tables into a similar template interface that comprises of boxes into which the questions, answers options and feedback are entered. However unlike Quizmaker, Hot Potatoes has no similar WYSIWYG system. It also uses HTML and JavaScript programming but does not necessarily require knowledge in either language. Clicking various function buttons in the template inserts the necessary HTML scripts into a master file. However basic HTML scripting is required to change font style (for example inserting text between \texttt{<B>} and \texttt{</b>} in order to bold text) or to change the colour of text. Users are able to customise the colours of the interface by separate colour palettes for different elements on the screen, such as the exercise background, the navigation bar and text. Images or video files are not inserted in the same way as they are inserted into Quizmaker modules, but rather are linked either by stipulating the URL in the case of an image on the internet, or specifying the location of the file on a hard drive (for use when the viewer is on the same drive). Packaging the module is achieved by simply clicking an ‘export to web’ button. This produces a single HTM file which again may be uploaded to a LMS in the same way as any other file (for example, by the ‘add content’ button for Blackboard pages). Accordingly, Hot Potatoes requires some additional skill that are not needed for Quizmaker; but they are skills that can be quickly and intuitively acquired.

Blackboard and other LMS quiz features can also be used with skills that can be quickly and intuitively acquired. These systems have the advantage of ease of uploading of media and formatting of text which can be performed using the range of buttons provided by the in-built step-by-step ‘wizards’. However they lack the freeform positioning and sizing capabilities of the WYSIWYG ‘Slide View’ in Quizmaker. Accordingly lack of technical proficiency should not be a barrier to the creation of programs like The OO Files.

E. Time Commitment

Academics are increasingly time challenged due to increasing class sizes and often competing commitments in the form of assessment, research and administration. Creating a program like The OO Files can be a time consuming endeavour and writing multiple choice questions may be daunting for those who are new to the task. There is a plethora of literature concerning effective multiple choice writing.\footnote{See, for example, Jennifer Murdock, ‘Basic tips for writing effective multiple choice questions (MCQ’s): A compilation of the most useful advice’ <http://homes.chass.utoronto.ca/~murdockj/teaching/MCQ_basic_tips.pdf>; Monash University, ‘General advice on writing multiple choice questions’ and the various articles and websites cited therein <http://arts.monash.edu.au/philosophy/peer-instruction/using/mcq-advice.php>; University of Leeds, Integrating technology into assessment <http://www.sddu.leeds.ac.uk/online_resources/assessment/objective/objective_design.htm>.} Questions need to be carefully crafted to remove any ambiguity or prolixity, distractors need to be plausible with sensible options, and feedback needs to be designed on both correct and incorrect responses. All of these steps can take a long time to complete.

However, The OO Files did not reach its current size of 180 questions in its first iteration. The program has a long history dating back to 1990 when it first began as a single module of 27 questions and was delivered on a 5¼ inch floppy drive. That program was subsequently expanded, first to three modules containing approximately 60 questions in 2000 when it was converted to use Hot Potatoes and first made available online, and again when it was converted...
to its current size using Quizmaker in 2011. The latest expansion was facilitated by time saving efficiencies achieved by the process of creating content in tables in Word (as noted above) and copied over to template boxes. Further, the use of story arcs and variations on the same fact scenarios can be a useful technique enabling the development of multiple questions with consequent time efficiencies in the creative process.

The development of a program with as many questions as The OO Files therefore need not be a one-off endeavour but can instead be a project spread over a period of time with new questions continually being added. In this way the necessary time commitment can be effectively managed by an academic in the context of their other workload. Indeed the current iteration of The OO Files is unlikely to be its last. The most common comment made by students – which in most cases was indeed the only comment – was that only way that The OO Files program could be improved was by adding even more questions.

F. Sustainability

While a program like The OO Files represents a significant investment in time, it can also have a significant return in terms of sustainability. With one caveat, quizzes created using Quizmaker, Hot Potatoes and LMS quiz features are all easy to update, add to or vary by academics sitting at their desktops without the need for specialist technical assistance. This means that if, for example, there is a change in the law it is a relatively simple matter for the online quiz to be amended accordingly. As a consequence, computer programs like The OO Files can have longevity spanning many years – at the type of writing the core of The OO Files has now been used by students for 23 years. When viewed in terms of the hundreds of students that use the resource every year, the time invested in its development may be considered time well spent.

The one caveat relates to the Hot Potatoes program. As noted, packaging a Hot Potatoes module produces a single HTM file. Unlike packaging a Quizmaker module, it does not actually import media files. Instead it includes in the master HTM file links to the URLs for the image or video files, for quizzes available over the internet. Accordingly, these links need to be maintained. If they are broken the images or videos will not appear in the Hot Potatoes module. In as much as most academics will not have access to their school’s computer mainframes, technical support is likely to be needed for uploading or changing image or video files used in Hot Potatoes modules. Further, if there is a change in the server hosting such files all links in the modules will need to be up-dated. The withdrawal of such technical support was one reason why The OO Files program was converted from Hot Potatoes to Quizmaker.

V. Conclusion

Two of the main criticisms of using multiple choice questions as a means to providing formative feedback are: that they are remote from legal practice and that they encourage a surface approach to learning. However the approach taken in The OO Files situating the multiple choice questions within a continuing narrative, including story arcs and multiple questions based on the same story-line, can enable students to obtain an appreciation of the relationship of the material they are studying to real world practice, provide contextual cues for the application of the law and enable nuances of the law to be explored beyond a mere surface level. Further, as a component of a broader learning and teaching approach a program like the OO Files can serve a valuable role in efficiently providing consistent and timely feedback at a time and in a place that is convenient for the student. They are a learning exercise that can be undertaken by students at their own pace and in a non-threatening environment. As one student described The OO Files:

Good, informative, entertaining, sometimes funny. They help explain situations in a practical way, sharpen thinking and recognition of the ‘symptoms’

The positive reaction of the cohort of students in the limited survey reported here suggests that there is value in the approach which is worth further exploration. In the meantime, the
development of *The OO Files* over more than 20 years, yields a number of valuable lessons for academics interested in developing similar resources for their courses. Among those lessons it can be seen that common concerns regarding cost and lack of technical proficiency need not be insuperable barriers. While the time involved in such a development is not to be underestimated, it is a burden that can be managed and one which in any event should be regarded as a valuable investment when viewed in terms of the sustainable, engaging and challenging learning environment that a properly designed program is capable of delivering for generations of students.
LEGAL CROWDSOURCING AND RELATIONAL LAW:
WHAT THE SEMANTIC WEB CAN DO FOR LEGAL EDUCATION

POMPEU CASANOVAS*

ABSTRACT
Crowdsourcing and Relational Law are interrelated concepts that can be successfully applied to the legal domain and, more specifically, to the field of legal education. ‘Crowdsourcing’ means ‘participation of people (crowds)’ and refers theoretically to the aggregated production of a common knowledge in a global data space. ‘Relational law’ refers to the regulatory link between Web 2.0 and 3.0, based on trust and dialogue, which emerges from the intertwining of top-down existing legal systems and bottom-up participation (the Web of People). Legal education today has a major role to play in the broad space opened up in terms of future potential of the Semantic Web. The following paper places a lens on the educational value of crowdsourcing and the relational approach to governance and law.

I. INTRODUCTION: THE SEMANTIC WEB AND LEGAL EDUCATION
Technology is now a deeply entrenched part of modern legal academic research and legal education. A glance at annotated bibliographies shows that researchers pay considerable attention to wikis, blogs, multimedia, open-access publications, web-based tools, e-learning platforms in their teaching.1 For the past five years technology developers, organisations, and legal educators have been highlighting the increasing potential of the Web of Data or Web 3.0,
the next stage of the Semantic Web leaded by the W3C Consortium. A number of recent studies have already addressed cognitive development in relation to educational skills and abilities fostered by the new stage of the Web.

The dissemination of Law and the Semantic Web (SW) has taken place inside the boundaries of highly specialised scientific and technological communities, such as the International Association for Artificial Intelligence and Law (IAAIL), the JURIX Foundation for Legal Knowledge Systems or the Organization for the Advancement of Structured Information Standards (OASIS). In peer reviewed articles of major legal journals, descriptions of the SW are usually offered in connection with specific legal topics such as intellectual property, copyright, anonymisation, sentencing, or the concerns for liberty and freedom of speech raised by the growing technical possibilities to get control over the development of the Internet. Mailland, for example, has even dramatically warned that “censorship is the semantic web’s lifeblood”.

The legal approach to the structured content of texts into the Internet has focused more on rights, liability, legal effects, the reconstruction of the commons, and the qualification layer of “second level agreements” than on the transformative power of technology and the changing nature of regulations.

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9 Mailland, above n 6, 294.

10 Commons refers to the cultural and natural resources accessible to all members of a society, held in common, not owned privately. Cf <http://en.wikipedia.org/wiki/Commons>. Referring to the SW, following the institutional analysis steps of Elinor Ostrom, cfr. Jorge L Contreras, ‘Data Sharing, Latency Variables, and Science Commons’ (2010) 25 Berkeley Technology Law Journal 1601; see alsoYakowitz, above n 7.

11 Second level agreements are ‘preemptive licenses granted by copyright owners to platforms operators, with the purpose of ratifying the mass usage of copyrighted content by their users’, see Yafit Lev-Aretz, ‘Second Level Agreements’ (2012) 45 Akron Law Review 137.
By contrast, law librarians have paid close attention to the possibilities of the Web of Data. Techno-legal blogs and library journals have increasingly been hosting discussions and reflections on SW technologies and Linked Open Data (LOD). The link between Legal libraries, LOD and the SW has emerged as a natural one, since the work of librarians is related to the classification of what is usually known as metadata or metacontent (data providing information about one or more aspects of texts, images or multimedia items): author of data, means of creation, purpose, time and date, location, standards used.

In this paper, crowdsourcing and relational law are first defined (II). Next, the relations between the Social Web and the Web of Data are discussed (III), followed by the principles of linked open data and the concept and scope of relational law (IV). Case studies from past and present research projects are outlined (V) and lastly, the conclusions for legal education (VI) are presented.

II. PRELIMINARY DEFINITIONS

A. Crowdsourcing and Relational Law

Crowdsourcing is the online resolution of micro-problems. For the purposes of this paper, a more complex definition is required: the aggregated production of a common knowledge, stemming from individual contributions, in a global data space. This global space is currently estimated to contain nearly 32 billion Resource Description Framework (RDF) triples with half a billion links between them. This was the case according to the last Statistical Report issued by the W3C in September 2011. In August that year industry research reported the first load

14 See Part IV A below in this paper.
15 RDF is ‘a language for representing information about resources in the World Wide Web. It is particularly intended for representing metadata about Web resources, such as the title, author, and modification date of a Web page, copyright and licensing information about a Web document, or the availability schedule for some shared resource’ <http://www.w3.org/TR/rdf-primer/> with several examples of how to formalise concepts like ‘author John Smith’ or ‘town of New York’. Any expression in RDF is a collection of ‘triples’, each consisting of a subject, a predicate and an object. Cf on triples <http://www.w3.org/TR/rdf-concepts/>, especially s 3.1, 6.1 and s 6.2. RDF refers to the metadata bases for the Semantic Web. An easy way to be introduced to Semantic Web technologies is through the hierarchy of languages of the Semantic Web Stack, where each layer exploits and uses capabilities of the layer below. See <http://en.wikipedia.org/wiki/Semantic_Web_Stack>.
and query of 1 trillion RDF triples.\textsuperscript{17} Actually, the number of triples was estimated to be more than 52 billion in October 2012.\textsuperscript{18}

The term, \textit{relational}, is concerned with a common feature that emerges from the existing social and economic bonds among companies, providers, customers, consumers, citizens (digital neighbors) or teachers and students. It refers to the capacity to set up a common space of mutual relations—a shared regulatory framework—in which some reciprocity is expected with regard to goods, services, attitudes and actions. Thus, ‘relational law’ is more connected to trust and dialogue than to enactment of formal procedures or on the enforcement of sanctions.

Both crowdsourcing and relational law are concepts that have application to the legal domain, especially legal education. A number of platforms such as W3C Semantic Education, Linking Open Data (LOD) and the recent Linked Legal Data (LII Cornell) lend themselves well to investigation, especially in terms of improving communication and enhancing the relationship between Web 2.0 (the Social Web) and 3.0 (the Web of Data). The aim of this paper is to demonstrate that legal education has a major role to play in this new broad space of structured and manageable data.

### B. The Social Web and the Web of Data

Through the Internet, information management has infiltrated our lives like never before. We rely on it for producing and reproducing new knowledge in different ways. This knowledge is general, but also local and \textit{personal}. It is developed through a dynamic and complex network of individual, collective and sometimes coordinated interactions within multiple changing environments. From a tiny fragment or a slight nebulous idea about something wanted, a process of refinement and discovery is regularly produced through queries and the interface with the web.\textsuperscript{19}

Today, browsing the web can be overwhelming. Typically, knowledge must be carved from an excessive amount of information. This is a social, proactive and dynamic process users cannot skip. Today’s web users have to enter into a dialogue with themselves and with the \textit{social knowledge} produced and unevenly distributed on the web; it is up to them to filter, select, aggregate and eventually mash it up.\textsuperscript{20} When users browse and query the web, they expect it to understand them, as if the system is able to speak their natural language and refer intentionally to the same cognitive objects they are referring to. ‘People don’t want to search’.\textsuperscript{21}

Actually, this is what the Semantic Web (SW) is all about —the smart interface between systems and users. The Web is not the Internet; the Web organises and processes the information being transformed into knowledge through the interaction with the end users who both consume and produce it (\textit{prosumers})\textsuperscript{22}. Someone finds a song, or a videotape (or an interesting document) they like after a query process. They might upload it again and a transformative process occurs by which not only some comments and ideas are exchanged. However people might use, re-use and work out the item itself. This process can be described as follows: (i) A song linked with

\textsuperscript{17} Total load was 1,009,690,381,946 triples in just over 338 hours for an average rate of 829,556 triples per second, using AllegroGraph, \texttt{<http://www.w3.org/wiki/LargeTripleStores>}.\textsuperscript{18} To be precise, 52,381,770,554, Virtuoso (CoRelational) DBMS Benchmarks -- LOD Cloud Cache Instances (8-node cluster with 48GB Ram Per Node) \texttt{<https://docs.google.com/spreadsheet/ccc?key=0AihblyhsQ5xstdH1xc3hhdk82UFdYd1ppaGw3WDFrV1Ge&gid=0>}. This is referred only to DBpedia (the RDF companion to Wikipedia, not updated yet). The 2000 USA census alone contains 1 billion RDF triples, cf Joshua Tauberer, \texttt{<http://www.rdfabout.com/demo/census>}. The semantic layer of the Internet remains largely unknown.\textsuperscript{19} See Ricardo Baeza-Yates and Prabhakar Raghavan, ‘Next Generation Web Search’ in S Ceri and M Brambilla (eds), \textit{Search Computing} (Springer Verlag, LNCS 5950, 2010) 11-23.\textsuperscript{20} Cf \texttt{<http://en.wikipedia.org/wiki/Mashup>}.\textsuperscript{21} See Ricardo Baeza-Yates, ‘People don’t want to search’ (2009) \textit{TNW. The Next Web}, 16 April 2009, \texttt{<http://thenextweb.com/2009/04/16/ricardo-baezayates>}.\textsuperscript{22} Cf \texttt{<http://en.wikipedia.org/wiki/Prosumer>}. 162
users as a document; (ii) people being linked by the song adding and sharing knowledge about it through an interactive network; (iii) and the song itself as a semantic object being structured and linked as data to other semantic objects. The Web, the Social Web and the Web of Data, all use written text and documents to communicate or convey meaning.

Extracting, using and reusing this shared meaning are different aspects of the acquisition, storage, retrieval and transformation of information into knowledge. These processes are intricate. Songs, paintings, or writings on the Web consist of structured abstract objects that cannot be confused with the structure of the physical objects. The same could be said about legal knowledge. On the one hand, knowing means representing and processing semantic entities in order to be able to reproduce and manipulate them; on the other hand, knowing means acting upon them to enrich the whole process with additional information.23

Web 2.024 and Web 3.025 are abbreviated forms broadly used to refer to new extensions of the Web. For example, blogs (and Blawgs), Wikis, Podcasts/Video Blogs (A/V Blogs), tags, mashups (AJAX), and Web Services (API) are among these new technologies that users switch between.

From a technical point of view the Semantic Web (SW) consists of a number of computer languages.26 These semantic languages are capable of modelling data, annotating and relaying information — RDF [Resource Description Framework] and OWL [Ontology Web Language]. RDF facilitates the description of knowledge using triples, encoding factual and linguistic knowledge; OWL facilitates simple deductive reasoning through sets and properties that model formal concepts, relationships and instances. These are graph-languages on XML [eXtended Mark-up Language], “serialized” and representing data in files (using Turtle or Phyton, e.g).27 The result presents information management and processing as knowledge — hypertext links, connection of objects, and information retrieval from the Web using not keywords (terms), but concepts.

Semantics are used to harness the human-machine interface. OWL formalizes what is known as ontologies. ‘Ontology’ is a philosophical term that refers to a systematic account of Existence.28 Ontologies, plural, is nowadays a common term in engineering and computational science — because ‘for knowledge-based systems, what ‘exists’ is exactly that which can be represented’.29 What is meant by ontologies, then, is the explicit and formal specification of

26 See above n 15.
27 ‘Serialization is the process of converting the state of an object into a form that can be persisted or transported. The complement of serialization is deserialization, which converts a stream into an object. Together, these processes allow data to be easily stored and transferred.’ <http://msdn.microsoft.com/en-us/library/7ay27kp9%28v=vs.80%29.aspx>.
the conceptual structure of a given knowledge. It is through ontologies that the Web is able to “understand” the meaning of queries formulated by users in their natural language (such as English, Spanish or French).

Legal ontology engineering, the formal structuring of concepts, is a well-trodden path, as ontologies have been built up for twenty years or more to be applied to security, e-libraries, e-commerce, e-court, e-government and e-administration. Five years ago it was still possible to summarise and organise legal ontologies according to their technical features and degree of development. However this task is not possible anymore because their use has become so common in the legal domain. In addition, it is important to keep in mind that ontologies are intrinsically plural and intentional, and there is more than one way to build them as they depend upon different and equally acceptable theoretical approaches (cognitive, linguistic, normative, socio-legal), according to the different perspectives and final ends for which they are designed.

### III. LINKED OPEN DATA

In a presentation at the W3C in July 2006 Tim Berners-Lee advocated four basic principles for Linked Data to operate effectively:

1. Use URIs [Uniform Resource Identifiers] as names for things
2. Use HTTP URIs so that people can look up those names.
3. When someone looks up a URI, provide useful information, using the standards (RDF, SPARQL [SPARQL Protocol and RDF Query Language])
4. Include links to other URIs, so that they can discover more things.

Three years later at a TED talk, he presented the proposal in an even simpler way: *All kinds of conceptual things now have names that start with HTTP.* This means relationships among subjects, data and metadata — the Web of Data — can be viewed as one big relational database of knowledge. As observed by Heath and Bizer (2011), the Web of Data is an additional layer that is tightly interwoven with the classic Web document and has many of the same properties:

1. The Web of Data is generic and can contain any type of data.
2. Anyone can publish data on the Web of Data.
3. The Web of Data is able to represent disagreement and contradictory information about an entity.
4. Entities are connected by RDF links, creating a global data graph that spans data sources and enables the discovery of new data sources. This means that applications do not have to be implemented against a fixed set of data sources, but they can discover new data sources at run-time by following RDF links.

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30 Ontologies can be defined as an explicit specification of a shared conceptualization. They consist of concepts (classes), relationships (properties), instances and axioms. See Gruber, above n 29.
31 Legal ontologies can be divided into core-ontologies (legal theory, structure of rules etc.) and domain-ontologies (for example: criminal law, civil law ). For a systematic overview see Núria Casellas, *Legal Ontology Engineering: Methodologies, Modelling Trends, and the Ontology of Professional Judicial Knowledge* (Springer, LGT Series, 2011).
5. Data publishers are not constrained in their choice of vocabularies with which to represent data.

6. Data is self-describing. If an application consuming Linked Data encounters data described with an unfamiliar vocabulary, the application can dereference the URIs that identify vocabulary terms in order to find their definition.

7. The use of HTTP as a standardized data access mechanism and RDF as a standardized data model simplify data access compared to Web APIs, which rely on heterogeneous data models and access interfaces.\(^{37}\)

Since 2007, a number of ongoing projects have involved recollecting and developing these ideas. The W3C project Linking Open Data updates the link between data using RDF.\(^{38}\) Perhaps the most popular visualisation of linked data is the one produced by the DBpedia Project on all the information contained in the databases feeding the Wikipedia\(^{39}\) [See Fig. 1]. DBpedia extracts information and links new sites as information resources describing millions of things.\(^{40}\) Visualization allows checking the shared elements present at different databases (thick arrows indicate a greater degree of linkage; bidirectional arrows point at the coexistence of elements).

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\(^{36}\) ‘The act of retrieving a representation of a resource identified by a URI is known as dereferencing that URI. Applications, such as browsers, render the retrieved representation so that it can be perceived by a user. Most Web users do not distinguish between a resource and the rendered representation they receive by accessing it.’ Rhys Lewis (ed), Dereferencing HTTP URIs, 31 May 2007, W3C, <http://www.w3.org/2001/tag/doc/httpRange-14/2007-05-31/HttpRange-14>.


\(^{38}\) See <http://www.w3.org/wiki/SweoIG/TaskForces/CommunityProjects/LinkingOpenData>.

\(^{39}\) See <http://dbpedia.org/About>.

The term Linked Data refers to a set of best practices (emphasis added) for publishing and connecting structured data on the Web. These best practices have been adopted by an increasing number of data providers over the last three years, leading to the creation of a global data space containing billions of assertions—the Web of Data.41

Although the Web of Data is a ‘network of items in the world, described as data on the Web’, it actually links beyond data to end users, citizens, prosumers: people:

There are cries from the heart (e.g. The Open Social Web Bill of Rights for my friendship, that relationship to another person, to transcend documents and sites). There is a “Social network Portability” community. It’s not the Social Network Sites that are interesting—it is the Social Network itself. The Social Graph. The way I am connected, not the way my Web pages are connected [emphasis added]. We can use the word Graph, now, to distinguish from Web. I called this graph the Semantic Web, but maybe it should have been Giant Global Graph!43

The Web of People or the Giant Global Graph is connected to law in many ways. Firstly it introduces shared ordering into the personal mashups used in ‘social machines’; secondly, creating SW standards on linking data means following general principles—such as transparency and accountability—to protect people; thirdly, ‘bringing humanity fully into the information loop requires data structures and computational techniques that enable us to treat social expectations and legal rules as first-class objects in the new Web architecture (to create a declarative rule-based infrastructure that is appropriate for the Web).’ These are the grounds for Government Linked Open Data - the practice of publishing public sector information on the Web using Linked Data.45 There is a parallel move towards establishing a regulatory layer for the Internet, based on concerns regarding trust, security and privacy expressed by many lawyers and engineers. This is termed Privacy by Design.46 It should be pointed out that issues related to embodying legal rules into a Web standard language are beyond the scope of this paper.

IV. RELATIONAL LAW AND LEGAL EDUCATION

Both Privacy by Design and Linked Open Data promote the empowerment of people, in a highly connected world—humanity in the loop, to use Hendler and Berners-Lee’s expression. Therefore, the role of law in this changing environment is evolving with more complex regulation patterns, involving protocols and good practices (soft law), governance (the relationships between citizens and public or private organizations), and ethics now playing a much bigger part.

A. The Concept And Scope Of Relational Law

For the purposes of this paper the above regulatory phenomena are referred to as relational law—the allocation of behavioral expectations (social assignment of rights and obligations),

in terms of a shared technological framework. Interactions among people, programs and human-machine interfaces create an aggregated value that facilitates the emerging bottom-up connection between Web 2.0 and Web 3.0. Trust, security, confidence, and not only the identity of users, matter and must be assumed as features of the regulatory models at stake. This constitutes the ecological niche in which different types of technology and behaviors (human or artificial) converge for a common result.

The Web of Data (WD) and Privacy by Design (PbD) appeared at the same time. In fact 2006 was the year in which the second version of Code was delivered by Lawrence Lessig as well. Lessig’s contributions to a better regulation of the Internet are invaluable —Creative Commons, and more recently, his fight against corruption are broadly known and continue to influence the field. As a result of the metasystem layer being shaped by big companies and governments, Lessig has been working on overcoming obstacles which undermine the web from reaching its full potential.

When Lessig wrote Code Version 2.0 he adopted a different approach to that used for the first version. Through a wiki tool he encouraged contributions from interested students and others to reshape his book. This represents an example of educational crowdsourcing, and demonstrates how people can contribute to a common outcome through a shared process of learning.

Originally, the term crowdsourcing was introduced by Jeff Howe in 2006 referring to “the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcings it to an undefined, generally large group of people in the form of an open call”. Different types of crowdsourcing have recently been discussed in the literature. Wikipedia, an example of crowdsourced encyclopedia, defines the term as a non-profit collective aggregation of information from micro-tasks widely distributed across the Web, and freely performed by people. Therefore, crowdsourcing implies much more than a new way to collect information or to respond to labor offers or contests, following the Amazon Mechanical Turk or Microworker marketplace models. Within the Semantic Web community, wikis were used to produce shared

50 Cf Lawrence Lessig, Code and Other Laws of the Cyberspace (Basic Books, 1999).
51 Cf Lawrence Lessig, Code and Other Laws of the Cyberspace (Basic Books, 1999).
52 See the Code Version 2.0 Website <http://code-is-law.org>. In addition, the Spanish version of Code 2.0 was also cooperatively translated by students from Tecnología de la Comunicación Audiovisual at the University of Málaga (Spain), Cfr. <http://es.wikipedia.org/wiki/El_Código_2.0>.
knowledge and keep track of the discussions required to build up ontologies.57 Crowdsourcing has a more public and open dimension that cannot be ignored, because of the *personalization* of services and applications, and its link to Web 2.0 and 3.0.

Crowdsourcing therefore, creates the conditions to aggregate individual information into collective, common knowledge,58 and it contributes to broaden and enhance democratic ways of living and acting in the global world. The challenge for education lies in the technological empowerment that the Semantic Web, mobile technologies, grid computation and cloud computing afford.59 How does legal education relate to this? Does “the cloud” make any difference with respect to previous educational processes? In particular, does cloud computing have any effect on the learning outcomes of students in Law Schools today?

The differences between virtual courses and conventional ones are obvious, but actually large universities remain competitive by offering online courses similar to those of the Open Universities. The recent examples of Coursera and OpenLearning demonstrate that massive numbers of students can engage in online courses, making it possible for a new business model to challenge the traditional one.60 These are becoming to be known as Massive Online Open Courses (MOOC). They are mainly focused on delivering content but, as Professor Buckland states, it is not clear yet how they will relate with other academic values as community building, learning from peers, tutorials, practical work, and motivation to study and progress.61

One of the many criticisms of this type of learning is that it may compromise academic integrity, especially in terms of assessment with students engaging in copy and paste practices or plagiarism.62 Students are always a step ahead of the game; they know how to browse the web, to exploit the most common tools in order to get the information they need; and they have extended horizontal links within the Social Web.63 Why would students in legal learning be an exception to these practices? How students and teachers overcome these practices is highly dependent on the organisational and technological context in which they operate. What are the sources, mashups and intelligent tools which retrieve information and transform it into personal knowledge? And how can these applications create the right type of environment in which to share discoveries?

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59 Crowdsourcing can be expanded into *crowdservicing*. See Joseph Davies, ‘From Crowdsourcing to Crowdservicing’ (2011) 15 (3) *IEEE Internet Computing* 92-94.

60 See [https://www.coursera.org/](https://www.coursera.org/); cf John Markoff, ‘Online Education Venture Lures Cash Infusion and Deals With 5 Top Universities’ *New York Times* 18 April 2012. All over the world, tens of thousands of students can follow the same online course.


63 *Patatabrava*, the most popular social network among Spanish graduate students has grown up to more than 300,000 members, see [http://www.patatabrava.com/](http://www.patatabrava.com/) (*Una manera diferente de vivir la Universidad*)
B. Steps Towards SW Educational Services

The Web is oriented to Web-services while the Semantic Web is oriented to SW services.64 Computer scientists usually represent SW applications as retrospective linear stages, and in doing so they set the stage for new challenges, applications and prototypes.65 Dicheva classifies the generations of Web-based educational systems into three broad categories66: (i) the first generation systems which provide a “centralized (typically client–server) architecture” and a proprietary format for representing learning resources, (ii) the second generation which add “domain conceptualization and concept-based presentation of the maintained resources”; (iii) the third generation systems which enable “ontology-aware software, reusability, exchangeability, and interoperability of the maintained learning resources and components”.

Rajiv and Manohar Lal recently summarised certain characteristics of the Web 3.067: (i) intelligence (documents in different languages to be intelligently translated into other languages, including natural languages), (ii) personalization (individual preferences such as information processing, search, formation of personalized portal on the web) (iii) interoperability (collaboration and reusability interrelated with what is called the pervasive web, in which applications are easy to customize and run on different kind of devices) and (iv) virtualization (high speed internet bandwidths and High end 3D Graphics). Accordingly, Rajiv and Manohar Lal single out certain toolkits: (i) 3D-Wikis / Virtual 3D Encyclopedia e.g Copernicus-3D Wikipedia68; (ii) learning with 3D Virtual worlds and Avatars (Second Life, IMVU, Active Worlds, Red Light Center...); (iii) intelligent search engines; (iv) online 3-D Virtual Labs / Educational labs / Simulations or 3D Web.

In the above applications, we do not see any reference to the social and educational conditions in which they were produced. What is missing is the treatment of the day-to-day activities involving teaching and learning, either on- or offline, in the toolkits. Legal innovative toolkits can help bridge the gap and there are three stages in their development. The first is the Free Access to Law Movement,69 with platforms focused on making legal data available, organised in Legal Information Institutes (LIIs) that constitute the World Legal Information Institute.70
is the effort to apply Artificial Intelligence to legal programming, helping students to master legal case-based reasoning and argumentation. The final stage is the Semantic Web, linking Web 2.0 and 3.0. These three stages have evolved concurrently providing flexible, shareable and secure ways of communicating and publishing.

We should distinguish between (i) producing, implementing and consuming resources for final users (Semantic Web techniques applied to Web-learning), and (ii) the converging process of developing technologies as a teaching resource. The former is captured by technological life-cycles in which technologies are tested, evaluated and eventually implemented, whereas the latter requires the combination of research and educational models, fostering the imagination of students and teachers alike towards active participation in hybrid, “mixed up” experiences.

For the past ten years, Law Schools have increasingly incorporated a virtual side into regular courses, and conceived a space in which students and teachers can communicate either privately or publicly with specific dashboards (wikis, communication rooms, downloadable materials). This might occur with different types of crowdsourcing, in different scales, from local experiences to global responses, as exemplified by Coursera. More importantly, it can be argued that web science and technological tasks introduced into the legal curricula prepares law students in learning how to overcome the challenges in SW languages, ontologies, and Internet scenarios. Students enter the legal learning and research process faster and more effectively when introduced into legal and technological content simultaneously.

V. CASE STUDIES IN LEGAL EDUCATION

According to Vladan Devedžić, web-based education offers the following features: (i) the separation of teachers and learners; (ii) the influence of an educational organization; (iii) the use of Web-technologies to use or distribute some educational content; (iv) the provision of two-way communication via the Internet.

Educational material is still highly unstructured, heterogeneous, and distributed as everything else on the Web, and current learning and lecturing tools offer limited support for accessing and processing such material. The main burden of organizing and linking the learning contents on the Web, as well as extracting and interpreting them, is on the human user.
While there have been some significant advances in technological support for e-learning and Web-based education, legal data requires careful representation into Web languages and needs to be coupled with metadata. Ongoing projects face the specific problem of building up legal XML standards and best practices for the use of XML in legislative, regulatory, and judiciary documents. This is a matter for future research, with increased educational projects on Law and the Semantic Web. Following the distinction made by the W3C between ‘case studies’ and ‘use cases’, SW Core-semantics Educational Projects are distinguished from SW Educational Applications. There are 32 accepted case studies and 12 use cases (prototypes). Only one full-fledged case study in the education and learning technology area exists to date.

A. SW Core-Semantics Educational Projects (CED)

A CED may be defined as a structural project covering all the four features of Web-based education, and embedding semantic tools (RDF, ontologies e.g.) into architecture to offer semantically-based web services. In response to the unstructured material problem pointed out by Devedžić, in 2007 the Talis group and the University of Plymouth started a project to be implemented into the internal architecture of services of UK and Eire Universities. They focused on collections of text books, journal articles, Web pages and/or audio visual content defined by instructors, intended to be companions for students to degree courses, modules or assignments known as Resource Lists (RL). A RL ontology was created to unify the descriptions of existing resources, linked open data principles improved the interoperability of the data, and students and instructors were encouraged to annotate and enrich the data to enable context-aware recommendation functionality.

Clarke and Greig define this CED as follows:

Once obtained, the metadata is stored in the instructor’s library as RDF using the Bibliographic Ontology increasing the interoperability of the harvested data with other systems and workflows. [...]

By storing metadata about the resource being described, rather than the page describing it, more resilient strategies can be employed to ensure content links do not break if the library decides in

78 There are several trends to teach and disseminate legislative XML, a markup language defining a set of rules for encoding legal documents in a format that is both human-readable and machine-readable. Cf the Handbook by G Sartor et al, Legal XML for the Semantic Web (2011, Springer). Since 2007 onwards, Prof. Monica Palmirani, from CIRSFID (Bologna), organises the Legislative XML Summer Schools (LEX) with the support of OASIS organization (USA), the European University Institute (Florence), the Leibniz Center for Law (Amsterdam), the UAB Institute of Law and Technology (Barcelona), among other Institutes for Legal Informatics. See <http://summerschoollex.cirsfid.unibo.it>, and <http://www.legalxml.org/governance/>.
79 See <http://www.w3.org/2001/sw/sweo/public/UseCases/>: ‘Case studies include descriptions of systems that have been deployed within an organization, and are now being used within a production environment. Use cases include examples where an organization has built a prototype system, but it is not currently being used by business functions.’
future to change supplier. […] The philosophy of this feature is to get the user as close to the resource as possible.82

This Resource List Management (RLM) tool is the origin of Talis Aspire, a cloud-based reading-list application used by most UK (and one Australian) universities.83 The philosophy of “getting the user as close to the resource as possible” is complemented by a clear *crowdsourced* orientation, because the tasks of re-using, sharing and transforming content are faced from two standpoints facilitating both personal as well collective learning.84

B. SW Educational Applications (EA)

Finally, three ongoing trends relevant to educational purposes and at the use case stage will be discussed. This is not the first time that IDT SW researchers and lawyers have collaborated on educational projects. From 2004 to 2006, and under the framework of the EU SEKT Project85 an i-FAQ system was designed for the Spanish Judiciary School to support newly appointed judges to solve practical issues not covered by the law.86 In the same judicial area, we developed multimedia tools to annotate and manage legal videos.87 These are first generation SW projects in which semantics and ontologies played a major role attempting to improve end users’ performances. However these initiatives did not contribute to the updating of the system or to the interplay of the community.

On the contrary, crowdsourcing is being applied in the ongoing EU Project *Justmen. Menu for Justice – Toward a European Curriculum Studiorum on Judicial Studies*.88 One of the most interesting outcomes of the Project is the crowdsourced map of Law Schools and legal educational units in Europe, with aggregated information (reports) from several different sources [Fig. 2].89

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8. 89 See <https://legaleducationineurope.crowdmap.com/>.
Another step in the same direction is the Stanford Project on constitutional tagging. Its main goal is to construct the Constitution Explorer, a structured database of Constitutions to enable people to compare and contrast Constitutions from other countries. Rather than going manually through the text, semantic searches are enabled by a legal taxonomy. This is an object of collaborative design through mindmaps. Volunteers from different countries review and complete the taxonomy, tagging and annotating national Constitutions with relevant cases. Students from the UAB Law School (alongside students from Stanford and the University of Edinburgh) performed this task on November 12th, 2011. This is an example of creative academic endeavour in which more than one-hundred students communicated in different languages to reflect on the conceptual difficulties of comparative constitutional law. We discovered that discussions in cross-cultural and political tagging are analogous to expert discussions in ontology building. In both cases, cross-fertilization and contrasting opinions helped to create an added-value in learning from the existing materials.

In the final case study the work of the legal scholar Núria Casellas, is cited. Casellas and graduate students from the Department of Computer Sciences are responsible for the Linked Legal Data Project (Project) at Cornell Legal Information Institute. Although the Project is still in its early stages it represents a rigorous attempt to bring LOD to law and law libraries:

With this project, we will enhance access to the Code of Federal Regulations (a text with 96.5 million words in total; ~823MB XML file size) with an RDF dataset created with a number of semantic-search and retrieval applications and information extraction techniques based on the development and the reuse of RDF product taxonomies, the application of semantic matching algorithms between these materials and the CFR.


content (Syntactic and Semantic Mapping), the detection of product-related terms and relations (Vocabulary Extraction), obligations and product definitions (Definition and Obligations Extraction).

One of the goals of this Project is to create an RDF dataset of the Code of Federal Regulations (CFR)—structure, vocabulary, definitions, obligations—and link content to other collections of data (DrugBank, DBpedia e.g.). One of the expected outcomes is the development of a standardized SKOS vocabulary for the CFR.

These three projects: Justmen, Constitution Explorer, Legal Linked Data—are substantially different. Only the last one implies the construction of a full SW application. The tasks performed by students are of different levels of complexity. The common element is the cooperative work of students, researchers and teachers alike from the legal field. These are the products of collective, crowdsourced knowledge, at the crossroads of shared understandings of technological and legal knowledge. These innovations spring from the ongoing dynamics of individual experiences, legal expertise, and technological skills.

VI. CONCLUSIONS

To a large extent regulatory systems rely on legal systems. By the same token, we need legal knowledge in order to structure and model legal data. We now have many ways at our disposal to aggregate, organise, re-use and improve knowledge which the synergy between SW technologies and educational experiences can provide. Research is being enhanced by crowdsourcing contributions. Since 2006, we have been witnessing the blossoming of a second Semantic Web generation of projects. While some of these projects are still in their infancy and caution is due, it is my contention that legal initiatives, innovative trends and regulatory requirements of Web 2.0 and Web 3.0 are creating the future for Web-based learning. Linked Open Data (LOD), Linked Government Data (LGD) and Linked Legal Data (LLD) have now entered the field and are here to stay.

New concepts such as crowdsourcing, crowdservicing, networked governance, data protection governance, hybrid open access publishing, semantic web services, legal mashups, dereferenced law, legal XML, have recently emerged. New principles and standards are being formulated to stabilise languages and protocols, and to harmonise them with legal systems known as global law (including actors other than national states and international official organizations—NGOS, companies, global institutions, digital neighbourhoods etc.).

The concept of relational law in this paper refers broadly to the regulatory link between Web 2.0 and 3.0, based on trust and dialogue, and which emerges from the intertwining of top-down existing legal systems and bottom-up participation (the Web of People). Relational law constitutes a new challenge in the development of democracy, providing further opportunities for the educational skills and programs upon which democracy is based.

In this paper, a distinction has been made between SW Core-semantics Educational Projects and SW Educational Applications. When web science and research tasks are integrated into the legal educational curricula students are provided with the opportunity to actively participate, as


93 See Núria Casellas, ‘Linked Legal Data: A SKOS Vocabulary for the Code of Federal Regulations’ (forthcoming), Semantic Web Journal (2013 Special Issue on Semantic Web for the legal domain: from text to knowledge) <http://www.semantic-web-journal.net/>. To date it has been explored in particular Title 21, Food and Drugs of the CFR. ‘SKOS’ stands for ‘Simple Knowledge Organization System’, see above n 12.

shown in SW Educational experiences\textsuperscript{95}. As Jason Ohler has said: “15 years ago, the Web was science fiction to most. Today it is taken for granted. Eventually, we will take Semantic Web for granted as well”.\textsuperscript{96}

If young lawyers are expected to operate in this technological environment, then web science needs to have a greater presence in course curriculum and design in legal education. In Europe, we have tried to give a preliminary answer to this need at the doctorate level, combining law, science and technology courses and framing this learning into research programs.\textsuperscript{97} It seems reasonable to expect new developments of the synergy between Semantic Web and legal education experiences in the next future.

\textsuperscript{95} See above n 48, 78, and s 4 A, s 4 B, and s 5 B.
\textsuperscript{96} See Ohler, above n 2, 9.
\textsuperscript{97} See the recent Erasmus Mundus European Joint Doctorate on Law, Science and Technology (University of Bologna, University of Torino (Italy), IDT-Autonomous University of Barcelona (Spain), Mykolas Romeris University (Lithuania), University of Luxembourg, University of Tilburg (The Nederlands); with Associated partners (NICTA, IIIA-CSIC); and Industrial Partners (IBM, S21, Vicomtech, ASCAMM, NOMOTIKA) <http://www.last-jd.eu/>.}
INTERCONNECTEDNESS, MULTIPLEXITY AND THE GLOBAL STUDENT: THE ROLE OF BLOGGING AND MICRO BLOGGING IN OPENING STUDENTS’ HORIZONS

KATE GALLOWAY,* KRISTOFFER GREAVES** AND MELISSA CASTAN#

ABSTRACT
The concepts of interconnectedness and multiplexity resonate globally in contemporary higher education, legal practice, and in citizens’ social and economic experience, where engagement takes place daily over distances mediated by information and communications technology. Meanwhile, literature regarding student transition identifies student engagement as a key to their retention – yet Australia’s universities are struggling to compete with our students’ employment and caring obligations. Is it possible for lecturers to retain an engaging presence with our students who are more likely than ever before to be distant from campus? How might we provide opportunity and experience to our students, beyond their own community and campus? Is it possible, or even desirable, for us to compete with texting, Facebook and other social media used by our students within and without the physical classroom? In this paper, the authors explore the world of blogging and micro blogging (Twitter) as a means of mediating engagement with students, lawyers, academics and other interested and interesting people around the world. Through the use of auto-ethnographic case studies of their own experiences with blogging and micro blogging tools, the authors propose that far from being a distraction from student learning, these tools have the potential to open up an international professional collaborative space beyond the physical classroom, for both academics and our students, from their first year experience through to practical legal training and continuing professional development.

I. INTRODUCTION
Much has been written about the role of information communication technology (‘ICT’) in higher education, which reflects some concerns. These concerns are: whether there is a divide between digital natives (students) and digital immigrants (academics)?1 How do we bridge that

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divide? How can academics use ICT to enhance student learning? How can ICT be used to assess learning? Is ICT better than face-to-face teaching? What are the risks involved in using ICT?

While this debate continues, scholarly literature including books, journals, and case and statute law are increasingly found online, student enrolment systems go online, universities sign up to Facebook and Twitter, staff and students are allocated space in the ‘cloud’ for data storage, and university content management systems have their own ‘apps’ suitable for mobile use. Despite the extent to which we find our academic lives immersed in ICT, academics still wonder how it can sensibly be used in educating our students.

In the arena of the academic’s tripartite work life (teaching, research and engagement) ICT again plays a significant role. Expectations of innovative and engaging teaching reaching out to the so-called digital native student and navigating content management systems contrast with the 19th century research culture of double blind peer review journals (until recently ranked the so-called digital native student and navigating content management systems contrast with the 19th century research culture of double blind peer review journals (until recently ranked in Australia according to esteem). Likewise, community engagement is just as likely to occur through school visits and faculty open days as through press releases to the mainstream media.

Increasingly, reports are emerging of academics overwhelmed by the task they face to meet various outcomes. One of the reasons for this seems to be a lack of understanding of just how


5 Tara Brabazon, Digital Hemlock: Internet Education and the Poisoning of Teaching (University of New South Wales Press, 2002); Tara Brabazon, The University of Google: Education in the (post) Information Age (Ashgate, 2008); Robin Goodfellow and Mary R Lea Challenging E-Learning in the University: A Literacies Perspective (McGraw Hill, 2007).

6 Christine L Borgman, Scholarship in the Digital Age: Information, Infrastructure and the Internet (The MIT Press, 2007). Statutes and case law are found in particular through free platforms such as the Australasian Legal Information Institute <http://www.austlii.edu.au/> and its equivalent sites in jurisdictions overseas, but also through proprietary databases.


ICT works, and how it may serve as a tool for teaching and for research and engagement.\textsuperscript{9} It seems that students too may resist new technologies and a blended curriculum design.\textsuperscript{10}

Against this background, literature on the transition experience still identifies lack of engagement in campus life as a predictor of students at risk.\textsuperscript{11} Because retention is a measure of university success, the third generation approach to first year\textsuperscript{12} has resulted in significant institutional resources being devoted to addressing student engagement – often with a focus on attendance on campus. An increasing focus on work integrated learning and student contact with the legal profession is seen as an important strategy to support an authentic learning environment within which to nurture the emergent professional identity of the student and to maximize student learning.\textsuperscript{13}

In this paper we pose the question: can ICT provide a means by which to align the academic’s work with student learning and engagement? Through collaborative auto-ethnography\textsuperscript{14} this paper seeks to provide an insight into how an academic might use the particular ICT tools of blogging and micro-blogging as a means by which to navigate the complex terrain of contemporary practice while engaging students in a learning and professional community. Importantly, this methodology affords concrete examples of the ways in which these tools mediate interactions between academics, professionals, students and the wider community. Additionally, it offers an integrated rationale for using these technologies as a means to participate in a globally connected community.

II. BLOGGING, MICRO-BLOGGING AND MULTIPLEXITY

In 2006, Black provided a comprehensive description of the evolution and nature of the blog:

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{15}

\textsuperscript{9} Betty Collis and JeF Moonen, \textit{Flexible Learning in a Digital World} (Routledge, 2002); Evrim Baran, Ana-Paula Correia, and Ann Thompson, ‘Transforming Online Teaching Practice: Critical Analysis of the Literature on the Roles and Competencies of Online Teachers’ (2011) 32(3) \textit{Distance Education} 421.


\textsuperscript{11} Kerri-Lee Krause et al, \textit{The First Year Experience in Australian Universities: Findings from a Decade of National Studies} (Centre for the Study of Higher Education, University of Melbourne, 2005); Craig McInnis, Signs of Disengagement? The Changing Undergraduate Experience in Australian Universities (Centre for the Study of Higher Education, Faculty of Education, University of Melbourne, 2001); Craig McInnis, Richard James and Robyn Hartley, Trends in the First Year Experience: In Australian Universities (Centre for the Study of Higher Education, University of Melbourne, 2000)


At that time, Black cites IT commentator Technorati as having tracked over 60 million blogs.\textsuperscript{16} It is now considered almost impossible to accurately calculate the number of blogs and there are now a number of sites hosting free blogs: anyone could set one up. One of these alone, Word press, reports 72.5 million blogs today,\textsuperscript{17} up from 32.5 million blogs in mid 2011.\textsuperscript{18} Likewise, Tumblr set up in 2007 and already has over 50.5 million blogs, with over 55 million posts a day.\textsuperscript{19} There are many more blog host sites.

Technorati provides a breakdown of what kinds of people blog, and what they blog for. It identifies hobby and professional bloggers – distinguishing those who make money from blogging and those who do not.\textsuperscript{20} The primary purposes are personal, topical and corporate. While a personal blog for example may chart one’s weight loss journey it could likewise comment on politics or current affairs. A corporate blog will seek to keep clients informed or to sell a product. The focus of this paper is on the topic blog – a blog with a single interest focus that may be either personal or run by a team – and in particular, legal blogs either professional or academic.

Not only does the number of blogs and blog posts continue to rise exponentially, but so does the influence of blogs: both on their readership directly, as well as more widely. Indeed the influence of blogs on current affairs has become so great that contemporary journalism has had to search for a means of distinguishing itself as a profession from the hobby commentator,\textsuperscript{21} and mainstream media is feeling the pinch of free news, seeking a means of capturing an income via the blogosphere.\textsuperscript{22}

\textbf{A. Microblogging}

Blogging has evolved further since the launch of Twitter in July 2006. 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.\textsuperscript{23} Through following accounts, or searching the platform on a particular topic, the user can view a ‘stream’ of tweets.

\begin{itemize}
\item[Ibid, 12.]
\item[17]Wordpress Stats (5 April 2012) \url{http://en.wordpress.com/stats/}.
\item[18]Web Articles, ‘Are There Too Many Blogs?’ (14 July 2011) \url{http://www.templatesold.com/articles/web-design/are-there-too-many-blogs/}.
\item[19]About Us (5 April, 2012) Tumblr \url{http://www.tumblr.com/about}.
\item[23]For a comprehensive overview of subscribing and functions, see Amy Mollett, Danielle Moran and Patrick Dunleavy, \textit{Using Twitter in University Research, Teaching and Impact Activities: A Guide for Academics and Researchers} (London School of Economics Public Policy Group, September 2011).
\end{itemize}
Twopblog, a Twitter analyst, reported Twitter’s 500 millionth account in February 2012.24 It does point out that this figure is contested: not all accounts are ‘active,’ that is they do not follow anyone and they have no followers. An active user would be a user who not just reads tweets but also sends them. It is impossible to gauge how many active users there are. Even those who do not actively send messages may be peripherally participating by following the stream of a particular person or topic area. It is probably impossible to gauge how many would use Twitter in this way. In any case, the number of tweets per day has jumped from 27 million in November 2009, to 290 million in February 201225 though again there is no way to determine how many of these were personally crafted, representing genuine engagement by real people, and how many were automatically generated, or ‘spam’.

In addition to those who are either active on Twitter or who join up simply to look at it, the medium has influence beyond its own platform. It is possible to embed tweets within a website – or a learning management platform such as Blackboard or Moodle.26 In the case of both blogs and microblogs of course, their popularity does not validate the source or the information presented. Principles of information literacy still apply and judgements need to be made about the quality of information at every turn.27 However the sheer volume of blogging and tweeting means that we cannot ignore it as a potential source of information. In addition, this raw data ignores what is arguably the real value in these media: that of connectedness, networking and multiplexity.

B. Multiplexity in the Medium

The focus so far in describing blogging and microblogging has been on the media as a means of disseminating information: through a blog post or a tweet, and the receipt by the viewer of that information. This implies a passive engagement as the reader, or an active engagement insofar as dissemination of information is concerned. While this offers obvious benefits for those who participate, this description fails to capture the social aspects of these media. Of particular interest here, are these media’s capacity to facilitate networks.

A network is a set of relations, and within a social network, ‘friendship, love, money, power, ideas and even disease’ might pass between members.28 In the educational context, network theory might describe the lecture theatre or perhaps the wider university campus as a ‘closed box network’.29 This implies a limitation to the number of people with whom a student may form relationships. The limitation arises through the proximity of students and academics to one another through location and through enrolment. There is also a limitation as to the roles undertaken by members of such a network – for example, the network would consist perhaps of students and academic staff, but not members of the profession.

26 For instructions on embedding a twitter ‘widget’, see About Twitter – WidgetsTwitter <https://twitter.com/about/resources/widgets>.
29 Ibid, 17.
While work placements, internships, clinical legal education and careers events will provide opportunities for widening students’ networks, social media provides an even wider opportunity. This is where the notion of multiplexity arises.

‘Multiplexity recognizes that there may be many networks that connect, in different ways...’

This can occur in relation to the roles that people have – so a fellow student in a network might also be a friend – but also in relation to the content that passes between members of the network. In the latter case, this could be personal support, course information or information about employment.

This term therefore encompasses some of the ideas implicit in the focus on student engagement in learning – not just through the formal curriculum, but also through social contacts and wider support, or, an informal curriculum. That is to say, the higher education literature recognizes the need for multiplexity in students’ networking: a variety of roles and connections amongst their networks to support their learning. In capturing the complexity of the types of roles played in the support of student learning, the term also has the capacity to represent the importance of student engagement with the profession.

If limited to the physical world, such networks have the capacity to be multiplex, but this is contained within the strictures of geography. The virtual world frees the student and the academic from these limitations, opening up an almost unlimited capacity for new networks in both the content and types of engagement, and the identity or role of those in the network. The authors themselves represent part of a network, and detail their own experiences as evidence of the potential of blogging and microblogging in the educational and academic context.

III. LIFE IN THE BLOGOSPHERE

In conceiving and writing this paper, the three writers seek to exemplify the very interconnectedness we feel is possible, mediated through ICT tool of micro-blogging in particular. Our initial connection through Twitter has resulted in sharing and collaboration in blogs, and finally through presenting and writing in a more conventional academic medium of a face to face conference.

After seeing increasing Twitter traffic about the utility of blogging for academics, and our shared observation of the development of intellectual and academic ideas and persona via the Twitter medium, we felt that our journeys – individual, intersecting and shared – might themselves provide data to support others in their own experimentation with these media. We do this through the methodology of auto ethnography.

Somewhat more than a simple case study of the authors’ own practice, 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.’ Use of this methodology aims then to articulate our common experience in the use of these media and to extrapolate from

31 Ibid, 36.
32 For examples see Gráinne Conole and Panagiota Alevizou, A Literature Review of the Use of Web 2.0 Tools in Higher Education (The Open University, 2010).
34 Leon Anderson, ‘Analytic Autoethnography’ (2006) 35(4) Journal of Contemporary Ethnography 373 compares ‘evocative’ autoethnography with ‘analytical’ autoethnography – this article tends to the former as a precursor to the latter.
35 Above, n 14 [3].
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this a narrative around the idea of such media and the practice involved. The authors see this methodology as an extension of the idea of the reflective practitioner, who through reflection seeks to develop a rationale for practice and to take informed actions.36

A. Networking in the ‘Twitterverse’

While each of the authors joined Twitter for a variety of personal and professional reasons, our interests have caused us to connect as part of a larger network of legal educators and lawyers – and indeed a network on a number of different levels. Each of the authors is part of a Twitter network with ‘fuzzy’ boundaries – there are few silos here. Our lists of followers include solicitors, barristers, academic lawyers, teachers, educational academics, PhD candidates, official feeds from legal organisations (including courts), statutory bodies, government departments, non-government organisations, students (not only our own), musicians, artists, writers, film-makers, inventors, journalists, commentators and interested and interesting members of the public. Some of these feeds are ‘strictly business’, however many tend to blur personal and professional domains by declaring opinions, tastes, and dispositions. Through engaging in these networks – both reading and tweeting – each of us has seen value in taking a cross-disciplinary approach to most topics.

For two of us (Greaves and Galloway) in particular, this network has broadened our capacity to engage with those sharing similar interests. Greaves is presently a full time PhD candidate working often from remote locations, and Galloway works at a smaller regional university. In each case, contact with those who share intellectual interest is limited geographically. Microblogging facilitates a much broader network.

Twitter supports our research by connecting us to global networks of academics involved in subject matter that is the same or similar or complementary to our own. Each of us has experienced productive interactions with academic and practising lawyers, at all levels of experience and seniority, all around the world. Galloway for example interacts with property law academics in the UK who share an interest in teaching the subject through the concept of sustainability. Castan is part of an extensive global human rights network of academics, practitioners and NGOs that provides a forum for ideas. For all of us though, engagement with lawyers and legal thinkers internationally that is regardless of location, highlights the utility of this medium for connecting globally.

Interactions can consist of simply sharing (or re-tweeting) a link to a blog post or peer-reviewed article, or a pithy comment; or they can involve extended discussions with one or more other correspondents. Some discussions earn their own hashtag (a search term connector), and this allows participants to ‘tie’ their tweets to a topic for as long as they desire. Some hash tags are perpetual (for example: #auslaw, #legaled, #phdchat), some are event-driven (for example: #ALTA2012) others emerge from the ongoing discussion (eg #multiplexity). Sometimes tweets take a surprising turn – on one occasion a frivolous tweet, ‘I’m imagining Bourdieu and Latour having an arm wrestle’ – elicited a response from one North American academic with a direction to useful literature about a theoretical dispute that might otherwise have gone unnoticed.

Importantly, and as a facet of multiplexity, the professional networks developed on Twitter – exemplified by our co-authorship of this paper – are also networks of friendship and professional support and of those who share other common interests. These relationships provide ongoing inspiration and support, and ‘constructive confrontation’ that challenge our assumptions and complacencies. Perhaps reflecting the collegiate nature of the workplace or the student experience, this online environment provides opportunities for layered interactions and a connection, a sense of community that in our experience, can enhance teaching, learning and

thinking.\textsuperscript{37} Notably none of us uses Twitter, or micro-blogging, alone – each of us extends our capacity to engage with these networks through our own blogs.

B. \textit{Blogs as a Scholarly Tool}

Again, each of the authors’ blogs reflects our own particular interests and slightly different rationale for engagement in the medium – though in each case, a scholarly approach is adopted that allows us to engage with diverse and global networks, including with our own students.\textsuperscript{38} A blog offers this opportunity for engagement by allowing people to read and comment on the material when and where it suits them, that is, without constraint by organisational or geographical boundaries. Additionally, it allows publication of scholarly work without the strictures and time lags of conventional academic publishing.\textsuperscript{39} Each time a blog post is published the author sends a link out via Twitter, promoting ‘traffic’ to the blog post and discussion both on Twitter and via comments on the blog itself.

As a journal-type format, each of us finds the blog as a medium ideal for sharing ideas,\textsuperscript{40} clarifying our own thinking, and as way of keeping track of ideas as they develop. This can be seen in particular on Pleagle Trainer Blog, and Curl, which each author uses to develop thinking around their PhD research and teaching.\textsuperscript{41}

Pleagle Trainer Blog is mostly focused on the topic of teaching and other aspects of practical legal training, which might be treated as a cognate of clinical legal education in jurisdictions outside of Australia. Greaves is especially interested in the use of ICT as part of a blended instructional design, and is also interested in evidence-based approaches to teaching methods that are useful to teachers in practical legal training. More recently he has been researching a sociologically informed approach to the scholarship of teaching in practical legal training. At first glance the audience for this blog would be a niche of those interested in the research and scholarship of teaching practical legal training, however people involved in teaching at law school, clinical legal education field, continuing legal education, and general education, in Australia and overseas (mostly the United Kingdom, Canada, and the United States) visit or subscribe to the blog.

Curl started more recently as a vehicle to express ideas relevant to the author’s teaching and research interests – notably property law, legal education and women in law. It offers a means of communicating immediately on the topic of the day and like Pleagle Trainer Blog, offers a repository of thoughts to generate broader discussion and also to map thinking over time. Galloway’s blog posts, both here and guest posts elsewhere, are included in her university’s e-research depository as scholarly articles.

As a teaching tool the blog provides a model for students of engagement in legal issues. It is used as a point of reference for class discussion, and as a means of guiding potential honours students in their thinking about various topics. For example, Galloway provides students with links to posts in Curl that relate to what she is teaching. Students have provided feedback of both the usefulness and the motivation for learning of various posts. More widely, the blog is read by both Australian and international audiences of lawyers, academics, other students and

\begin{enumerate}
\item Conole and Alevizou, above n 32, 16.
\item Dunleavy and Gilson, above n 33; David Gauntlett, \textit{How to Move Towards a System that looks to “Publish Then Filter” Academic Research} (10 July 2012) LSE Impact of Social Sciences Blog<http://blogs.lse.ac.uk/impactofsocialsciences/2012/07/10/publish-then-filter-research/>.
\item David McKenzie and Berk Ozler, \textit{Academic Blogs are Proven to Increase Dissemination of Economic Research and Improve Impact} (15 November 2011) London School of Economics<http://blogs.lse.ac.uk/impactofsocialsciences/2011/11/15/world-bank-dissemination/>.
\end{enumerate}
non-lawyers. This is evidenced not only through the comments on the blog, but also through discussions on Twitter in response to each post. In terms of reach, Curl has attracted over 15,000 hits since January 2012 mainly from Australia, the US, UK and Canada, but also from elsewhere. While there is not a direct connection with each reader, this nonetheless represents a large market for ideas coming from a small regional city.

Amicae Curiae was started by Castan and a colleague, as an adjunct to some published research on the expectations and motivations of law students. It invites guest bloggers to post around its theme of ‘discussing the role of women in the law, in legal education, as students, as academics, and within the legal profession’. It seeks to fill the gap between a blind peer-reviewed journal and the lecture theatre, and encourages submissions and conversation. In this way, the blog engages a wide international and Australian audience in contemporary feminist legal issues. In this blog and in Curl, posts have attracted the attention of online media outlets from time to time, affording an additional avenue of publishing and an even larger audience, on issues as they arise.

IV. MICRO/BLOGGING IN THE ACADEMY

Our respective (and collective) experience on Twitter and blogging is borne out by the literature on social media in higher education. While there is some evidence that Facebook is regarded by students as a social space, differentiated from the learning environment, there is a growing body of literature supporting the use of Web 2.0 technologies generally in an educational context. Naturally, the considerations for using these tools as a teaching medium are similar to using other forms of ICT as a teaching medium. The medium is not the message, and it is only used to facilitate teaching and learning.

In the contemporary higher education context, the role of the academic as teacher has become more of a facilitator of student learning than the resident expert. While social engagement between student and academic via social media may not be attractive to students, the blurred boundaries between teacher and learner such as those we have observed, and the extended collegiate network available via Web 2.0 technologies including Twitter and blogging, do

42 Amicae Curiae <http://amicaecuriae.com/>
44 About Us Amicae Curiae <http://amicaecuriae.com/about/>.
47 For an introduction to instructional design considerations, see: Michael R. Simonson et al, Teaching and Learning at a Distance: Foundations of Distance Education (4th ed, Allyn & Bacon, 2009) xix, 374.
facilitate a less formal learning environment. This environment could be harnessed within the classroom, but in particular as we have observed it, most effectively as an adjunct to support student learning and connectedness.

Such an environment whether formal or informal, has been shown to foster collaboration skills in student cohorts—again, with multiple possible networks. Collaboration is recognised as a vital (indeed, threshold) skill for law graduates though it has sometimes been a challenge to incorporate and assess in the classroom, particularly in the law curriculum. The evidence concerning social media as a means of fostering collaboration suggests this tool might usefully be incorporated into the law curriculum to facilitate not just student engagement, but collaboration also.

Importantly however, use of these tools needs to start ‘at home’ and it is challenging indeed to consider how an academic could incorporate these tools into instructional design, or facilitate student use without themselves having experience in the media. The first step would be to set up a Twitter account. Relevantly, consider whether this will be a personal or professional account (or a combination). It is of course possible to have more than one account. Consider also the risks, and legal and professional ethics consequences of this form of engagement with students and others.

One might flippantly say there is only one rule on social media, ‘Act Professionally’, however it is worth investigating in more detail what is reasonable and appropriate for your workplace.

Becoming globally connected through Twitter to exchange, discuss, or collaborate on ideas takes only a little effort and time. Through Twitter it is possible to connect to other students, teachers, researchers and academics with a range of experience and expertise living and working in a variety of circumstances. For example:

49 Foroughi, above n 48; Grace Saw and Wendy Abbott, ‘Social Media for International Students: It’s Not All About Facebook’ (Paper presented at the 33rd Annual IATUL Conference, Singapore, 4-7 June, 2012)


52 Sally Kift, Mark Israel and Rachael Field, ‘Bachelor of Laws Learning and Teaching Academic Standards Statement’ (Australian Learning and Teaching Council, 2010).


54 Mollet, Moran and Dunleavy, above n 23.


• Investigate the use of Twitter hash tags and lists and think about how these can be used as teaching and learning or research tools, investigating what established users are doing with these tools.
• Consider using a unique hash tag for your class group, for example #adminlaw101, and instruct students to include the hash tag in their Tweets around the class topic.
• Some academics use Twitter as a way of making announcements, or posting leads to current developments relevant to the class topic (in addition to, or in support of the online learning management system).

If embedding Twitter into subject design, existing literature concerning the use of computer-mediated discussions in teaching may assist. This includes the instruction (and the ground rules) involving Twitter. In particular, see substantial literature around the community of inquiry framework approach to online discussions.57

Most learning management systems incorporate a blog that can be used in subject design to promote student learning,58 however based on our own experience, blogging independently of the formal curriculum has proved an excellent way to understand how this medium can be incorporated into instructional design. Our own blogging demonstrates to students how this form of expression can be undertaken.

There are however many scholarly legal blogs available to showcase almost every legal topic to students as a means of connecting students with a wider world of discipline knowledge and evidence of applied legal thinking.59 As with Twitter, such blogs can be linked via the learning management system and students can follow these as they see fit, contributing to students developing their own personal learning environment.

V. CONCLUSION

The evolution of the academy and the nature of the contemporary student and graduate, is never far from the national conversation. In the law school, evidence is mounting as to the impact of increasing student disengagement with their cohort and with a sense of professional or discipline identity.60 Likewise, the capacity of academic staff to engage in multiple roles of teaching, research and engagement is stretched. While the internet and its tools are not a panacea for the woes of the academy, they do afford a range of opportunities for a more engaged scholarly community. In the authors’ experience, both Twitter (microblogging) and blogging open a global conversation about the law, about learning and indeed about anything of interest.

These social media platforms can be used creatively to supplement conventional educational practice to generate collaborative communications beyond the limitations of physical classes


58 Black, above n 15.


or traditional printed media, allowing even the most reticent first-year student to engage with an appellate judge, and the law lecturer to reach an expanded community of practice. These platforms can provide additional forums for professional development and greatly expand legal networks and resources. Thus we advocate these platforms as a means of enhancing the multiplexity of students’ educational engagement, developing a variety of roles and connections amongst their networks in order to support their learning. Our own experience in these networks demonstrates the capacity for collaborative and connected intellectual discourse to arise, as well as a multiplex, supportive and collegiate environment within which to learn and of course to share.
MOTIVATING LAW STUDENTS TO ‘DO THE READING’ BEFORE CLASS: APPROPRIATE EXTRINSIC AND INTRINSIC MOTIVATIONAL TOOLS

Liese Spencer*

ABSTRACT

Many university lecturers despair at the low rate of pre-reading and preparation students undertake prior to coming to class. Set passages of textbooks and other allocated material are often not read at all – or are only read in part – by students. In seeking to remedy this, the lecturer has at their disposal an array of extrinsic and intrinsic motivational tools. Deciding which of these tools to apply to a particular cohort of students requires careful consideration of a number of variables. The stage of the degree program is of primary importance – first year students require more scaffolding, and extrinsic motivational tools can be appropriately used to facilitate the transition into more independent, later-year reading patterns. As academics who are training future lawyers, we have to equip our students to be regular and competent consumers of the written word, in considerable bulk and complexity. This paper examines the practical considerations facing the lecturer in deciding how to motivate students to read beforehand and prepare for class, and suggests specific motivational techniques suitable to different circumstances. The results of a small survey of a first year cohort are also reported. The survey gathered quantitative and qualitative responses from students about their motivation to read and obstacles to reading. The literature identified various positive and negative influences on students’ decisions about ‘doing the reading’. Student responses in the survey data corresponded with the themes identified in the literature.

I. INTRODUCTION

The frequent failure of university students to ‘do the reading’ is reported in relevant literature and anecdotally amongst lecturers. This article first considers the importance of students acquiring the habit of reading and then identifies barriers or obstacles to students’ reading. The suggested response to the problem of non-reading is in two parts: the first part is a revision of the content of compulsory reading lists, and the second part is the application of strategies to motivate students to read the revised lists. This article also discusses the responsibilities of lecturers when students do come to class prepared with pre-reading and the appropriate response by lecturers when students arrive in class not having done the reading.

Finally, this article reports the results of a modest pilot survey. Changes were made to assessment in a first year core introductory law subject in the Autumn 2012 semester. These changes were made to improve reading habits amongst first-year students. The survey sought three quantitative and two qualitative responses from students. The survey questions asked students about their reading habits and motivation to undertake compulsory reading in the subject. The results of the survey tended to ratify assertions made in literature surveyed for this paper regarding student motivation to ‘do the reading’.

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A. Should Law Teachers Be Concerned About Students Not Reading?

Many students now request podcasts and vodcasts, for example a recording of lectures. The ‘digital natives’ of this generation of law students prefer multimedia presentation of learning materials. As with the adoption of all new technology, it must be asked whether it is a supplement to, or replacement of the old way of doing things. The law teacher’s response to this perhaps rests on our fundamental conceptions of what a university is for; for most university teachers the purpose of a university includes the sharing of book-knowledge with students. The term ‘book’ need no longer mean paper-based reading materials, as access to electronic reading devices and e-books is increasing, and law journals and other legal research materials are available through university library online portals. What is meant by ‘reading’ and ‘books’ then, is text, whether on paper or in electronic format. Reading text is in contrast to multimedia presentation of information, and/or the verbal delivery of information (such as in a lecture face-to-face, or a recorded lecture).

In the ‘digital age’ wherein many students complain bitterly about being set heavy reading loads based in thick, expensive legal textbooks, is reading still a relevant skill to impart to law students? Should law teachers be worried when students do not read the allocated text prior to classes? The answer to both questions is yes, on two grounds. Reading, it is argued, is still relevant and important, firstly for the acquisition of legal knowledge and skills, and secondly as an essential graduate attribute.

1. Reading For The Acquisition Of Knowledge And Skills

Academics operate from the ‘ingrained assumption’ that reading is still an indispensable mechanism for the acquisition of knowledge and skills. The ‘Great Conversation’ of scholarly discourse — the exchange of ideas across continents and through time — is only fully accessible to the student who reads. The student who does not read relies on potted summaries in lectures, and on scraps of information and ideas gleaned from tutorial discussions. The full context, content, and application of the subject-matter will not be grasped. A student who reads before class has hopefully acquired the building-block factual knowledge (in the case of a law student, knowledge of legal principles); the student can then progress to application of those legal principles to other contexts in the lecture or tutorial. The quality of student participation in tutorial discussions is compromised by a failure to read beforehand — ‘chutzpa aside, you can’t intelligently discuss what you haven’t read’.

2. Does Reading Preparation Affect Student Performance?

This issue receives skimpy coverage in tertiary legal education literature. Larcombe et al found that high-achieving law students had realistic expectations of the law school workload; the study also found that a higher proportion of high-achieving students self-reported a dislike

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5 Hobson, above n 1, 2.

6 Filip Dochy, Catherine deRijdt and Walter Dyck, ‘Cognitive Prerequisites and Learning: How Far Have We Progressed Since Bloom?’ (2002) 3(3) Active Learning in Higher Education 265, 266.


of ‘attending class without completing the assignment reading’. The Larcombe study did not ask the high-achieving students whether they actually followed through and did preparatory reading. Ippolito’s earlier study, in an American law school, looked at predictors of academic success in law students. Law students were offered the chance at a grade bonus (extra marks) if they signed into lectures as ‘ready and prepared’ to be called upon by the professor. Superior performance in all first year classes was demonstrated by the students who signed up as ‘ready and prepared’. The most comprehensive research data available relates to a report on a sample of 2422 first year students — not confined to law students — across nine Australian universities. James et al found that students’ private study time has decreased. Students’ self-reported preparedness for class has also decreased; 58% of students ‘sometimes’ and 13% ‘frequently’, come to class without completing readings or assignments. The report does not make direct correlations between preparedness and performance. Students who reported positively on ‘comprehending and coping’ measures, however, were also more likely to come to class having completed the required readings. ‘Comprehending and coping’ are reasonable indicators of eventual performance.

One isolated study, not in a law school context, found that the majority of university students do not undertake preparatory reading and concluded that student compliance with ‘required reading is not an accurate predictor of course grades’; Hobson reported that on any given day 70% of students have not done the set preparatory reading; Burchfield et al found that about one third of students had complied with set readings on any given day.

Two conclusions can be drawn from the above literature: many students do not do preparatory reading, and preparatory reading impacts performance. However poor performance does not necessarily equate to failure, as student failure rates would correlate to student non-reading rates. Students can often obtain at least a passing grade without doing some or all of the reading, as they rely on lectures and tutorials. These students see the purpose of university in a different light to their teachers — it is about the acquisition of a collection of grades resulting in a qualification, not about participating in the scholarly Great Conversation and immersing themselves in books and the world of ideas. There is a clash of expectations occurring between teacher and students. As Weir observes, ‘instructors often mistakenly assume that all students share their zest for learning. Alas, often we are but credit-accumulation obstacles that they must dodge’.

11 Ibid 460.
13 Ibid 2.
14 Ibid 43.
15 Ibid 55.
16 ‘Academic readiness’ and ‘use of effective learning strategies’ were predictors of high achievement in Larcombe, Nicholson and Malkin, above n 9.
18 Hobson, above n 1, 3.
21 Weir, above n 1.
3. Reading Skills As A Law Graduate Attribute

Most Australian law degrees are now accompanied by a set of ‘graduate attributes’, which add law-specific attributes to the particular institution’s universal ‘graduate attributes’ applying to all degree programs. The University of Western Sydney, for example, lists among its generic (university-wide) graduate attributes: ‘communicates effectively through reading, listening, speaking and writing in diverse context’, whilst the School of Law attributes add to this an attribute specifically for law graduates, that they be able to ‘read effectively — comprehend meaning in text and make inferences; analyse text to identify evidence, lines of reasoning, consequences and logical flaws, assumptions, intentions of author’.  

These graduate attributes expand the idea of a ‘successful’ graduate, in that successful grades (obtaining at least a pass in all subjects, leading to the award of a degree) do not necessarily equate to successful graduates. Dearnley and Matthew offer this broader definition of success: ‘the development of the skills, knowledge and motivation required for independent learning and autonomous professional practice’ Success is more than just graduating. Success from the law teachers’ (and presumably employers’) perspective is a graduate who has achieved self-discipline and an internally-motivated habit of updating their own professional knowledge.

Law schools can therefore, produce successful grades but fail to produce successful graduates if we do not prepare students for employment and professional life. The law is still in written form. We have to equip our students for this reality by training them to be regular and competent consumers of the written word in considerable bulk and complexity. Law students in Australia must master reading, writing, speaking and listening to legal language. This requirement is not diminishing over time – the volume of statute law is increasing and reading judgments still requires a sophisticated command of English and legal language.

4. Reasons for Student Lack Of Reading Preparation

The literature proffers the following three categories of explanation for students’ lack of preparation for classes and reading of assigned material.

(a) Competing Activities and Priorities

Students’ working hours outside university have increased, and part-time or full-time work imposes considerable demands on their time. Placed in a role-conflict, students prioritise roles or responsibilities they perceive as compulsory or necessary and only allocate time and energy to non-mandatory activities if ‘leftover’ resources are available. If law teachers rely on intrinsic motivators for students’ reading prior to classes, reading may suffer in their ordering of priorities. At the beginning of the semester, students scan the subject guides with forensic

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24 Judgments are in fact becoming longer, with more dissents and unnecessary separate concurring judgments, according to Justice Dyson-Heydon: John Dyson-Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) XLVII(1-2) Quadrant.

25 John Tarrant, ‘Teaching Time-Savvy Law Students’ (2006) 13 James Cook University Law Review 64, 71 citing the Australian Vice-Chancellor’s Committee statistic that students worked an average 14.8 hours/week in 2006; Baron, above n 20, 39.

26 Tarrant, above n 25.

27 Tarrant,above n 25, 72.


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precision to ascertain what is compulsory and what is not, and subsequently give their best efforts to compulsory items.

Compulsory attendance in first year seminars is, in the writers’ place of work, an instance of academic attempts to use extrinsic motivation to instil foundation habits of study and attendance in the early stages of university, in part as a response to the fact that poor attendance on campus is a risk factor for student attrition. Whilst in principle intrinsic motivation is to be preferred, in a spirit of being realistic and teaching the students who are sitting in our classrooms, not those we wished were sitting there, extrinsic motivators should be incorporated as a concession to the time poverty of the modern university student. If reading is to successfully compete for students’ limited time, we cannot rely solely on their intrinsic motivations – too many other extrinsic demands are clamouring for attention. Mature-age students face particular demands on their time from multiple roles and responsibilities, juggling the demands of university study with partners, children, care of elderly parents, household duties and the need to contribute financially.

First-year students have a somewhat different set of challenges than those faced by later-year students, in managing activities and priorities that compete with reading and study. First-year students, particularly school-leavers, are busy developing a sense of purpose and identity, forging social connections, and dealing with unprecedented responsibility and autonomy for their own study. They may not be sure why they are at law school, or whether it is for them, and may be anxious about what is expected of them. First-year law students generally require scaffolding to attain self-mastery in reading skills, study and time management, and to reconcile themselves to the realities of the workload. Erickson wryly notes on this front that ‘most first-year students study more than they ever imagined they would but less than we can reasonably expect’. Motivating first-year students to read, then, involves a tricky balance in selecting appropriate strategies. This balance lies in bringing first-year students up to realistic expectations of the reading load without exacerbating first-year anxiety, whilst also imparting skills of self-discipline and time management.

(b) Lack of Consequences, (Or, Doing The Kids’ Homework For Them Is Bad Parenting)

In a Torts law tutorial two years ago the writer asked the students in curt terms why so few had ‘done the reading’. The response was startling: ‘You always cover all the important bits, and we’ll just take notes from that’. The research for this article was catalysed by the realisation that students felt that reading was dispensable.

30 Tarrant, above n 25, 77.
33 Tones et al, above n 31, 510.
35 Tones et al, above n 31, 522.
36 Bette Erickson, Calvin Peters and Diane Strommer, Teaching First-Year College Students (Jossey-Bass, 2006) 119.
40 Erickson et al, above n 36, 119.
41 Bromberger, above n 38, 53.
42 Haggis and Pouget, above n 37, 328.
that one had — to use the modern parlance of addiction — become the students’ ‘enabler’ in non-reading.

It is thus that a vicious cycle of ‘dependency and irresponsibility’\(^43\) ensues. Students do not read; lecturers rescue students by providing a structured summary of the important components of the reading; students cleverly ascertain that reading is, as they suspected, an onerous and unnecessary imposition on their valuable time. Various researchers report explanations for student non-reading as students feeling ‘confident the teacher will always review the important points in the textbook during lectures’\(^44\), students believing that lecturers would ‘discuss any important information included in the reading during class lectures’\(^45\), students coming to class unprepared because ‘they don’t see what difference it makes’\(^46\), and because ‘in all too many classes, there are absolutely no consequences that students experience when they come to class not having done the reading’\(^47\).

This might be done with the best of intentions on the part of the lecturer, as Thomason notes: ‘professors often substitute their strong reading skills for the students’ inadequate ones… this produces a vicious cycle: inadequate student preparation, commendable professorial clarification, even less student preparation’.\(^48\) Good intentions aside, if law teachers want students to read before classes, we cannot ‘rescue’ or shield them from the consequences of the choice not to prepare. If law teachers constantly act as mediators or translators of the reading\(^49\) we are engaging in behavioural conditioning to reinforce undesirable behaviours.

\(c\) Perceived Lack Of Value In Reading Preparation

Students may feel cheated if they do the set reading prior to a class, and then find that it bears little or no relationship to what goes on in the class. The content of the reading thus needs to be incorporated so that students see clear connections between reading, class content, and assessment\(^50\), and conclude that the set reading material is ‘worth learning’.\(^51\)

5. How To Tackle The Problem Of Student Non-Reading In Two Stages

In summary, it would appear that students struggle to find the time to do set reading; even if they do have the time, they don’t see the point of doing the reading as lecturers will rescue them from the consequences of non-reading; the subject can then be passed without reading. A large proportion of students consequently do not do set reading (refer to ‘Lack of Consequences’ above). To insist on continuing with a model that results in students not reading — on the grounds that we would be ‘dumbing-down’ the curriculum\(^52\) — is a form of self-deception and lacks authenticity.\(^53\) Our current reading lists might be impressive, however they are only impressive in an abstract and hypothetical sense if students do not actually read what is on the list.

\(^43\) Weimer, above n 1, 107.
\(^44\) Doyle, above n 32, 67.
\(^45\) Doyle, above n 32.
\(^46\) McKeachie, above n 1, 182.
\(^47\) Weimer, above n 1, 105.
\(^48\) Thomason, above n 8, 16.
\(^49\) Carlos Gonzalez, ‘Extending Research on ‘Conceptions of Teaching’: Commonalities and Differences in Recent Investigations’ (2011) 16(1) Teaching In Higher Education 65, 73.
\(^50\) Lowman, above n 28, 239.
\(^52\) Hobson, above n 1, 4.
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(a) Rethink The Compulsory Reading List

The difficulty for a law teacher in pruning a compulsory reading list lies in the ‘trap of expertise [whereby] experts forget that they are aberrant in relation to the norm’.

A majority of law students may not be able to contend with the reading list that might strike a law academic as ideal. It is better to revise the reading list, so that the majority of students will actually read what is set, than to delude ourselves that the material is relevant and manageable. This revision involves a reduction in both volume and degree of difficulty.

Law constantly changes, and the content of the law taught to students during their degree may well not represent the law when they graduate. As Whitehead said in 1932, ‘knowledge does not keep any better than fish’. Legal content will go out of date, and we would do better to focus on equipping students to update their own knowledge of legal content in the future. Reducing the volume of reading allows time and space for more in-depth engagement with individual topics, and progression to deep learning (which in itself encourages motivation and sustained interest in students). Decisions about volume of reading material can also come back to more basic ideas, referred to earlier, about the purpose of universities (see ‘Should Law Teachers be Concerned About Students Not Reading’ above). The quotation popularly attributed to W B Yeats, ‘education is not the filling of a pail, but the lighting of a fire’ is pertinent to this question. The writer has observed the behaviour of students in constitutional law, who are given a particular topic for a moot assessment, in which they are required to take roles as solicitors and barristers in a team, and argue adversarially against another team of students. The students have time (and an extrinsic motivator, assessment) to go into a single aspect of constitutional law in great depth. They carry great stacks of textbooks from the law library and assiduously read every mention therein of their narrow topic, and have even been seen to read entire High Court judgments, including the dissents! It is illuminating to contrast this with the level of interest and engagement shown by students in preparing for their weekly tutorials in this subject, for which they are expected to read chunks of text and case extracts, which in large part they appear not to have done. The opportunity to focus on a single topic in a purposeful, in-depth fashion appears to be an efficacious motivator of reading.

In carefully pruning a compulsory reading list, with a focus on allowing deep engagement with aspects of the law, students are thus set up for success rather than failure. The experience of success, or ‘competence motivation’ is a powerful incentive for future study.

(b) Apply Strategies To Motivate Students To Read The Revised List

In writing about postgraduate student procrastination in thesis-writing, Kearns and Gardiner describe the myth, or ‘procrastinators’ assumption’ commonly held amongst postgraduate students that motivation is a prerequisite for doing the work. Rather, it is doing the work that creates motivation, which then inspires more work. Applying this to undergraduate law students, law teachers can catalyse this cycle of action – motivation – more action, by the judicious use of extrinsic motivational tools, particularly when dealing with first-year students.

54 Eble, above n 4, 126.
55 Alfred Whitehead, The Aims of Education (Benn, 1932).
57 Tarrant, above n 25, 73-74.
60 Hugh Kearns and Maria Gardiner, Time for Research: Time Management for PhD Students (Flinders Press, 2006) 57-59.
61 Ibid.
62 Scholl, above n 39, 492-493.
Lecturer attitude was identified in the literature as having profound influence on student motivation. Positive motivational attitude was described variously as being that of a coach or role model, possessing enthusiasm, passion, involvement, charisma, clear communication, energy, dynamism; personalising a subject by discussing what it means to the lecturer, exemplifying and embodying competent practice; whilst also showing humility and reminding students that all experts were once novices, lecturers included; and students feeling ‘known by’ lecturers who cultivated interpersonal rapport and a sense of relationship. Cultivating interpersonal rapport is admittedly challenging in the era of larger class sizes and reduced staff-to-student ratios.

Attitudinal traits in lecturers which had a negative effect on student motivation were identified as lecturers who were ‘discomfited, disinterested, mumbling, inarticulate [and had] poor presentation skills, lack of enthusiasm and bad choice and organization of material’, and were ‘negative, patronising and discouraging (‘anyone who can’t follow this isn’t fit to be at university’). A lecturer’s attitude can salve the notorious law student tendency to depression and anxiety, and consequent demotivation, by developing in students a sense of self-efficacy, or confidence in their ability to take on the identity of competent scholars. Lecturers can point to later year students as examples of transition from novice to expert, holding out the possibility to early-stage students that they too can develop into competent legal scholars. Confidence can also be bolstered by providing opportunities for small successes, such as by setting realistic reading loads, particularly in the early weeks.

A further aspect of ‘setting students up for success’ is ensuring that students know how to read scholarly material. The role of the law lecturer is twofold: to impart reading skills unique to the genre of legal texts, and to provide guidance on reading the specific set material.
For first year students, it might be appropriate to provide instruction in specific reading skills: in concept mapping (the graphic or diagrammatic representation of ideas) in core introductory subjects;\(^\text{78}\) in reading for a purpose (using a reading guide or cues such as tutorial discussion questions);\(^\text{79}\) and in the basic skill of ‘text-marking’ or highlighting and annotating reading material.\(^\text{80}\)

Later-year students and first-year students both benefit from guidance in the form of tutorial questions, provided in advance as an aid to reading in preparation for tutorials. If a student is reading large quantities of a legal textbook, it helps to have advance warning of how they will be expected to use the information. Other than tutorial questions, lecturers can provide reading guides, to indicate to students how the weekly reading fits into the structure of the subject as a whole.\(^\text{81}\) This reinforces how the information fits into the ‘big picture’ of the subject, and helps students fit a mass of detail into a scaffolded context. For example, a week’s set reading on the subject of causation in negligence, within a tort law course, can be accompanied by a reading guide which starts by restating the elements of negligence, highlighting for students the context of the material to be read. A reading guide in this instance could also set out the legal tests to establish causation, and suggest to students that they note how each case or piece of legislation fits in with the ‘big picture’ of the element of causation, and the ‘bigger picture’ of negligence as a tort.

\(\text{(e) Extrinsic vs Intrinsic Motivation, Or, Choose Your Weapon Wisely}\\)

External, or extrinsic motivation is the carrot-and-stick style of motivation,\(^\text{82}\) whereby a student is driven to act by external forces not within their control, and sees university as a way of passing examinations and obtaining qualifications. Intrinsic motivation by contrast derives from the student’s own values, priorities and aspirations.\(^\text{83}\)

There is a place for both – the task of the lecturer is to ‘choose their weapon wisely’. As discussed above, students are time-pressured and, in large numbers, not doing their reading. Law students, in one study, reported that they did not want to have their preparation for tutorials assessed, but acknowledged that if it were assessed, they would be motivated to ‘prepare adequately for tutorials’, because ‘they would like to obtain higher marks’.\(^\text{84}\) Extrinsic motivation works to catalyse reading habits,\(^\text{85}\) and once reading habits have been initiated, it is to be hoped students will progress to intrinsic motivation to sustain those habits.\(^\text{86}\)

Likewise, not all surface learning is inherently bad. The classical education ‘trivium’ model of the acquisition of knowledge in three phases\(^\text{87}\) holds true for law students today — a student has to acquire the building-block facts and principles (grammar stage), progress to being able to apply those facts and principles (logic stage) and finally be able to mount an independently reasoned argument based on the facts and principles (rhetoric stage, or ‘deep learning’ in more modern parlance).\(^\text{88}\) Law lecturers can justifiably resort to extrinsically motivating students to acquire the grammar-stage facts and principles from their weekly reading, which can then
be used to support problem solving activities in tutorials (logic stage skills) and higher-order reasoning and arguments in assessments and tutorial discussions (rhetoric stage skills).

(f) Specific Strategies and Tactics

The following are specific strategies suggested by the literature, to be selected with an eye to the degree-stage of the students and the vagaries of individual subjects.

Vocational assessment taps into students’ sense of purpose and intrinsic motivation. Students know why they have to read and prepare for an item of assessment if it is linked to workplace skills — the reading is put in context and has a clear purpose. In the law school context, moots, debates, letters of advice, memos, and so forth can all be used to provide vocational context and purpose for set reading.

Appealing to students’ curiosity, several authors recommend giving a ‘trailer’ or ‘teaser’ at the end of class about next week’s reading material to pique student interest.

At the more extrinsic end of the spectrum, scheduled quizzes, pop quizzes, and ‘minute papers’ are a time-honoured means of motivating students to read before class. The efficacy of these tools is in part contingent on whether there is a mark attached that counts towards the final grade. Even if unweighted, however, quizzes and minute papers (where students are given one minute to answer a question about the reading) take the student who has not prepared from a passive to an active role, as they might otherwise just sit in a tutorial or lecture hoping to absorb, sponge-fashion, all that is required to pass the subject. The quiz or minute-paper that is weighted carries the extrinsic motivator of assessment and grading, a powerful influence in student decisions about whether or not to do the set reading before class. A colleague of the writer uses quizzes very effectively in revenue law tutorials, by setting six questions, collecting the quiz papers, and immediately going through the answers in a class discussion. Students are encouraged to debate the correct answer to each question, reportedly displaying a high level of enthusiasm and engagement. This adaptation of the traditional quiz is attractive in that students are progressing along the spectrum of surface learning to deep learning within the one activity.

Fernald adds extra pizzazz to the pop-quiz with his ‘Monte Carlo’ quizzes — a roll of the dice determines at the start of the class whether a quiz will be administered, and a further roll of the dice decides which article, chapter, or section of the reading will be covered by the quiz. Obviously, with this technique a bank of alternate quizzes is required as it cannot be known in advance how the dice-roll will eventuate.

90 Lowman, above n 28, 247.
91 Christensen, above n 76, 618.
92 Bligh, above n 63, 237; Hobson, above n 1, 6.
93 McKeachie, above n 1, 182.
94 Lowman, above n 28, 230.
96 Scholl, above n 39, 499.
97 Perhaps not a recent development – see David Robertson, ‘Some Suggestions on Student Boredom in English and American Law Schools’ (1968) 20 Journal of Legal Education 278, 282.
98 Hobson, above n 1.
Weir has observed colleagues to ‘give weekly writing assignments and tell students you will collect them randomly during the semester’, with the caveat ‘I’m personally not comfortable with a controlled-terror approach to teaching but I’ve seen it work’.101

Continuing the theme of ‘controlled-terror’ via unpredictability, random oral questioning of students is associated with improved levels of student consistency in preparing for lectures and tutorials.102 This may cause discomfort or fear in students, faced with the prospect of public humiliation103 (thus a tactic to be used with caution on first-year students). The lecturer has to balance the potential embarrassment for the unprepared student against the potential benefits104 arising from that student being motivated to read for the next class.

A less confronting method to use within tutorials is the peer-marked not-for-credit (unweighted) activity. Students are given, without notice, a short piece of writing to do in tutorials as a response to the set reading for that week. This could take the form of a paragraph on a particular aspect of the reading, a point-form response to a problem scenario using the law from the reading, or the facts and ratio of a case within the reading. The students’ work is collected and redistributed on a random basis to other students within the class to be ‘marked’ according to criteria and/or a model response supplied by the lecturer.

The use of 3x5 inch index cards appears in the literature on motivating student reading, in various guises.105 One suggestion is the use of ‘admit cards’, whereby students write their names on one side of a 3x5 index card, and on the other side, the answer to a question nominated in advance by the lecturer, for example a quote from the reading and an explanation of why it is important. If the student does not have a card, they are not admitted to class.106 For law students, this idea could be adapted as, for example, the name of a case and the key legal principle or principles in the case. A colleague of the writer does not allow students to remain in her taxation law class unless they demonstrate they have completed a few set ‘homework’ problems on arrival. A variation of this is to set a writing assignment for the students who are dismissed from class for lack of preparation.107

Another suggested use of index cards is ‘survival cards’ – students can hand in an index card at the start of the class with key ideas from the reading, with cards returned at a revision class in which material can be added, then collected again, with these being all the notes allowed in the exam.108 A simpler variation is the use of exam notes cards, where students submit cards with notes about the preparatory reading at the start of class. The cards are returned during the midterm exam. A student who does not hand in a card, cannot use notes during the exam.109

Lastly, a tactic that most lecturers have tried at some point - telling students you will base exam questions on the tutorial questions and readings110. Go further, and tell students you will base an exam question on specific ‘undiscussed readings’, if the rate of preparatory reading by students in a specific tutorial is so abysmal that there can be no class discussion on the material.111

101 Weir, above n 1.
103 Ibid,48.
104 Ibid,48.
106 Ibid.
109 Ibid, 283.
110 Ibid.
111 Ibid, citing ‘When They Don’t Do the Reading’ (1989) 3(10) Teaching Professor 3-4.
6. Law Teacher Responsibility For Prepared Students: (or, Not Falling At The Last Fence)

If the lecturer’s concerted efforts are successful, and a good number of the students do actually do the reading, what then is the lecturer to do so as not to sabotage their strategy?

A respectful response to the prepared students in the class is to treat the reading as ‘assumed knowledge’ and spend class time using the building-block facts of the reading in higher-order application, analysis, and legal problem-solving. The consistent message given to students, by using the set reading materials as the basis of lectures and tutorials, is that the exercise of reading was worthwhile, and that motivation to read is worth maintaining. This avoids the trap of setting up the cycle of ‘dependency and irresponsibility’ discussed above.

7. An Appropriate Response When Law Students Are Unprepared

It is important to go ahead with the class as planned, and respond consistently to non-reading. This simulates a professional environment, and allows students to realise they are not equipped for the situation in which they find themselves.

The response to an unprepared first-year student requires a more gentle approach than what might be appropriate for a final-year student. For first year students, targeting Socratic-method questioning at an obviously unprepared student could be a confidence-damaging and counterproductive exercise.

For law graduates, arriving at a meeting with a client, or a court date, without having prepared would at best result in loss of professional credibility and at worst, in loss of employment. Thus asking a later-year student who is clearly unprepared for class to lead a classroom discussion or take a side in a debate or mini-moot, whilst potentially discomforting, might help correct flaws in work habits that would later have more serious consequences.

8. Survey Of First Year Students In A First Year Core Introductory Law Subject

‘Introduction to Law’ is the core first-year introductory law subject in the LLB at the University of Western Sydney. In Autumn 2012 semester the subject had 615 students, taught by 15 academics (fulltime and sessional), across two campuses; the author of this article was the coordinator and one of the teaching team in the subject. Changes were made to assessment in the subject in Autumn 2012 semester. In part, these changes were made to try and improve students’ rates of preparatory reading. Three multiple choice quizzes, worth 5% each, were introduced, and conducted in random weeks without notice to students. The aim was to motivate students to do their set reading, lest they be ill-equipped to answer the quiz questions. Quizzes were selected as an extrinsic motivational tool, appropriate for formative low-stakes assessment in a first-semester, first-year subject.

(a) Methodology

A live survey link was created by the UWS Office of Planning and Quality Survey Team, and added to the electronic learning platform homepage for ‘Introduction to Law’. Students were invited via email and announcement to complete a voluntary survey. The Survey Team collated and de-identified all the data to ensure anonymity of responses.

112 Doyle, above n 32, 67.
113 Weimer, above n 1, 107.
114 Bromberger, above n 38, 53.
115 McDougall and Cordeiro, above n 86, 48.
116 Koujoumdjian, above n 95, 111.
117 The UWS Office of Strategy and Quality Unit Survey Team was chosen as the administering agent because of their in-house ethics clearance status. The Survey Team administers the mandatory Student Feedback on Unit quality surveys, and have existing protocols to ensure ethics compliance. In this survey, for example, the Survey Team created the link to the survey, received student responses directly, made the responses anonymous, and quarantined the data from teaching staff until the appropriate release date.
The survey comprised three questions to gather quantitative data, and two questions to gather qualitative data. The three quantitative questions were posed on a ‘prototypical Likert scale with five categories… [displayed as] equally sized and equally spaced… to convey to the respondent that the categories are of equal importance and require equal attention… [the categories] form a clear progression and exhaust the underlying variable’.

The two qualitative questions were designed to gather student perceptions as to what motivates them to read and what obstructs their reading.

The purpose of the survey was to measure the effect, if any, on student reading habits of changes made to the subject. The survey was also intended to gather descriptive open-ended qualitative data from students about why they did or did not ‘do the reading’. The latter purpose was an important justification for the two qualitative questions. Students in the study may have had reasons for doing or not doing the reading which were not raised in the literature. Open-ended qualitative questions — written carefully to avoid biased language — obtain deeper, personalised, more extensive or multiple answers than closed questions can elicit.119

(b) Results

The survey was voluntary, so the data has to be read on the basis that the respondents were a self-selecting subset of the student cohort and therefore likely to be the more diligent and engaged students. 93 students out of a cohort of 615 responded, a 15% response rate. The low response rate of 15%, combined with the voluntary nature of the survey, means that the data obtained has to be treated with caution.

(c) Responses To Quantitative Questions

Question 1:
I did most of the set reading for Introduction to Law each week before seminars
1 = Strongly disagree, 5 = Strongly agree

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Question 2:
The seminar multiple choice quizzes in Introduction to law motivated me to do the set weekly reading
1 = Strongly disagree, 5 = Strongly agree

A high proportion of respondents said they did their preparatory reading each week (over 50%); a high proportion were motivated to do so by multiple choice quizzes; and a high proportion said they would have done their reading even if there were no quizzes. It would appear that these students are the more diligent and engaged students, as anecdotally, the 15 law teachers in the unit in Autumn 2012 reported low rates of reading preparation amongst their seminars, and certainly not 50%.
Motivating Law Students to ‘Do the Reading’

(d) Responses To Qualitative Questions

The qualitative responses were more interesting, being the individualised, personal reasons for students reading or not reading. Responses to both questions were grouped or ‘triangulated’ into clear themes.

Question 4: What motivates you to undertake weekly reading in preparation for your seminars?

Students were motivated to undertake set weekly readings by:

- Interest in the content;
- Fear of falling behind;
- Ambition to get good grades;
- A desire to be prepared for quizzes, seminars and final exams;
- Not having to cram for final exams;
- A desire to understand the content and the seminar discussions;
- And teachers who asked questions of students in seminars.

Question 5: What are the barriers or obstacles that prevent you from doing weekly reading in preparation for seminars?

Barriers/obstacles students identified as preventing them from doing weekly reading preparation:

- Time to read - specific time problems identified were reading and assignments for other subjects, work (paid employment), social life, family;
- Lack of motivation;
- Feelings of ‘laziness’;
- Procrastination;
- Falling behind then being too overwhelmed to catch up ('missing one week and then the next');
- Volume of reading ('content is too dry/lengthy or time consuming to read', 'doing 4 units of law concurrently, each with nightmarish amount of long and complex readings');
- Reading perceived as not necessary ('The amount of reading and that our lecturer writes the textbook up onto slides and goes through it', 'The fact that nobody else does them', 'material is basically covered all over again, it’s like doing the reading twice').

These responses included one of disarming honesty – this student’s one-word explanation as to what prevents him from doing his reading… ‘Girlfriend’ (an instance, perhaps, of ‘competing activities and priorities’).

II. Conclusion

The literature claims various causes for students choosing to read, or not read, in preparation for university classes. Motivating factors for reading were identified as interest, fear, ambition, a desire to be prepared and perform well, a desire to understand, and teachers’ expectations. Obstacles to student reading included competing demands on time, feeling overwhelmed, the volume and complexity of reading, and the perception that reading is unnecessary. In the modest pilot survey reported in this paper, students’ qualitative responses tended to confirm claims made in the literature.

Taken together, the literature and the survey results support a two-pronged attack on the problem of student non-reading: a revision of the reading list, followed by the application of selected motivational strategies. The purpose of intervention is to set students on a course to becoming graduates with the internally-motivated habit of reading and keeping themselves abreast of developments in their fields of law. Law teachers, like all good mentors, must aim to have made ourselves redundant at the end of the process, our motivational tactics no longer necessary to students who have become independent scholars and successful graduates.

‘COLONIAL CAP, GOWN AND WIG’ – THE ORIGINS OF AUSTRALIAN LEGAL EDUCATION

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ABSTRACT

Australian legal education largely emanates from the legal education system of Great Britain and Ireland. This paper examines the early development of legal education as exercised by the London Inns of Court and the King’s Inns Dublin and the qualification of the legal profession in England and Wales. It will also consider the adoption of the British model of law teaching as practised in the early Australian law schools and the predilection for those law schools to appoint, where possible, law academics who had gained their early teaching and practical legal experience in England, Wales and Ireland.

The paper will also examine the gradual development of an Australian orientated ethos of legal education and the early conflicts between the influence of the State Supreme Courts Admission Boards on training for the legal profession and the desire of the law schools to adopt a more creative approach to legal education.

I. INTRODUCTION

The origins of legal education in the New South Wales colony and subsequently of the rest of Australia largely emanates from the qualification system of Great Britain and Ireland. The beginning of the legal profession in Great Britain and Ireland traces back to the thirteenth century.1

In the Middle Ages there were no professional judges in either the communal or feudal courts, nor in the Royal Court in its original feudal form of a meeting of the king’s tenants-in-chief. Consequently there were no practitioners in these courts either. However gradually there came into being a class of legal experts in the communal and feudal courts applying the law and giving judgment, such as the sheriff’s bailiff or the lord’s steward. Conversely, the Royal courts were staffed by royal judges recruited from among the clerks in the royal household and chancery, mostly ecclesiastics who had a smattering of knowledge of either the civil or canon law.2

In the Middle Ages it was still a requirement that the major steps in a legal action had to be taken in court in person. However as litigation became more common it became the practice for parties to be represented by ‘attorneys’ on whom they had conferred the power of binding them by their acts. As the law became more complicated and sophisticated, the skills of the attorney were not sufficient, and so this role came to be progressively filled by an advocate, originally known as a ‘narrator’ or ‘counter’, but subsequently developing into what became known as a ‘barrister’.3

It was during this Middle Ages period that the Inns of Court – Lincoln’s Inn, Inner Temple, Middle Temple, Gray’s Inn – were founded, which together with the chancery inns by the fifteenth-century formed a law school which was nearly equal in size to the University of Cambridge.4 The inns operated very much as universities, with a student having previously studied at an inn of chancery then applying for admission to one of the inns of court as a student. His period as a student (invariably a male) or ‘inner barrister’ would involve being present

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2 Ibid 373.
3 Ibid 375.
at the courts, participating in moots, attending lectures or ‘readings’ and eating dinners with colleagues. On completion of this period of training, the student would graduate by being called to the bar, taking on the status of an ‘utter barrister’. Part of this educational process involved the election of a barrister of at least ten years standing being selected twice a year during the lent and summer vacations to undertake a course of lectures, known as ‘readings’, to the students in the inn. On completion of this task the reader would become a bencher, by virtue of sitting on a bench at moots and fulfilling the role of a judge of the moots conducted within the inn. In the course of time it was these readers or benchers who undertook the administration of the inns which would also have the task of selecting candidates for admission to the bar.  

That branch of the legal profession now known as the ‘solicitor’ originally appeared in the fifteenth century, the name being gained from their function of ‘soliciting causes’. While it would appear that originally this was a role occupied by young lawyers, it was assumed that the earliest solicitors were: ‘probably “in-house” lawyers to religious houses and large landowners’.  

Gradually, despite the opposition of the Star Chamber, solicitors became regarded in the seventeenth century as a separate branch of the legal profession,  with their status being formalised in 1739 by the establishment of a ‘Society of Gentlemen Practisers in the Courts of Law and Equity’ which was the forerunner of the Law Society, incorporated in 1826.  

It was notable that municipal law was excluded from the academic curriculum of English universities until the latter part of the eighteenth century, when Dr William Blackstone commenced lectures on English law at Oxford University in 1753. A Chair in Law (the Vinerian Chair of English Law) was established in 1758, followed by the Downing Chair of Laws of England at Cambridge University in 1800. Similarly at London University, lectures in law had been commenced by John Austin, with the first Chair in English Law being held by Andrew Amos in 1828, although it was not until 1839 that the University awarded the first degrees in common law.  

The background of English law is relevant when considering the establishment of a legal system in Australia when New South Wales was originally settled in 1788. If a British colony was established by settlement, it received the English common and statute laws as might have applied to it at the time of settlement. This was the situation with regard to the settlement of Australia. It is important to note that the doctrine of colonisation by settlement, applied in Australia by the English courts, was not without challenge from the indigenous people of Australia. Sufficient to say that while the High Court in Mabo v State of Queensland (No 2) (1992) recognised the continuing rights of Aboriginal and Torres Strait Islander peoples in the form of native title, the Federal courts have refused to recognise Aboriginal Sovereignty.  

The first professional judges arrived in the colony of New South Wales in 1810, and that until 1808 it was convict attorneys who advised the Governor and assisted the courts. There was a political divide in the New South Wales’ colony between the Exclusives and the Emancipists. The former was composed of those who had come to the colony as free persons, such as former members of the New South Wales Corps, new wealthy free settlers, current members of the military garrisons in the colony and colonial officials. In comparison, the Emancipists were mainly of former convicts and included less wealthy free settlers and those opposed to the influence of the Exclusives. In the early 1820s the leadership of the Emancipists included two

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5 Ibid.  
6 Ibid 163.  
7 Ibid.  
8 Edwin Freshfield, Introduction to the Records of The Law Society, (The (Incorporated) Law Society, 1897)  
9 Baker, above n 4, 171.  
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11  
free lawyers, W. C. Wentworth and Robert Wardell and one ex-convict, Edward Eager.13 These
two early political groups in the New South Wales’ colony gave rise to a dispute over recognition
of the various groups of practising lawyers at the time. The recognition of former convicts who
subsequently satisfied the general property qualification as being able to participate freely in the
conduct of courts gave rise to opposition from the Exclusives.14

In 1810 the only lawyers in New South Wales were three former convicts, George Crossley,
George Chartres and Edward Eagar, all of whom had been lawyers in England or Ireland. They
were supplemented by two English solicitors subsidised by the Colonial Office to practise in
the colony. The arrival of the two qualified lawyers questioned the right of emancipist lawyers
to practise, which was conditional on the absence of qualified lawyers.15 On 1 May 1815, the
new Supreme Court established under the Second Charter of Justice met for the first time, the
Chief Justice, Mr Justice Jeffery Bent, refused to admit any of the three emancipist lawyers,
only approving the admission of W.H Moore, one of the two qualified lawyers from England,
the other not yet having arrived. The outcome was a stand-off between Governor Macquarie,
who supported the admission of the three emancipist lawyers and the opposition of the Chief
Justice who adjourned the court until the 28 May 1815. The court then remained closed until
October 1816 when the two qualified lawyers were eventually available to practise in the court,
their number being increased to five by 1819. The outcome of this dispute was the dismissal of
the Chief Justice by the Colonial Secretary, Lord Bathurst.

Concurrent with these procedural disputes with regard to the admission of lawyers to practise
in the Supreme Court is the consideration of the educational and professional requirements
to qualify potential lawyers for admission. In this respect, qualifications for admission were
originally derived from a British statute of 1729 (2 Geo.II, c.23). These required: ‘applicants for
admission to have been admitted as solicitors in England, Scotland or Ireland to have qualified
by serving a clerkship of five years with a New South Wales practitioner, subject perhaps, to an
examination as to fitness’.16

From this time onward, various changes were made to the admission of attorneys and
barristers. The Third Charter of Justice 1823 established the Supreme Court of New South
Wales in its present form and provided for a fused profession permitting a practitioner to act
either as a barrister or an attorney. This was amended in 1829 with the imposition of a divided
profession, the rule coming into operation in 1834.17 The outcome of these changes was that
while a potential attorney was required to serve for a period of five years as an articled clerk in
the employment of a qualified practitioner in either, New South Wales, Great Britain or Ireland
there was no such provision for barristers. This meant that anyone wishing to be admitted as a
barrister in New South Wales had to have been previously admitted as a barrister or advocate in
either Great Britain or Ireland.18

When examining the various strands for the qualification of lawyers in early Australia and
the various forms of education involved in preparing them for admission the legal profession, it
is necessary to trace this development across the various Australian colonies, and the states and
territories once Australia became a federation in 1901.

13 Ibid 18.
14 Ibid 19.
15 Ibid 100.
16 L Martin ‘From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth
17 Ibid 115.
18 Ibid.
II. New South Wales

The establishment of the New South Wales Barristers Admission Board on 18 June 1848 by the 1848 Admissions Act was the first recorded provision in Australia to regulate the admission of lawyers in New South Wales by stipulating the necessary educational requirements to qualify a candidate for admission, in addition to him being a person of good fame and character. The candidate was to be examined in the Ancient Classics (Greek and Latin); Mathematics, Law and any other branch of knowledge deemed appropriate by the Board. The Board was to consist of the three Judges of the New South Wales Supreme Court, the Attorney General and two barristers elected annually by the practising barristers of the Supreme Court. However this legislation permitted the Supreme Court to retain the right to continue to admit Barristers of England or Ireland, or Advocates of Scotland, in accordance with the provision originally stated in the Third Charter of Justice (1823).

There is no doubt that from the time it was established, the Barristers Admission Board - later to be added to by a Solicitors Admission Board with both being merged in 1958 to form the Joint Admission Board - had an important influence over the maintenance of the educational standards of those who wished to be admitted to practice as a barrister in New South Wales.

Just two years after the establishment of the Board, the University of Sydney was incorporated in 1850. During the inaugural ceremony for the foundation of the university, the Vice-Provost, Sir Charles Nicholson, expressed the purpose of the University as being the provision of ‘those higher means of instruction by which men may be fitted to discharge the duties and offices belonging to the higher grades in society,’ adding that these would include: ‘enlightened statesmen, useful magistrates and learned and able lawyers.’ At this time there was no provision for teaching law at the new University so that in 1857, in acknowledgement of its establishment, legislation was enacted to confer certain privileges on the graduates of that University by exempting those with the University’s Master and Bachelors of Arts qualifications from all of the Board’s examinations other than law. In 1859 a further University Graduates Act extended this privilege to any person with a Degree in Arts, Medicine, or Law from Oxford or Cambridge or from a University established by Imperial Statute, Colonial Act or Royal Charter.

While Nicholson in his inaugural address had also envisaged ‘the early introduction of Lectures on Jurisprudence’, in fact no lectures in law took place until 1859. This was despite the fact that the University Senate adopted by-laws in December 1855 which established a Faculty of Law which ‘consisted of a Chair in English Jurisprudence and, until other chairs in the Faculty were founded, a Board of Examiners to test the qualifications of candidates for degrees in Law’. The by-laws also stipulated that:

[C]andidates for the LL.B were required to attend the lectures of the Professor of Jurisprudence, and to submit to examinations in civil and international law; constitutional law of England; and general law of England. No candidate was to be admitted to the degree until the expiration of one academic year from his graduation in Arts.

While these by-laws subsequently received the approval of the Executive Council in 1856, there was further delay until September 1858 when John Fletcher Hargrave was appointed Reader in General Jurisprudence and delivered his first course of lectures. These lectures which were on jurisprudence have been described as:

19 An Act to regulate the admission in certain cases of Barrister of the Supreme Court of New South Wales Act 1848 (11 Vic., No.57).
21 Clifford Turney, Ursula Bygott & Peter Chippendale, Australia’s First, A History of the University of Sydney Volume 1 1850-1939 (The University of Sydney in association with Hale & Iremonger, 1991) 115.
22 Ibid
[B]eing part of a University System of Education, and the studies in Jurisprudence leading us back into all ages of the world, and into the greatest depths of philosophy, ancient and modern, will necessarily compel us to take enlarged views of every topic before us; and after a time will create an instinctive habit of examining and testing every topic of Jurisprudence with reference to its widest possible relations to the progressive development of society.23

Hargrave, who retained his role as Reader at the University until 1865 when he was appointed as a Judge of the New South Wales Supreme Court, was a prolific teacher. Besides teaching at the University he also taught on a wide variety of legal topics delivering lectures in the Supreme Court, the Law Institute, the School of Arts and throughout country New South Wales.24

A major problem which Hargrave and his successor experienced was one that was common to the University generally at that time; notably, the ability of law lecturers to attract students. In his evidence to a Select Committee of the NSW Legislative Assembly, which had been convened in 1859 to report on the progress of the University, Hargrave attributed the low numbers in his first law classes as being mainly due to two factors: the first was a clash with the examinations for students studying for the Arts degree. The second was the problem of the distance of the university campus from the city, particularly for those students who were articled clerks.25

There were other major difficulties arising from the attempt to formalise legal education at the university. The major one, which will surface at regular intervals throughout this study, was the problem as to the validity of a university law course in providing a qualification for professional legal practice, as had been the case with the legal studies previously conducted in the English Inns of Court.

The problems of recognition of the status of the lectures at the university at this time had been compounded by the refusal of the Barristers Admission Board to recognise the results of an examination which Hargrave had set in his first year of teaching law. The reasons for this refusal of recognition by the Board were unclear. The outcome of these setbacks was that Hargrave resigned from his position as Reader, his successor Judge Alfred MacFarlane continued to experience the same problems, with the outcome being the discontinuance of the lectures in 1869.

This did not prevent the University continuing with arrangements for the establishment of an active Faculty of Law. A Board of Examiners was appointed in 1863 who were made responsible for conducting examinations in civil and international law, constitutional history and constitutional law of England and the general law of England. These examinations were open to graduates in Arts and led to the law degrees of the LLB (1864) and LLD (1866). However no formal teaching was given in these law subjects, since studies were conducted by private reading with the role of the university being that of an examining body.26

In 1876, the 1848 legislation was again amended when the Barristers Admission Act 1879 dispensed with the examinations in the Classics and Mathematics whereby a candidate for admission had passed two annual examinations in any Sydney University Faculty. A candidate was also permitted the option to substitute the additional subject of Logic and French language and literature for Greek.27

A major advance was made with regard to the formation of a law school at the University of Sydney with the appointment in 1878 of a judge of the Supreme Court and a former Attorney General Sir William J. Manning as the Chancellor of the University in 1878. In his first address to the University he referred to new Supreme Court rules which had been introduced and how

23 Ibid 71.
24 Ibid 224.
26 Ibid 128.
27 Ibid 130
they implied a greater role for the University in providing legal education for barristers both at
the preliminary and final stages of their examination, with the University ‘taking a prominent
part in direct legal training’.28

Further progress was made in establishing a fully constituted Sydney University Law
School, with a committee being appointed in 1885 to consider the establishment of Schools
of Jurisprudence and Modern History,29 although a further committee was appointed in March
1886 to enquire into the establishment of a School of Law not Jurisprudence, subsequently
reporting in May that it was not practical for financial reasons to proceed with this proposal.30

Previously there had been a change in the endowments at the University with an English-
born merchant, John Henry Challis, conferring a bequest to the University of two hundred and
fifty thousand pounds on his death in 1880. The outcome of this endowment was that in 1888
a Committee was appointed to make provision for the expenditure of the Challis bequest and
recommended the establishment of a Professorship and four lectureships in law be paid for out
of the bequest. This finally led to the establishment in 1890 of the University of Sydney Faculty
of Law with the appointment of Pitt Cobbett to both its first Chair of Law and as the foundation
Dean of the Law Faculty.31

III. VICTORIA

When examining the various strands for the qualification of lawyers in early Australia and the
various forms of education involved in preparing them for admission to the legal profession, it
is necessary to trace this development across the various Australian colonies, and the states and
territories once Australia became a federation in 1901.

The first mention of the introduction of a structured legal system in what was to become the
colony of Victoria occurred when:

William Meek, Melbourne’s first attorney or solicitor, arrived in September 1838, followed in
January 1839 by Robert Deane. Three barristers - E.J. Brewster, James Croke and Redmond
Barry - arrived in November 1839. Mr Justice Willis, the first Resident Judge at Port Phillip of
the Supreme Court of New South Wales, admitted six barristers to practise on 12 April, 1841
and fourteen attorneys on 8 May 1841.32

Until Victoria was created as a separate colony apart from New South Wales in 1851 it was
subject to the same restrictions on admission of lawyers to practise as provided for by the
Supreme Court of New South Wales and subsequently the New South Wales Barristers Admission
Board.33 However the problems that existed between the University of Sydney and the New
South Wales Supreme Court Boards of Admission during most of the nineteenth century did
not occur in the same way between the University of Melbourne and the Supreme Court of
Victoria. The University of Melbourne, was established in 1851 and began teaching in 1855, but
at this stage the curriculum did not include legal studies. In 1857 law was added to the teaching
programme in order to attract more students. At this time it was fortunate that the University’s
first Chancellor Redmond Barry, besides being Chairman of the Victorian Barristers Admission
Board, was also a judge of the Supreme Court of Victoria. The outcome of this relationship
was that, as the Supreme Court judges were responsible for introducing the rules for admission

28 Ibid 131.
29 Ibid 135.
30 Ibid 139.
to practise in the court, the new admission rules that were adopted exempted University of Melbourne law graduates from having to sit the Supreme Court’s law examinations.34

The teaching of law at the University of Melbourne had quite a modest beginning with the appointment of a single ‘Reader or Lecturer’ – the title of Reader disappearing in 1873. The first lecturer was Richard Clarke Sewell, previously an English academic lawyer, who was already in practice at the Melbourne bar. However, for various reasons, including heavy court commitments, his teaching was not a success and on his resignation in 1861 he was replaced by Henry Chapman.

The appointment of Henry Chapman to succeed Sewell brought a new dimension to the teaching of law in the Melbourne Law School. He had previous extensive legal experience in Canada, the United Kingdom and New Zealand, including his appointment as a Judge of the Supreme Court in Wellington, New Zealand, and as Colonial Secretary of Van Diemen’s Land. His ongoing role as an elected member of the Legislative Council of Victoria and his two terms as Attorney-General, apart from maintaining his practice as a barrister, meant that there were only intermittent periods when he was able to fulfil his role as a Reader at the law school. However some of his notes still survive and give a flavour of teaching was carried out in law school in the 1860s. According to Waugh, there were:

[M]any topics of the first year of the course, including contracts, personal property, the court system and an introduction to constitutional law. His lecture notes on contract had nothing to say about the general principles of formation and content that loomed large for later teachers, but centred on particular kinds of contracts and the varied grounds of incapacity and illegality. His coverage of personal property was like-wise taxonomic rather than analytic, cataloguing forms of property and ways of acquiring title.35

On completing his third period as Reader in 1864 Chapman returned to New Zealand on his reappointment there as a judge of the Supreme Court. The demands of practice and judicial appointments meant that there were constant changes in the appointments to the teaching staff of the law school at this time, and in fact the law school history tells of a protest by the law students in February 1860 on finding themselves without a lecturer at the start of term.36

The first Melbourne academic to have a major impact on the operation of the law school was William Hearn, who was a professor of history and political economy, although he had studied law and had been admitted to practice as a barrister in Dublin.37 In 1857 he commenced his involvement with the law course by acting as an examiner. Then, when the law degree had been formalised, he lectured to the LLB students in Ancient History and Constitutional Law, two of the compulsory subjects in the programme. He was obviously a very innovative teacher, as one Melbourne arts student has described:

He would, soon after lectures began for the year, sort out from his class a troupe who formed the dramatis personae in his little dram of “Legal Duties and Rights” - the cast included a perpetual plaintiff who was the victim successively of a burglar with homicidal tendencies, a usurious moneylender and other predators – Cases have been known of men taking up jurisprudence as an extra subject, merely because it was such a pleasant way of spending a morning hours.38

Hearn’s progression to the position of Dean of the Faculty of Law in 1873 was via a tortuous route. His ambition to be elected to the Victorian Legislature, led the Chancellor to separate the post of Dean from a professorial chair so that he was able to stand again for parliament while retaining the position of Dean which incorporated the same salary and tenure of a professorial position without any restrictions on his political activities.39 These machinations

34 Ibid 7.
36 Ibid 29.
37 Ibid 31.
38 Ibid 32.
39 Ibid 40.
by Hearn should not overlook the fact that law teaching within the University was raised to the
status of a Law Faculty. This was on the basis of recommendations contained in a University
Council committee report convened by a George Mackay. Mackay reportedly based his model
for a Melbourne University Law Faculty on that of: ‘the modern law Schools’ of London and
Dublin’.40

In 1857 the Law Faculty was established by statute which provided that it should consist of
the Dean, all lecturers (who were then all part-time) and all lawyers who were members of the
University Council, whether members of the judiciary, barristers or solicitors. This arrangement
subsisted well into the twentieth century.41

Another interesting aspect of the affairs of the Law School at this time, which still resonates
across the development of many law schools in Australia and internationally, was that of the
appropriate location of the Law School. In the early days of the Melbourne Law School, the
lecture rooms, office and library were located at the university, as was the housing of professors
and their families, who lived in the law faculty building.42 However the majority of the law
students were part-time and objected to having to travel from the City to the University for their
law classes. The matter of location of law classes was exacerbated when in 1880 a new court
complex was completed in William Street in the centre of the city. As a result of a petition by
property students, it was agreed that most classes would be conducted within this new building
in the future. This suited most of the law students and many of the law lecturers, who were also
mostly part-time.

The records of the Law School during this period indicate not only divisions between the
interests of the full-time and part-time students as to where classes should be held but also
the competing demands by the Court for the increasing use of its facilities for its own needs.
This left the Law School to conduct its classes in increasingly unsatisfactory teaching facilities
within the court complex. Although teaching continued in the city within the court premises
well into the twentieth century, the provision of better facilities on the university campus, as
well as the construction in 1926 of new courts by the Commonwealth Government for use of the
High Court of Australia and later the Federal Court, meant that all teaching was subsequently
conducted within the university precincts itself.43 It has been said that:

For the forty years during which they were held largely at the law courts, the location
of the law lectures linked the course to the profession even more strongly than did the
preponderance of barristers among the lecturers… By coincidence, the move back to the
university prefigured a renewed emphasis on the academic, rather than the vocational
side of the law course. 44

IV. TASMANIA

An organisation to represent lawyers in Tasmania (Van Diemen’s Land as it was then known)
was founded as early as 1845. On 29 October of that year a meeting of lawyers resolved that
‘The Van Diemen’s Land Law Society’ be established with the objects as set out below:

[T]o promote fair and honourable practise among the Members of the profession – to
promote propriety of conduct in articled Clerks to attend to applications for Admission–
to oppose improper applications to take such measures as may be requisite to prevent
persons not admitted from practising- and to offer to the proper authorities from time

40 Ibid 38.
41 Ibid
42 Ibid 43.
43 Ibid 43.
44 Ibid
to time such suggestions respecting the Practice in any of the Courts, and respecting alterations of the same as may appear useful. 45

It would appear that the Society had only a limited existence because, while it is mentioned in the 1848 Royal Kalandar and Almanac, there is no further reference to it in subsequent editions.46 One theory of its demise was the lack of contact, (mainly because of distance) between the two main towns in Tasmania - Hobart and Launceston. This also led to antagonism between the north and south of the island whereby the northerners believed southerners considered themselves to be superior. It was this form of inferiority which nearly led to the premature end of the University of Tasmania law school even before its foundation! Further evidence of this antipathy is seen in the establishment in 1888 of a successor society, known as the Southern Law Society, to serve only the needs of legal practitioners residing and practising within the limits of the southern district of Tasmania.47 Not surprisingly, in the same year a similar meeting was held in Launceston, which gave rise to the establishment of the Northern Law Society to serve the needs of those legal practitioners in the northern district of Tasmania.48

The antagonism between northern and southern Tasmanian sections of the legal profession was also evidenced in the discussions that led to the establishment of the University of Tasmania, whereby there was a great deal of opposition by northern Tasmanians to the concept of a University in Tasmania. Despite this opposition the University was established in 1890.

The Faculty of Law of the university was established by the University of Tasmania Council on 6 October 1893, and the meeting to convene its operations took place in Hobart on the 14 March 1894.49 Prior to the commencement of legal studies at the university, qualification of a lawyer involved apprenticeship as an articled clerk as well as success in the local Law Society examinations. In addition, in the absence of a university, students could study for an Associate of Arts qualification conducted by the Tasmanian Council of Education.50 The three leading members at the inaugural meeting held on the 14 March 1894 were Andrew Inglis Clark, the Attorney-General of Tasmania, James Backhouse Walker, a qualified solicitor and University Vice-Chancellor 1896-1899, and Jethro Brown, who had obtained first class honours at St. John’s College Cambridge and qualified as a barrister in England. It was Brown who was elected by the University Council to be the first lecturer in law and history at the University. He was also subsequently elected as Dean of the Faculty of Law.51

The University was able to enrol 32 articled clerks in Hobart who, together with further articled clerks in Launceston, formed the basis for undertaking legal studies. As with most early Australian law schools there was a wide divide between practical and theoretical legal studies, with the articled clerks needing to be convinced of the necessity of studying non-practical subjects such as jurisprudence, roman law and international law.52 Another unanticipated problem was the fact that most articled clerks were not able to satisfy the matriculation requirements of the University, which involved a knowledge of and qualifications in English language and literature, history, and Latin together with an additional language, arithmetic and another science. This problem was solved by the University Senate resolving that legal practitioners could be admitted as students without examination provided they applied before the last day of 1896.53

46 Ibid.
48 Ibid 2.
49 Richard Davis, 100 Years, A Centenary History of the Faculty of Law, University of Tasmania, 1893-1993 (The University of Tasmania Law School, 1993) 1.
50 Ibid 2.
51 Ibid 1-4.
52 Ibid 4.
53 Ibid 5.
These arrangements to facilitate the current articled clerks gaining entrance to the University were not reflected in the first enrolments for the LLB classes in 1893, when there were less than a dozen students enrolled in all the law programmes within the Law Faculty, and only one candidate for the October law examination in that year. By 1900 only twelve law students had graduated, although this was no less a number than graduates in other disciplines across the University.54

Jethro Brown remained as the sole lecturer in law until he left in 1900 to take up a chair in law in London, followed by a similar position in Wales, before finally succeeding to a professorial position at the University of Adelaide. While he was at Tasmania he not only taught all the law students in Hobart but was required to teach on a fortnightly basis in Launceston. When there were insufficient enrolments there to justify him making visits he conducted his teaching by correspondence, posting questions to the students. During part of his tenure, two honorary readers, F. Lodge and N.E. Lewis were appointed to teach property and constitutional law respectively.55

In 1896 Brown received a further set-back when his salary of £500 per annum as a lecturer was reduced on the basis of economy. While the University attempted partially to alleviate the effect of this by redesignating his position as ‘Professor’, Brown held out for permission to practise at the Bar. Although the University initially resisted this request, it finally acceded to his demand but this did not prevent Brown from resigning his position in 1900.56 He was replaced by Dugald Gordon McDougall, who been a graduate at Balliol College, Oxford University, called to the Bar at the Inner Temple and awarded an LLM by the University of Melbourne.57

V. South Australia

Soon after the foundation of the University of Adelaide in 1874, action was taken in 1877 to establish a law school of the university by the appointment of a Committee on Legal Education.58 Initially the Committee was enthusiastic about the proposal and considered recommending the appointment of a professor and a lecturer in law as the inaugural staff of the law school. Consideration was given to admitting all articled clerks in South Australia who had a judge’s certificate to form the initial law student intake. It was also intended to make an exception for these articled clerks by admitting them even if they had not matriculated from the University. This latter proposition was based on the false premise that such a process had been adopted by the University of Melbourne when it was forming its law school, although, as mentioned previously, it had been a procedure followed in Tasmania (then Van Diemen’s Land). However, none of these assumptions finally mattered as the University decided that it was not financially viable to create a law school at that time.

Soon after the University Council recognised the need to establish a law programme and solve any financial problems relating to this proposal, it resolved to vary a previous endowment by Walter Watson Hughes with respect to a Chair in English and Philosophy. It was intended that these subjects would in future by taught by a lecturer, with the Chair being solely devoted to the teaching of English. A proviso allowed for the professorial appointment to be additionally renumerated if the incumbent agreed to undertake some teaching in the proposed law school. Although Edward E. Morris was appointed to this Chair in October 1882, within a month he had withdrawn from the position, overwhelmed by the projected teaching load of not only English, but also jurisprudence, constitutional history, roman law, ancient and modern history and political economy.

54 Ibid 8-9.
55 Ibid 9.
56 Ibid 10.
57 Ibid 12.
To avoid any repetition with any future appointment, the University reverted the Hughes Professorial Chair to the sole teaching of English and appointed Walter Ross Phillips as a new full-time lecturer-in-charge of law. Although the law school student cohort was only twenty six in number, in his first year Phillips was still expected to teach across a wide range of subjects encompassing roman law, law of property, jurisprudence, constitutional law, law of obligations, international law and torts and procedure.

It was near the end of Phillips’ tenure as a lecturer in 1890 that problems arose with regard to the recognition of Adelaide’s law degree by the University of Melbourne. The basis for this objection was that the Melbourne law degree required a student to have a Bachelor of Arts degree as a prerequisite to gaining entrance to the law school programme but this was not a requirement for the Adelaide law degree. Melbourne University’s concern was that many Melbourne students would be tempted to undertake the Adelaide law degree as an easier route to qualifying as a lawyer in Victoria. The problem was solved by the Senate of Adelaide University in 1890 amending its law degree curriculum to incorporate at least two years of the Arts course.\footnote{Ibid 31.}

In the same year Phillips was replaced by a Frederick Penne father with his teaching position being upgraded to that of a professorial chair. Penne father in turn was replaced in 1897 by John Salmond. This appointment is worthy of special comment because Salmond is recognised as being one of the outstanding law academics of the modern era, as his Law of Torts, which was first published in 1907, remaining a standard work up until the present day in all common law jurisdictions. He is also remembered for his well-known text on Jurisprudence. He had previously been a barrister in New Zealand where he subsequently returned to become Solicitor-General, and then a Judge of the Supreme Court.\footnote{Ibid 32.}

\section*{VI. Western Australia}

Not all the Australian Colonies at this time aspired to a local university law degree as a qualification to practise law. Despite the fact that the University of Western Australia was established in 1911 there was no tertiary teaching of law in Western Australia until the founding of the law school in 1927. Prior to this period, while it was possible for members of the legal profession to act as both barristers and solicitors, they could not qualify as solicitors within the colony and subsequently the state. This was commented on in the colony’s leading weekly newspaper, the Inquirer, whose editor stated in the 6 October 1870 edition that:

\begin{quote}
Gentlemen brought up to the Law, in the colony, are barristers only, being called to the bar after having studied as pupils for five years under a barrister of the Court….Our Supreme Court does not condescend to take any notice of attorneys properly so called; there is abundant provision for suckling barristers, but not for incipient attorneys, and we believe we are right in saying that the Chief Justice does not recognise the right of the practitioners of the Court to take article clerks in the way that attorneys do at home.\footnote{Enid Russell, A History of the Law in Western Australia (University of Western Australia Press, 1980) 72.}
\end{quote}

This emphasises the problem of qualifying as a legal practitioner at this time because until 1855 there was no provision for becoming a member of the legal profession. While legislation in 1855 provided for an examination to be taken to qualify as a barrister, there was no alternative provision to undertake articles, and a subsequent Supreme Court Ordinance in 1861, whilst requiring service in the office of a barrister, did not provide for a qualifying examination.\footnote{Ibid 93.}

An ancillary matter at this time, but one of greater relevance as legal practice expanded within the colony, was the lack of law books; not only textbooks but the shortage of \textit{Imperial} statutes and local Acts of Parliament. Earlier practitioners and judicial officers brought their own law books with them when they moved to Western Australia - in 1844 it was claimed that...
there was only one adequate law library in the colony, which was located in the office of Messrs A.H. and G.F Stole local solicitors and agents.63

VII. QUEENSLAND

Queensland was another colony that suffered because of the lack of a law school prior to Federation. It was not until 1936 that the University of Queensland (T C Bearne) established a functioning School of Law. Identifying the pre-requisites required to practise law in Queensland during the nineteenth century is extremely haphazard. It required the examination of both the character and qualifications of each applicant to understand why they were appointed and whether their admission set a precedent for those who followed.

Even though a Circuit Court opened in Brisbane in May 1850, it was not until 1857 that a Supreme Court Act of 1857 (NSW) widened the jurisdiction of the Supreme Court of NSW to include the Moreton Bay District. One of the first functions of the first resident judge S.F. Fulford was the promulgation of rules whereby Barristers of the Supreme Court of New South Wales were also accorded recognition by the Supreme Court of New South Wales in the Moreton Bay District which led to the establishment of a local Bar. The rules also extended the division between the two parts of the profession which persisted in New South Wales, those of barristers and attorneys (solicitors), in that solicitors were prevented from appearing without a barrister, (if there was one available) in cases which involved disputes in excess of £50.

The proclamation of Queensland as a separate colony in 1859 led to the establishment of a Roll of Queensland barristers. The enactment of a Supreme Court Constitution Act of 1867 maintained the ongoing distinction between barristers and solicitors, although the right for a solicitor to appear without a barrister was extended to disputes not exceeding £100. This Act also provided for the establishment of a Queensland Barristers Board. Both this and a subsequent Act of 1867 empowered the Supreme Court to make laws with in respect to the admission of attorneys, solicitors and barristers. The profile of barristers at this time, and in fact up and till the establishment of the University of Queensland Law School in 1936, was that of either immigrant barristers who had qualified in their home country, or native Queenslanders who had either moved interstate or overseas to qualify before returning to their native state.

The formalisation of professional organisations to represent both sides of the legal profession in Queensland was completed on 7 August 1873 when a meeting of attorneys resolved to form a Queensland Law Society. This was followed on the 12 June 1903 by a meeting of barristers in the Chambers of Sir Arthur Rutledge KC, the Queensland Attorney-General, when a resolution was adopted to form a Queensland Bar Association.64

VIII. REFLECTIONS ON THE EARLY DEVELOPMENT OF LEGAL EDUCATION IN AUSTRALIA

Any examination of legal education in Australia at the close of the nineteenth century, a year before the proclamation of Federation, reveals the development of some early trends, even though only a century and a half had elapsed since European settlement on the continent. A major development relates to those early universities that had established law schools. These tertiary institutions at this stage were unsure about whether the major objective of the law degree was to provide a qualification with the primary function of permitting the graduate to gain entry into the legal profession, or whether it should also be designed to give law graduates an all-round education. At this stage, in both the Universities of Sydney and Melbourne and in the New South Wales Bar Admission Board, there was just as much focus on satisfying the standards for a degree in Arts, with its expectation of a knowledge of Greek and Latin, as there

63 Ibid 74.
was on promoting an expertise in major legal subjects such as constitutional law, torts or civil and criminal procedure.

Another trend reflected the major division within the legal profession between barristers and solicitors, and the question of whether the profession should remain divided or be fused, with its consequential implications for the law curriculum. Close examination of the history of the legal profession reveals that this was a major pre-occupation of both the legal profession and the judiciary, with Victoria and New South Wales opting for a divided profession while South Australia was satisfied with a fused profession. It is difficult to ignore its influence within Victoria with the Legal Profession Act 1891 (Vic) converting: ‘all existing members of each branch into barrister and solicitors with rights of practice in every recognised legal field.’

This led to the Melbourne Bar Association’s successful boycott against the legislation which continued on to 1901. Such division of opinions would have long-term implications for the character and the composition of the legal curriculum as taught in tertiary institutions and the conflicting requirements demanded by the various admission boards controlled by each State and Territory Supreme Court.

The other main development is with regard to the nature of the teaching itself. This incorporates not only the selection of the law teachers, including whether or not they should also be involved in practice, employed part or full-time, with higher academic legal qualifications – but also the standard of the teaching accommodation and whether it needed to be near or within easy access to the law courts and also the provision of the teaching materials themselves incorporating a large and high quality law library. It is easy with the virtue of hindsight to reflect on the fact that although both colonial and state legislatures and University Councils usually included a large body of qualified lawyers, they tended to neglect any advocacy to emphasise the provision of these essential components of a successful law school. It will be seen that this lack of self-interest on behalf of the legal profession led to an unfortunate effect on the funding of legal education in the twentieth and twenty-first centuries.

One of the characteristics of this period is that there was a tendency for law school professors to still be expected to have an English law degree and to be of rather young years. At the University of Melbourne:

The council specified that the new professor should be not much under thirty and not much over forty. The job was one for an intelligent, presentable young man with English qualifications and plenty of promise; it was not until 1947 that the university appointed a law professor who was over thirty years old or who had completed a doctorate, and not until 1951 that it appointed one who did not have an English university degree.

During this period, deans of some law schools served for considerable periods of time, exercising a major influence over the development of legal education within their academic institutions. At the University of Melbourne, William Moore, who had legal qualifications from both London and Cambridge University, was appointed Dean and Professor of Law in 1893 at the age of 25 and served as Dean for 34 years until his retirement in 1927. Moore is unique with regard to the development of Australian legal education at this time in that he was the first law professor at the Melbourne Law School to visit law schools in the United States. He had already pre-empted this interest in North American legal education when he appeared before the University of Melbourne Royal Commission in 1902 and stated that: ‘What we have to learn we have to learn from America’. On his visit in 1911 to the law schools at Columbia University and Harvard University he focussed on the case method which characterised law teaching in the United States then, as it still does today. Like his counterpart Jethro Brown of Adelaide University Law School, who

65 J R S Forbes, The Divided Legal Profession in Australia (The Law Book Company Ltd. 1979) 114.
67 Ibid 59.
68 Ibid 80.
had made an earlier visit to America in 1904, he realised that while the case method might be regarded as effective in the United States, the pre-conditions for this effectiveness - such as a large academic staff, graduate entry, casebooks and a substantial library - were not available at Melbourne Law School. It is interesting to reflect that this is most probably the first occasion that an Australian academic took the opportunity to turn away from the past influence of English traditional forms of legal education. Nevertheless it would take at least another half century before Australia would develop unique forms of teaching and learning which would give a lead to the improvement of legal education in other common law systems.
FOCUS GROUPS: THE WHO, WHAT, WHEN, WHERE AND WHY OF THEIR VALUE IN LEGAL RESEARCH

DAVID NEWLYN

ABSTRACT
Legal research takes place in an environment where there is continual scrutiny over particular methods of research and the data obtained via these methods. Focus groups have established themselves as a credible method of data collection in many diverse areas of research and are a popular qualitative ethnographic method of undertaking research into legal questions/problems. This paper will examine the theory behind focus groups, their strengths and weaknesses and how they can best be utilised to obtain meaningful data when undertaking legal research questions.

I. INTRODUCTION
A large amount of literature exists on most aspects connected with focus groups, including their value, design, selecting participants and analysing their results, however there is a distinct lack of literature which has a focus on the use of focus groups for legal research. A focus group is an exploratory qualitative method of investigative research used to gain valuable data often in social areas of research in relatively short periods of time. In its most basic form a focus group consists of a select group of individuals being asked a series of questions designed to establish their reactions to certain topic areas. As Brouma states ‘In the focus group, a group of people agree to meet with the researcher and to discuss among themselves issues raised by the researcher.’

However, the focus group interview is more than just a conversation amongst participants. It is a conversation with a definite and pre-determined purpose. This is a very important distinction that separates the use of a focus group from other more haphazard interviews, conversational based research methodologies or other qualitative research strategies. Fundamentally, unlike qualitative research methodologies which seek to test hypothesis, focus groups aim to understand, rather than measure people. Focus groups aim to provide a: what, how and why of the topics they investigate and as such this may mean that a different type of data is obtained from their usage compared with other quantitative methodologies. This data is often much more descriptive in nature, focusing on what, how and why rather than quantifying things as may be the case via the use of other techniques such as a survey which used a Likert scale to measure participants responses.

II. VALUE OF FOCUS GROUPS
The use of focus groups for conducting qualitative research within social science has a long history. As a qualitative data method tool, focus groups have established themselves as a

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2 Some of the earliest work in social science on focus groups was undertaken by Merton, see for example Robert K Merton & Patricia L Kendall, ‘The Focused Interview’ (1946) 51 American Journal of Sociology, 541 and Robert K Merton et al, The Focused Interview (Free Press, 1956). For a detailed analysis of the history of this type of information gathering tool see David L Morgan, Focus groups as qualitative research: Sage University paper series on qualitative research methodologies – Volume 16 (Sage Publications, 1988) especially 11-14.
very credible method of data collection which enables researchers to access rich and complex processes of an individual's lived experiences. They combine the strengths of a much longer in-depth interview with the element of participant observation in a group context. They provide a naturalistic enquiry which studies real world situations and results in the production of a substantial quantity of valuable descriptive data based on participants' own experiences using participants' own words where other methodologies may fail to gather such levels of detail.

Perhaps simplistically, it is Robson who captures the essence of the focus group interview when he declares that the 'interview is a kind of conversation... (but it is) a conversation with a purpose.' Robson further describes their value by stating that focus groups permit people's views and feelings to emerge, not on any amorphous topic that the participant themselves desire, but on one in which the moderator has some control – through their questions.

Merton, Fiske and Kendall provide a more comprehensive statement of the value of the focus group when they state that: 'The primary objective of the focussed interview is to elicit as complete a report as possible...’ Ary, Jacobs and Razarijie agree with the suggestion from Merton, Fiske and Kendall that focus groups can be a very valuable methodology for allowing a holistic picture of a research topic to emerge. These authors further state that the focus group interview should be considered of greater value to most other structured research tools because of the flexibility it offers.

Focus groups provide a way of gaining deep insight into the construction and transforming of meaning of participants. They not only provide a forum in which participants can list information but they also provide a safe forum in which participants' opinions can be heard. As Berg indicates:

The informal group discussion atmosphere of the focus group interview structure is intended to encourage subjects to speak freely and completely about behaviours, attitudes and opinions they possess.

A properly constructed focus group environment can be mutually stimulating and encourages discussion that allows spontaneous viewpoints to emerge. Ideally it is a flexible research technique that does not limit participants in their choice or range of responses to the questions posed by the moderator. From a legal research perspective, focus groups can result in:

- Cost effective data collection;
- An opportunity to explore a diverse range of topics in which the participants can consider their own views in the context of the views of others present in the group. This social experience results in the production of much richer data;
- An understanding by the moderator of any degrees of consistency or extremity of views amongst the participants;

4 For a general critique of the criticisms and accolades given to the use of focus groups as a comprehensive methodology for primary research see particularly David L Morgan & Richard A Krueger, 'When to use focus groups and why' in David L Morgan (ed), Successful focus groups: Advancing the state of the art (Sage Publications, 1993) 3-19.
5 Colin Robson, Real World Research: A resource for social scientists and practitioner researchers (Blackwell, 1995).
6 Ibid 229.
7 Ibid 240.
10 Ibid 487.
11 Bruce L Berg, Qualitative Research Methods for the Social Sciences (Pearson, 2001) 111.
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• The opportunity to use open ended questions which permit participants to describe what is important and meaningful to them without being restricted to preconceived ideas/expectations or closed ended questions;
• An opportunity to further explore or clarify quantitative data collected through other research gathering methods such as a survey.

As the use of focus groups will require the involvement of individual participants, the organiser of the research project will need to obtain the relevant ethics approval for themselves and all other members of the research project. Legal researchers should be especially cognisant that they may be undertaking research into emotionally sensitive and/or highly prejudicial topics and that they will need to take these matters into account in framing their applications for ethical approval to undertake their research project. Although the use of a focus group into legal questions of research would not involve any invasive techniques, it could involve situations where convicted criminals, children or other potentially vulnerable groups may be asked to participate and this may require extra levels of information and potential safeguards to be supplied during the application process; this of course may increase the time taken to obtain ethics approval. The time to gain ethics approval, which could be as short as several weeks but often because of the nature of how ethics committees meet within university establishments, may be several months, should not be underestimated by any person contemplating the use of a focus group.

III. FOCUS GROUP AND STRUCTURE SETTING

The structure of the focus group is an important concept. It is important that there not only exists a credible balance between the characteristics of the participants selected, but there is a real need to identify the optimal number of people to constitute a focus group.

One of the structural areas of concern for the focus group is size; there is considerable debate about the optimal size for these groups.12 A focus group needs to be manageable for a number of reasons, including the practicality of communicating with a group in a particular setting over a specified time with an appropriate number of moderators. Clearly a number of participants in the hundreds for a focus group is absurd whilst it is also true that too few may prove unresponsive. Figures cited in the literature appear to suggest a range between a minimum of four and a maximum of twelve for an effective focus group. For example Krueger13 states that there should be between four and twelve participants, whilst Morgan14 states that there should be between six and ten participants. The consensus is that the ideal size is somewhere between seven and ten.15

In legal research the moderator or organiser of the focus group session may struggle to individually cope with any more than ten people in any one session. If necessary and time permits, more than one session can be held. This results in numerous participants views being able to emerge, albeit not from the one same group.

It is also important that any focus group session(s) be held in isolation. The group should be physically isolated from others, so that they are not easily disturbed, distracted or influenced by other events.16 From a legal research perspective, this could be a highly important issue as the topics for investigation may be sensitive or complex. Researchers unfamiliar with this concept would be wise to be mindful of this or alternatively seek advice from an experienced moderator.

12 On this issue of the size of the focus group see especially Merton et al, above n 2, 136-137, Bouma, above n 1, 179 and Morgan, above n 2, 43.
14 Morgan, above n 2, 43.
15 Krueger, above n 13, 17.
16 Merton, Fiske & Kendall, above n 8, 139-140 discuss some of the spatial requirements for the operation of a focus group interview.
It is also feasible that people undertaking legal research topics for the first time consider using more than one moderator.

There is also debate as to the time needed to make the session as effective as possible.\(^{17}\) It seems that as few as thirty minutes will be too short to be productive, whilst sessions in excess of two hours may be physically, intellectually and emotionally draining on participants. So it seems that the ideal time lies somewhere around the one hour mark.\(^{18}\) In legal research the topics being discussed may be more emotionally and/or intellectually demanding than sessions held with respect to other areas of social science. Of course, if necessary for larger research projects, multiple sessions could be organised with the same participants although the logistics of this level of organisation may be problematic.

Additionally it seems almost mandatory, after securing the participants’ consent that the session be recorded (either via audio or audio-visual means).\(^{19}\) This gives the opportunity for the material to be transcribed and for a detailed analysis to be undertaken of the participants’ comments. Analysis of the data, with respect to complex/emotive legal issues may prove very difficult if the sessions are not recorded and transcribed for analysis (discussed in detail later in this paper).

**IV. SELECTION OF FOCUS GROUP PARTICIPANTS**

There is a large corpus of literature dealing with the selection of participants for use in the focus group.\(^{20}\) However, most of it appears to be directed to selection of participants from a marketing point of view. In the marketing field identification and recruiting of the ‘right type’ of participants seems to be crucial to the success or failure of the focus group.\(^{21}\)

However, it is submitted that the selection of participants for the purposes of legal research is not as paramount as the selection process identified for the marketing groups. The primary consideration for the selection of participants in any legal research would appear to be that they are in some way connected with the topic of research. Other factors including age, gender, or occupation may not ordinarily be a bar to selection for legal research questions. Indeed a legal researcher may find that there is a limited availability of participants for research questions they wish to examine and they therefore have to accept any and all willing participants. This of course presents a limitation on the data obtained as a result of focus groups and therefore the selection methods for participants would need to be fully disclosed in the reporting of data via this method of research.

A challenge in obtaining participants for focus groups in legal areas is not only identifying willing and eligible participants, but in also ensuring that once identified they attend the prescribed session. Considerable energy will be wasted by the legal researcher if they organise a focus group session and either no one or too small a number of participants attend. Moderators should ensure that they keep in contact with identified participants and send reminders to ensure that they attend the scheduled sessions.

\(^{17}\) Morgan, above n 2, 54-55.

\(^{18}\) Ibid.

\(^{19}\) For a discussion on the merits of audio recording the focus group session see Krueger, above n 13, 111-113. See also Morgan, above n 2, 61-62 who states that whilst audio recording is a necessity, the use of a camera is to be avoided as it tends to be obtrusive and stifles the group’s willingness to be open and honest and to believe that the material that they are presenting the researcher with is less likely to remain confidential.

\(^{20}\) See for example Morgan, above n 2 and Krueger, above n 13.

\(^{21}\) See particularly Morgan, above n 2. See also Krueger, above n 13, 91-94 who even attempts to outline the costs associated with the paying of participants for their involvement in the focus group as a way of inducing their participation. He also outlines some of techniques that professional organisations use in selecting participants such as how marketing research companies track down and eliminate potential participants through random telephone calls at 82-86.
The question of inducements must arise when a researcher is asking a participant to make their views known on legal issues, the discussion of which may cause distress to the participant. Unlike marketing focus group sessions which often use cash as an inducement, it is suggested that offering inducements such as free movie tickets or shopping vouchers could be useful in securing participants for questions involving legal research. In this instance the sum of money involved would be not so great to attract inappropriate participants, but no so low as to be insulting to the participant. This of course, would mean that the cost of holding a session is increased to the research, which in terms of legal research projects often operating on limited budgets could be a concern. However the cost to the researcher in not undertaking this measure in terms of wasted time and inconvenience for other effected participants may be worthy of consideration.

V. FOCUS GROUP QUESTIONS

The most critical aspect of the focus group session for legal researchers are the questions that are presented to the group. Here it is imperative that the rationale for the session is achieved. Importantly a distinction must be made between a prescribed list of closed questions simply put to a group for comment and a completely unscripted interview which allows participants’ discussion to wander towards different tangents. A balance must be struck. There needs to be some outline of the topic to be discussed but the questions cannot be completely scripted and prescriptive if the focus group is to be of full benefit.

Exemplifying the importance of the design of questions, Krueger\(^ {22} \) sequences five types of questions which it is possible to ask in any focus group situation. These are the opening questions, the introductory questions, the transition questions, the key questions and the ending questions.\(^ {23} \) Within these five groups of questions each question can be identified as either being one that is open ended, closed or scale in nature.

Closed questions are defined as those which require very simple answers, often they are suggestive and prompt a particular response, requiring only a yes or no answer. For example, a question such as ‘Do you believe that people require knowledge of the law?’ is likely to achieve a very minimal, perhaps yes/no type of response. A better and more open ended question is designed to allow the participant an opportunity to further expand and relate their response to their own experiences. So a much broader and perhaps extreme example of the open ended version of the previous closed example might be ‘Tell me about your experiences with the law’.

Maykut and Morehouse\(^ {24} \) rightly point out that the majority of questions in a focus group interview need to be open-ended, which invite ‘the interviewee to participate in a conversation.’ A series of rigidly prepared closed or scale type questions will not serve the moderator well and will certainly not allow the maximum benefit of a focus group to be achieved. Hall and Hall also support the views expressed by Maykut and Morehouse in explicitly stating that by using open ended questions participants are able ‘to express themselves more freely than in a structured format.’ In the context of the aim of focus groups being for the development of a holistic picture of a subject to emerge it can thus be clearly seen that the use of open ended questions throughout the focus group session is of paramount importance.

22 Krueger, above n 13.
23 Ibid 54-55.
24 Pamela S Maykut & Richard E Morehouse, Beginning Qualitative Research: A philosophic and practical guide (Falmer Press, 1994).
27 David Hall & Irene Hall, Practical Social Research: Project work in the community (Macmillan, 1996) 191.
It is also important that the moderator does not phrase or present the questions in any way that might be suggestive of an expected response; leading or directive questions are to be avoided. This can be very difficult to achieve when researching legal topics which can be sensitive, emotional or controversial. It can also be further complicated when researching legal questions which may involve dealing with people in vulnerable situations or have experienced crimes being committed against them. This poses a difficult task for any moderator, requiring an ability to distance themselves from their research in order to be able to gauge a more accurate picture of the focus group participants.

Additionally, if the participants are not forthcoming with information, or if their answers are shallow, the use of probes will be appropriate. Probes are questions that are more open ended in nature and tend to move away from the initial question in order to allow participants opportunity to better understand the nature of the question and to draw from their own experiences in answering. For example, if participants were posed the open ended question ‘Tell the group about your experiences with the law’, and responses were minimal or participants were unable to think of examples then perhaps a further probe question would be ‘Can you tell the group about any problems you have encountered in your life’. Further if this also did not prove successful an additional probe such as ‘Tell the group about any problems that your friends have had. What were the outcomes of these experiences?’ This example clearly shows a situation in which the range of possible responses increases as the breadth of the question is gradually increased. Of course, the more distant the probes become from the original question posed the more likely it is that the information obtained is not directly relevant to the research being undertaken, so very careful planning and preparation is needed by the researcher before conducting the focus group session. The researcher needs to have a list of open ended questions and probes ready before beginning their session, but they also need to be flexible to respond to different group dynamics.

VI. SPECIFIC FOCUS GROUP QUESTIONS IN LEGAL RESEARCH

If the questions used in the focus group session are not properly conceived, planned and executed, the data which is obtained may be poor. Quite obviously the questions participants are asked must seek to address the problems/questions the research has as its premise, although there is always potential that participants might not necessarily confine their comments to any one particular research topic.28

The following examples about topics which involve legal research illustrate this point.

If the topic of research was with regard to legal aid and the appropriate interest group was the general public, appropriate open ended questions might include some of the following:

• What do you understand about legal aid?
• Can you tell me about any problems you have had where you have needed to seek legal aid?
• If you were faced with a legal problem what would you do?
• What services do you think are important for legal aid to deliver?

If the topic of research was the role of lawyers in society and the appropriate interest group was the general public, appropriate open ended questions might include some of the following:

• What do you understand by the term ‘lawyer’?
• What do you think the role of a lawyer should be?
• Can you describe the characteristics of a good lawyer?
• Can you indicate some examples of the moral issues lawyers might face in their work?
• Tell the group about a recent court case you’re aware of and how you feel about the lawyer’s role in that case.

28 So important is this that the researcher should seriously consider undertaking a pilot focus group (perhaps with a smaller sample) to refine their questions/group interaction skills before conducting a live focus group(s).
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Examining a sustained legal research project which has already been completed with regard to research relating to the knowledge that school teachers had of the law as appropriate to the performance of their professional duties, appropriate open ended questions included:

- What do you understand by a ‘legal issue’ or ‘legal problem’?
- Can you tell me about any legal issues which affect your daily working lives?
- Can you think of any particular instances in your career which have involved a legal problem or issue.
- If you were presented with a legal problem (for example an assault) what would you do?
- What legal information do you think it is vital for a teacher in the classroom to have?

Another useful example (from a completed PhD project) to illustrate this point with specific reference to legal research involves a project of research completed to examine the impact that television programmes about the law have on the development of beginning law students. That project used the following questions with its focus group participants:

- What legal shows have you seen or do you watch on television? Why do you like to watch those ones?
- How would you describe the lawyers on television?
- What distinguishes a good lawyer from a bad lawyer?
- Who is your favourite lawyer on television and why?
- What conflicts or ethical dilemmas arise for television lawyers?
- What does television tell the public about lawyers?

VII. ANALYSING FOCUS GROUP RESULTS

Following a focus group session a number of tasks need to be undertaken in order to develop meaningful data which can then be analysed. Knodel describes this specific process in relation to focus groups as having two essential parts, those being ‘a mechanical one and an interpretive one’.

The mechanical process referred to by Knodel is a logical first step in the organisation of material. It involves a transcription of all material that was recorded during a focus group session. This verbatim transcript is checked for accuracy against the original recordings and is refined to remove any stumbles, such as ‘umm’s’, ‘ahh’s’, pauses and repetition which frequently occur during people’s speech but have no bearing on the data which is obtained from the focus group sessions. This information is supplemented by notes that the moderator has made during the conducting of the session. These notes can be very important in the conceptualisation of the information provided by any participant which may not be directly evident from the audio only version of the session. For example, a participant may point to something or smile or shrug their shoulders and each of these events would have a specific and important context to what they have actually said. Thus the transcript which is then produced needs to be supplemented with this information wherever it is available. This process is consistent with the views of Kvale who in particular detail describes not only the practical difficulties of this process but also the dire consequences and limitations on the data gathered if the process is neglected. The aim of this

31 Ibid 273.
32 John Knodel, ‘The Design and Analysis of Focus Group Studies: A practical approach’ in Morgan (ed), above n 4, 44.
33 Steiner Kvale, Interviews: An introduction to qualitative research interviewing (Sage Publications, 1996) 160-175.
The entire process is to produce user-friendly material for coding and analysis, whilst preserving the integrity and accuracy of the information obtained from each of the sessions.

Following the mechanical process is the interpretive stage. This stage can be just as complex and time consuming as the mechanical stage. As Burns describes, the interpretive stage involves taking all of the information provided from the transcript and putting it into manageable and meaningful form. This also involves the segmenting of the data or its categorisation. This is a continuous process of reducing what can often be an overwhelming amount of raw data into a manageable form. Knodel suggests that these categories be kept as broad as possible and that the key criteria in the categorisation should be with regard to the similarity of the topic that the participants are making a comment upon. This author specifically states that material should be categorised ‘into analytically distinct segments.’ The process of categorisation is helped, according to Knodel, because ‘…topics for analysis are generally dictated by those included in the focus group guidelines.’

The classification or categorisation of this information is undertaken in order to achieve the intent of the focus group. That is, to allow the most comprehensive picture of the research topic to emerge as possible. Morgan notes this implicitly in stating that the categorisation of the focus group material needs to be consistent with the purpose of the focus group that is “…to understand why…” To this end quantification will not be a useful tool in seeking to categorise information. Reporting on the number of particular responses is a mistake that novice uses of focus groups often make. Under no circumstances should the particular responses of focus group participants be counted and/or expressed in percentile form in the reporting of the data obtained.

Implicit in this process is the notion of subjective judgement. It is inevitable that the researcher must use subjective judgement in the choosing of the categories to use to segment the data and then choose which data to include in those categories or even when necessary sub-categories of information should be used. A further element of subjectivity is contained within the notion that the researcher must then select which examples they choose to report upon as providing typical or atypical examples of a particular category of information. It is this very subjectivity, which as Charles and Mertler note, leaves the focus group open to considerable criticism. It is for this very reason it is suggested that the focus group should not be used as the sole method of data gathering in any research project involving legal subjectivity. Instead the focus group should be used as one element in the process of triangulation of data.

VIII. A SPECIFIC EXAMPLE OF CODING/ANALYSIS OF FOCUS GROUP RESULTS IN THE LEGAL RESEARCH FIELD

Using the example described above relating to the open ended questions about the knowledge that school teachers had of the law as appropriate to the performance of their professional duties, we see that the author of this paper indicates three distinct categories of responses emerged relating to the question ‘Can you tell me about any legal issues which affect your daily working lives?’ These three categories were an injury to a person, a crime and some other type of work related responsibility. In the reporting of the results for this research project the author indicated

36 Knodel, above n 32, 37.
37 Ibid 45.
38 Ibid 44.
39 David L Morgan, ‘Future directions for focus groups’ in Morgan (ed), above n 4, 241.
40 Ibid.
42 Newlyn, above n 29, 166.
that he coded all of the recorded data into one of these three categories. For example, when we look at the full reporting of the results in this research project we see representative responses reported from the focus group under the category of an injury to a person (specifically injuries to a student participant) such as:

Since my school is involved in a lot of contact sports (rugby union and rugby league) there seems to be a lot of injuries to the boys … particularly broken bones … one student has had the same leg broken twice.43

It’s not common but I have come across a few accidents of our kids…particularly during work experience…we make it compulsory for them to do the experience so I get really worried when one of them gets injured.44

Of course numerous other comments from focus group participants were also reported in that study not only for this category but for the other two categories of responses identified as being relevant to the focus group question which was asked of the participants.

IX. OTHER EXAMPLES OF FOCUS GROUPS USED IN LEGAL RESEARCH TOPICS

The project undertaken by Belknap, Holsinger and Dunn45 represents a very good example of how focus groups can be used to successfully undertake research into legal questions and produce a rich data set from small, purposive samples which may not have been as successfully obtained by using other research methodologies. In an effort to better understand the large rates of incarceration of female offenders the authors of that paper undertook eleven separate focus groups across the state of Ohio with both prisoners and the professionals who were responsible for their care and rehabilitation and were able to gather very rich data relating to their topic of research. The authors indicated that the focus groups provided a very effective method of data gathering as they allowed for genuine and close engagement with individuals who may in other circumstances may be difficult to engage with.46

The extensive legal research project into sexuality and the politics of violence and safety within the homosexual community of the United Kingdom undertaken by Moran and Skeggs47 is a very useful example of a project that not only uses focus groups as a data gathering strategy but also sought to strengthen the credibility of the data obtained by using additional and complementary research tools such as structured interviews and surveys. This process of using multiple research methodologies is referred to as triangulation and is discussed in the next section of this paper. The Moran and Skeggs project used focus groups as a method of engaging with the marginalised homosexual community as a way of establishing individual rapport and to gain trust in the obtaining of data which may not have been forthcoming via the use of other more traditional forms of data gathering techniques such as a survey. Although the project did also use other methodologies such as surveys for data gathering from relevant local government and criminal justice bodies. This different strategy was deemed appropriate for use with the other groups for cost reasons and also for triangulation reasons.

43 Ibid 178.
44 Ibid 179.
46 Ibid 381.
Triangulation\textsuperscript{48} is just one of the various multi-method strategies frequently referred to in the literature.\textsuperscript{49} The technique’s origins can be traced back to the work of Campbell and Fiske in 1959.\textsuperscript{50} It is a commonly used technique to improve the validity of the research results obtained. In its simplest form triangulation is defined as “…the use of two or more methods of data collection in the study of some aspect of human behaviour.”\textsuperscript{51} Triangulation can involve the use of either qualitative or quantitative additional methods of data collection such as surveys or individual interviews; each new method of data collection does not have to come from the same methodological branch of research, but instead is designed to provide a fuller picture of the questions/problems being examined.

One of the most influential articles on the nature and benefits of triangulation is that written by Mathison.\textsuperscript{52} In her article titled \textit{Why Triangulate?} Mathison gives a comprehensive account of the history of triangulation and its benefits. Mathison is categorical in her belief that triangulation is essential for accurate research to be undertaken. She states this quite clearly in the following comments:

\begin{quote}
Good research practice obligates the researcher to triangulate, that is, to use multiple methods, data sources…to enhance the validity of research findings.\textsuperscript{53}
\end{quote}

Mathison further notes that regardless of epistemological or philosophical perspectives:

\begin{quote}
…it is necessary to use multiple methods and sources of data in the execution of a study in order to withstand critique by colleagues.\textsuperscript{54}
\end{quote}

Similarly Greene, Caracelli and Graham provide a comprehensive analysis of the benefits of triangulation when they state that:

\begin{quote}
The core premise of triangulation as a design strategy is that all methods have inherent biases and limitations, so use of only one method to assess a given phenomenon will inevitably yield biased and limited results. However, when two or more methods that have offsetting biases are used to assess a given phenomenon, and the results of these methods converge or corroborate one another, then the validity of enquiry findings is enhanced.\textsuperscript{55}
\end{quote}

Therefore it can be seen that triangulation is a technique used to give validity to the data collected. In essence it involves the use of different research devices. It is utilised to ensure that sole reliance is not placed upon one source of data. Using triangulation can lead to the strengthening of credibility of the data obtained in undertaking legal research projects by indicating to the reader of researcher findings that as full as picture as possible of the research topic has been examined.
XII. CONCLUSION

As Dominowski suggests: ‘research is a fact-finding activity’ so it would be naïve to think that the use of a focus group in legal research is a panacea. Properly conceived, planned and executed, focus groups can be a valuable source of data gathering which is designed to ensure that a holistic picture emerges of the relevant research topics/questions. However, focus groups like all research methodologies draw some controversy. When researching legal problems/questions if a researcher was to focus exclusively upon quantitative methodologies they would be open to criticism from supporters of qualitative methodologies and vice versa. The use of multiple methods or multiple research strategies reduces the possibility for criticism. As Jick notes, multi-method research is a valuable strategy which allows researchers to ‘…improve the accuracy of their judgements by collecting different kinds of data bearing on the same phenomenon.’

The focus group can be an extremely valuable tool for researching different areas of the law and its use should be promoted to the legal research community. However any researcher who uses it exclusively must fully acknowledge the limitations of their approach in the reporting of their research findings. It would be extremely wise for a researcher in the law discipline to wherever possible/feasible/practical plan to use multiple methods of research activities otherwise they should expect that they will face scrutiny of their findings if they choose to exclusively use the focus group as their sole method of data gathering. Ideally, in any given legal research project a focus group would not be used in isolation as the sole method for gathering data/information on a given topic. The value of triangulation is implicit to the concept of ensuring that the data/information obtained is credible when undertaking legal research questions.

57 Further, all research strategies have limitations. It would be naïve to suggest that any one particular research strategy could comprehensively hope to achieve the accurate recording and reporting of all of the relevant information concerning a particular problem. Instead what is necessary in the choice of a particular methodological stance is to identify an appropriate approach and make its limitations clearly known. For a further discussion on the limitations of all research methodologies see particularly Paul D Leedy, Practical Research: Planning and design (Maxwell Macmillan, 5th ed, 1989) at 214-220.
ASSESSMENT IN THE LAW SCHOOL: CONTEMPORARY APPROACHES OF AUSTRALIAN PROPERTY LAW TEACHERS

KATE GALLOWAY,* PENNY CARRUTHERS** AND NATALIE SKEAD#

ABSTRACT

Assessment in higher education has received increasing attention in the last decade. This attention is partly a result of the recognition that traditional assessments do not reflect the application of learning in a real life, or real work context. Calls for changes to traditional modes of assessment in legal education have gained currency with the latest iteration of what it means to be a law graduate, in terms of knowledge, skills and attitudes. The nature of what is taught in the law curriculum in terms of legal knowledge and skills – both professional and generic – inevitably has an impact on the learning outcomes for a degree course or course unit and this in turn will affect the intent and the mode of assessment. This paper reports on the assessment practices of Australian property law teachers ascertained from results of a national survey, and situates these practices within the context of the diversity of learning outcomes and types of assessment, as well as contemporary thinking on assessment per se.

I INTRODUCTION

Much has been written about law curricula particularly in terms of what should be taught. This focus has recently been expressed in terms of what law graduates should ‘know, understand and be able to do’.¹ This raises the question of how we know that students know, understand and are able to do these things. As law teachers, we may teach doctrine, context and skills to our students, but do they learn it? How can we support their learning? And if they do learn, how do we know this? Assessment is of course one means by which we can determine what students know, although this is not as straight forward as it may seem.² For example, some analyses of modes of assessment indicate its capacity to promote ‘surface learning’ which is learning that is not retained. In this regard, assessment and its design also affect how students learn.³

In 2002, James, McInnis and Devlin pointed out that there was ‘considerable scope to make assessment in higher education more sophisticated and more educationally effective.’⁴ The role of assessment and its effective implementation takes on a new resonance in the context of contemporary statutory regulation of universities in Australia via the Tertiary Education Quality and Standards Agency (TEQSA) which began its tenure in January 2012,⁵ and creates a new

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1 Sally Kift, Mark Israel and Rachael Field, Bachelor of Laws Learning and Teaching Academic Standards Statement (Australian Learning and Teaching Council, 2010).
4 Richard James, Craig McInnis and Marcia Devlin, Assessing Learning in Australian Universities (Centre for the Study of Higher Education, 2002).
5 Tertiary Education Quality and Standards Agency Act 2011 (Cth).
reason for serious dialogue about assessment in higher education generally, and in light of the Discipline Standards for Law, in legal education in particular.

In terms of the Discipline Standards for Law, a focus on skills such as communication and self-management suggest a need for different forms of assessment that would embrace more than simply discipline knowledge which is the traditional domain of legal education.

In a survey of property law teachers around Australia, the authors have sought to understand the landscape of property law curricula in terms of content and skills. What is taught and what might be taught have been reported on elsewhere. What also emerged out of the survey responses is the way in which property law teachers assess content and skills and what they would like to do – and this is the focus of this paper. While not a comprehensive review of the law degree generally, what this study reveals may well be of interest to legal educators more broadly as a sample of approaches to assessment of and for student learning across Australian law schools.

After introducing the survey and discussing how respondents assess in their property law units and how they would like to assess, this paper will contextualise these data in light of contemporary literature on assessment in legal education and in higher education more broadly.

II The Survey

The results reported here are part of a larger project surveying property law teachers in Australian law schools. The survey complies with the National Health and Research Council of Australia’s National Statement on Ethical Conduct in Human Research. Both the University of Western Australia and James Cook University have provided ethics approval for the project.

The authors administered an anonymous online survey as the method of data collection in this project. Property law teachers in all Australian law schools were identified via law school websites and authorship in the field of property law, and were invited to participate.

The survey dealt first with general information about the structure of the respondent’s degree program and followed with questions on: teaching methods; unit content; skills acquisition; and assessment and outcomes. Finally, there were open-ended questions about what respondents wished to change in their teaching of property law, and the challenges they faced. A total of 18 responses were received from 14 different universities. The survey questions dealing with assessment in the property law unit are included as an appendix at the end of this paper.

A. Assessment Types And Weighting

In terms of assessment, the authors sought information regarding assessment practices adopted by the respondents in their property units. The alternatives provided in the survey were: final

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6 Kift, Israel and Field, above n 1.
7 Ibid.
10 In this paper ‘property law unit’ is used as a generic term covering all those aspects of property law that are prescribed by the ‘Priestley 11’ including property concepts, land law and personal property. The ‘Priestley 11’ is the list of prescribed areas of legal knowledge identified by the Law Council of Australia that a student must cover within his or her law degree in order to be admitted to legal practice. See <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3043E5A9-1C23-CACD-2244-5630B0BFA046&siteName=lca>, 11 December 2011.
exam; written assignments; in-class tests; class participation; practical component; and oral presentations. Overwhelmingly, the assessment of property law at the respondent universities is by way of a final exam and a written assignment (see Figure 1 below.) All respondents include a final exam as part of the assessment and most respondents (81%) also include a written assignment. About 20% of respondents include an in-class test or class participation component and there is minimal assessment by way of a practical component or oral presentations.

Figure 1: The number of respondents adopting different forms of assessment.

On average, the final exam is worth around 60% of the final mark in the unit and, where there is a written assignment it is worth about 30% of the final mark. The remainder of the mark is made up of some form of combination of the other assessment types (see Figure 2 below.)

Figure 2: The mean percentage of the unit mark allocated to each assessment type.

There were no additional questions in relation to the written assignment such as word or page limit for the assignment and whether the assignment was a research assignment or rather one that focused on assessing the fundamental property principles covered in class. It is recognised therefore that there is no means of benchmarking such assessment.

In regard to the final exam, the authors sought further information as to the different question types that may be included in the exam and their respective weighting. Figure 3 shows the
number of respondents who adopt problem solving, essay or short answer questions in the exam and Figure 4 shows the mean percentage of the final exam that is allocated to that particular question type.

**Figure 3: The number of respondents who adopt particular types of exam question**

![Figure 3: The number of respondents who adopt particular types of exam question](image)

**Figure 4: The mean percentage of marks for particular types of exam question.**

![Figure 4: The mean percentage of marks for particular types of exam question.](image)

Figures 3 and 4 reveal that the property law exam at all the respondent universities includes problem solving questions and that the mean weighting for the problem solving component is in the region of 70%. Half of the respondent universities include essay style questions and the mean percentage of marks allocated for essay questions in the exam is 45%. In those universities that adopt short answer questions in the exam (25% of respondents) the mean allocation of marks for this type of question is 35%.

The overall picture that is painted by these results is that the typical assessment methods adopted at the respondent universities consist of a final exam worth the majority of the marks in the unit accompanied by a single written assignment worth the remainder of the marks. Some universities may also include an in-class test, class participation, a practical component or oral presentations; however only a small minority of the respondent universities adopts these forms of assessment.

**B. Preferred Alternative Assessments**

In light of traditional practice in the law degree, the authors contemplated that the standard assessment in the property unit would be by way of a final exam and a written assignment.

11 Davis and Owen, above n 3, 4; Johnstone and Vignaendra, above n 3.
However, given the contemporary focus on graduate attributes and the skills aspects of the Discipline Standards for Law, the authors sought to identify whether property teachers would prefer to adopt other assessment practices in the unit that embraced a wider approach than the traditional focus on doctrine. If so, respondents were asked: why they would like to adopt other practices; whether it was likely the preferred form of assessment would be adopted in the future (viability); and what would be the reasons preventing the adoption of the preferred assessment type.

A variety of responses were provided and these are included in Table 1 below. There was no common theme regarding the preferred assessment type, though three respondents indicated they would like to introduce oral presentations or oral exams (or both) and two respondents were interested in online quizzes or multiple choice or short answer questions. Another respondent indicated a preference for an extended research essay. This is of interest. As noted below in the discussion of outcomes, property teachers rarely include, as one of the outcomes for the property unit, the development of research skills. The respondent who would like to introduce a research essay indicated that it was unlikely this would be adopted due to lack of time.

There were however, common threads running through the reasons why respondents would like to introduce the preferred assessment. These include improved assessment of skills, increased variety of assessment, and improving the amount or quality of feedback provided to students. Unfortunately, most respondents reported it was unlikely that the preferred form of assessment would be adopted. A variety of reasons were provided with a lack of resources, time and funding being the most commonly cited.

<table>
<thead>
<tr>
<th>Preferred assessment type</th>
<th>Reasons for preference</th>
<th>Viability?</th>
<th>Reasons re viability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written assignment</td>
<td>Variety; assessment of skills; feedback</td>
<td>NO</td>
<td>Lack of human resources; too many students</td>
</tr>
<tr>
<td>Extended research essay</td>
<td>Assessment of skills</td>
<td>NO</td>
<td>Lack of time</td>
</tr>
<tr>
<td>Multiple choice questions and answers that could be read by an optical scanner</td>
<td>Variety; feedback; efficiency; saves money</td>
<td>NO</td>
<td>Politics</td>
</tr>
<tr>
<td>Oral presentations</td>
<td>Assessment of skills</td>
<td>NO</td>
<td>80% of students are external. Intensive School, no compulsory [attendance].</td>
</tr>
<tr>
<td>Oral exams; Oral student presentations</td>
<td>Legitimate, accurate truthful assessment; variety; assessment of skills; feedback; alignment with outcomes</td>
<td>NO</td>
<td>Lack of time; Lack of funding</td>
</tr>
<tr>
<td>Would like to continue the reflective journal (if can find marking assistance); would like to do a negotiation exercise, of a lease as means to introduce different skill and real world context for learning about leases</td>
<td>Variety; assessment of skills; feedback</td>
<td>NO</td>
<td>Lack of time; Lack of funding; Lack of human resources</td>
</tr>
<tr>
<td>Preferred assessment type</td>
<td>Reasons for preference</td>
<td>Viability?</td>
<td>Reasons re viability</td>
</tr>
<tr>
<td>---------------------------</td>
<td>------------------------</td>
<td>------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>Group work, practical problems, short answers, secure online quizzes</td>
<td>Variety; assessment of skills; feedback; alignment with outcomes</td>
<td>YES</td>
<td>Staff opposition will have to be overcome if we are to meet the regulatory requirements imposed by the AQF and ALTC Standards</td>
</tr>
<tr>
<td>I am quite interested in vivas</td>
<td>Legitimate, accurate assessment</td>
<td>YES</td>
<td>Because I am senior enough to be able to do so</td>
</tr>
</tbody>
</table>

C. Assessing Skills

While many of the assessment types may seem to involve assessing content knowledge, of particular interest are those responses that related specifically to the acquisition of skills. Assessment of statutory interpretation, negotiation and oral communication stood out from the responses.

In two cases, respondents reported the incorporation of a statutory interpretation assignment requiring students independently to learn an entirely new area of law by reading the relevant legislation and applying the law to a hypothetical legal problem scenario. The exercise was described in terms of facilitating a range of skills, including self-learning, problem solving and clear, concise writing skills, as well as statutory interpretation. The task implicitly also requires immersion in a discrete area of property law content.

At another law school, negotiation skills are assessed both summatively and formatively through ‘an early lecture, small group on theory/ethics of negotiation, formative exercise in small group and summative exercise in small group’.

Additionally, oral communication skills through oral presentations on property law topics; or the rigorous and robust incorporation of class participation, are reported by a further two respondents. Robust class participation was undertaken as a form of assessment in these terms: ‘I make it clear that I am not assessing whether what they say is correct, just whether they have done the reading and thought about the law. “I didn’t understand p458”, counts as CP [compulsory participation].’

In addition, a range of other thoughtful practices have been adopted to enhance the development of skills including the drafting of court submissions as part of an assignment, the writing of an assessable weekly reflective journal and undertaking an in-class exercise where students read a trust deed and relate its provisions to the background substantive law regarding the creation of trusts and trustee’s powers and duties. Although this latter exercise relates to the trusts component of this particular property unit, it may easily be transferred to a property context. For example, reading a mortgage or lease document, or an appropriately drafted will, and requiring students to comment on the particular provisions of the document in the light of a hypothetical fact scenario and the relevant substantive property law.

While not a large sample, these examples offer an alternative to the traditional forms of assessment. These examples embrace a focus on skills relevant to the context (and content) of property law units. In this respect, it is suggested they provide a model for development of practice in this area.

12 Survey response.
D. Outcomes

An integral part of assessment is of course alignment with the unit outcomes. The survey therefore asked participants to indicate unit outcomes and the level of expected outcome: advanced, intermediate or introductory. The question asked was: ‘What are the key outcomes for the unit and at what achievement level (advanced, intermediate, introductory)? Please indicate how the assessment aligns with the key outcomes’.

Responses were wide ranging. This could be attributable to a number of reasons. This question came towards the end of a very long survey; it is possible that the question was not phrased very clearly: ‘Question is somewhat advanced for the co-ordinator!’ and ‘Don’t follow the question – sorry.’ An alternative interpretation for this response may be that at some institutions, there may be no practice of categorising levels of understanding in this way.

For the most part, however, respondents provided detailed information regarding the outcomes, skills, achievement level and assessment alignment. The responses fell into two groups: those who interpreted outcomes to mean skills and provided an achievement level in relation to the acquisition of particular skills; and those who reported on broader outcomes, including skills. In the latter case, outcomes were linked with either the achievement level or assessment type or both.

A number of respondents provided information linking outcomes or skills with assessment. In some cases the responses were quite brief, for example:

The assignments test students’ abilities to research, reason and [tests] communication skills in the area of property. The exam tests students’ comprehension of the unit. The exam is not perfect, but to date no one has come up with a more efficient and cost effective way of assessment.

In other cases the responses were more detailed, as illustrated by the response in Table 2 below, covering three discrete areas: integrating knowledge; theoretical and comparative perspectives in understanding the social and economic effects of property law principles; and effective and persuasive communication.

<table>
<thead>
<tr>
<th>Outcomes, including skills</th>
<th>Assessment type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Integrate knowledge of property law principles and exercise analytic skill and professional judgment to generate appropriate responses to moderately complex problems</td>
<td>Problem solving exercises in exams</td>
</tr>
<tr>
<td>Critically evaluate the social and economic purposes and effects of property law principles, using theories, broader contexts and comparative perspectives</td>
<td>Assignments</td>
</tr>
<tr>
<td>Research independently, synthesise and analyse property law information in standard formats to create new understandings or new applications</td>
<td>Assignments</td>
</tr>
<tr>
<td>Interpret, communicate and present property law ideas effectively and persuasively to specialist and non-specialist audiences and peers</td>
<td>Class discussion and assignments</td>
</tr>
</tbody>
</table>

Another respondent also emphasised the integration of property law knowledge with other areas such as equity, contract, torts and succession and requires students to ‘understand the international aspects of land law in particular in relation to native title’.

A further conceptualisation of the question appears in Table 3 below. The structure of this response indicates the mode of curriculum design in terms of knowledge, skills and attitudes.
implicit in the Discipline Standards for Law. This unit is ‘introductory [and] assignment and exam aligns with attitude and skills’.

### Table 3: Survey Response – Outcomes for a Property Law Unit

<table>
<thead>
<tr>
<th>Knowledge</th>
<th>Skills</th>
<th>Attitudes</th>
</tr>
</thead>
<tbody>
<tr>
<td>to understand the fundamental principles relating to property law, and the policy factors which underlie these principles</td>
<td>to use the skills of statutory interpretation and case construction in addressing law problems</td>
<td>to never rely on memorised statutes or cases</td>
</tr>
<tr>
<td>to develop an understanding of the relevant statute and case law relating to property law</td>
<td>to develop the ability to recognise and discuss property law issues; 8. to develop internet based communication skills</td>
<td>to always check the currency of any source of information</td>
</tr>
<tr>
<td>to gain an appreciation of the context in which property law operates</td>
<td>to demonstrate high level written communication skills</td>
<td>to never be satisfied with an indirect report of what the law states</td>
</tr>
<tr>
<td>to critically evaluate the implications of land law principles in Australia and explore potential areas for reform</td>
<td>to develop oral communication and presentation skills</td>
<td>to consider the ethical and practical dimensions of property law</td>
</tr>
<tr>
<td>to develop a working knowledge of fundamental land law, including land title systems, sufficient to satisfy professional requirements for legal practice</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This response confirms the emphasis in property law units more generally, of: statutory interpretation; problem solving and written communications skills. Interestingly, this response identifies additional skills not noted elsewhere in this survey including the development of internet-based communication skills and oral communication and presentation skills. In addition, the respondent, under the heading ‘Attitude’, articulates and flags some basic, though wise, warnings for students.

In the results overall, an outcome which is perhaps noticeable by its absence is an emphasis on research skill development. Although some respondents mention research it does not appear to be a skill which is generally developed in the property units of the respondent universities. This is possibly a reflection of how the survey questions were posed. In the skills acquisition section, research skills were not included as an alternative and this may have affected the way in which respondents answered the outcomes section.

### III. Discussion

The importance of assessment in higher education cannot be overstated, and this is reflected in its place ‘at the forefront of efforts to improve teaching and learning in Australian higher education.’ On this view, assessment may be seen not just as assessment of learning, but assessment for learning and even assessment as learning. Regardless of the purpose of assessment, as Bloxham and Boyd point out, it ‘shapes the experience of students and influences their behaviour more than the teaching they receive.’

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15 Kift, Israel and Field, above n 1.
16 Survey response.
17 James, McInnis and Devlin, above n 4, 3.
19 Ibid, 1.
Johnstone and Vignaendra confirm this in the context of legal education. Their 2002 national survey revealed that legal education at that time was incorporating what they described as ‘diversification of assessment tasks’ - that is, assessment beyond a traditional exam. They found that this was a result of growing semesterisation of the law degree, a changing student body and a different institutional policy framework. While there was evidence of diversification of assessment however, the examination still remained the dominant mode of assessment, particularly in the core subjects. This comprehensive 2002 survey provides a useful benchmark against which to measure contemporary assessment approaches in property law units and, more generally, to assessment in all units in the law degree. Two areas of interest are the diversity of assessment in the property law units surveyed, and the purpose of assessment.

A. Diversity of Assessment

The first point of note in the property survey results is the ongoing heavy reliance on the examination as assessment, some 10 years after Johnstone and Vignaendra’s report. While the data collected seems to indicate that a variety of learning outcomes are sought in property law units, there remains a steadfast reliance upon traditional modes of assessment, predominantly the examination heavily weighted towards problem solving. This reliance suggests an ongoing doctrinal approach to the teaching of property law, and a low emphasis on the development of skills through alternative or more diverse assessments. There are a number of possible reasons for this.

The first observation is that the perception of property law as a challenging subject conceptually may result in a focus on teaching doctrine, possibly at the expense of skills. This is reflected in the bias in the reported learning outcomes, towards knowledge. The fact that the principal skill taught is statutory interpretation does not contradict such a conclusion, given the centrality of statute to property law content (particularly in terms of the Torrens system). Statutory interpretation is one skill that intersects with content per se.

Such a focus on knowledge may predispose a teacher towards an exam as assessment especially in light of academics’ own undergraduate experience. This is particularly the case in law, where most academics would have graduated within a system with its own focus on examinations as assessment. As James, McInnis and Devlin point out:

The values underlying approaches to assessment are so deeply embedded in academic practices developed over many years that it is often extremely difficult to change them without challenging fundamental and often competing assumptions about the nature of teaching and learning across the institution.

Likewise, attitudes in the profession have in the past influenced assessment choices in the academy. The examination is seen as the ‘gold standard’ of genuine assessment of learning.

The second possible reason for the limited diversity of assessment may be the ongoing (and incomplete) transformation of legal education from its traditional doctrinal foundation to a much wider education: a mixed model of legal education that incorporates practical skills which, one might expect, are best assessed using a more diverse array of assessment types. While professional and generic skills have been on the agenda for legal education for many years.
years now, in terms of property law units at least, there seems to remain a greater emphasis on discipline content (knowledge) than on teaching skills. This is evidenced by the survey results in both the learning outcomes and the types of assessment in property law units.

Thirdly, those respondents who would prefer to diversify their unit’s assessment have themselves identified why they do not. It is crucial to understand these reasons, which go to the heart not just of law teaching, but teaching and assessment in higher education generally. These reasons centre on time, funding, resources and what could be described as collegiality.

James, McInnis and Devlin point out that the context of the university, faculty and department are critical for development and renewal of approaches to assessment. They acknowledge that change takes some years to implement successfully. Kift also identifies that the law curriculum has struggled to keep pace with the change in higher education and the profession. Yet if it is accurate to extrapolate from this sample of property law assessment, to say that there has been little shift in types of assessment in legal education since Johnstone and Vignaendra reported in 2002, then perhaps a fresh look needs to be taken at the resources available and the attitudes of academics towards such renewal.

While some respondents indicated a desire to diversify the assessment in their units, it is also notable that many respondents were happy to retain the status quo. This could be either because there was already a diversity of assessment in their units, or because of a preference for more traditional modes of assessment. This highlights the role of values and attitudes in curriculum design, particularly in choice of assessment.

**B. Attitudes to Assessment**

As mentioned above, Earl’s classification of approaches to assessment identifies assessment of learning, assessment for learning and assessment as learning. It is suggested that the traditional mode of heavily weighted exam is most likely to focus on assessment of learning. It is of course possible that an exam offers a strong motivation to learn thus crossing the boundaries of these different types of learning. The latter categorisation of exams as assessment of learning however, may represent the more traditional doctrinal focus of the law degree whereby being versed in doctrine, or subject content, is the primary purpose of legal education.

The survey results may also be interpreted to show that each of these three attitudes to assessment is represented in the survey responses. Some responses, for example, seem to presuppose the learning of skills through assessment or assessment as learning. Oral communication skills are seen to be developed through tutorial participation and robust class discussion. It is not clear whether such skills are explicitly taught, however this assessment is seen of itself to foster such a skill. Likewise, while responses did not include research as an explicit outcome, assessments such as written assignment presuppose student engagement in research thus representing assessment as learning.

Assessment for learning may be represented by on-course assessment. It promotes learning through feedback to students on their understanding of discipline knowledge, or their acquisition of skills. It has been reported for example, that the frequency of assessments may improve student learning and experience particularly in relation to mastery of basic concepts, though at
the expense of ‘redundant’ subject content.\textsuperscript{34} Recent research suggests this is also the case in a (US) legal education context, though these results are somewhat qualified.\textsuperscript{35} Additionally, any loss of subject content is potentially of concern for property law teachers.\textsuperscript{36}

This view of progressive assessment supporting student learning is not uncontested. Torrance for example, is of the view that continuous on-course assessment represents assessment as learning, in a way that promotes an instrumentalist approach to student learning,\textsuperscript{37} or ‘surface learning’.\textsuperscript{38} In contrast, James, McInnis and Devlin frame this in a positive way, in terms of a ‘reasonable workload (one that does not push students into rote reproductive approaches to study), [that] provides opportunities for students to self-monitor, rehearse, practise and receive feedback’.\textsuperscript{39}

Further complicating the benefits apparent in assessment for learning via on-course or continuous assessments, Johnstone and Vignaendra\textsuperscript{40} as well as James, McInnis and Devlin,\textsuperscript{41} recognise the increasing pressure on students and academic staff in terms of the sustainability of continuous workloads. The issue of sustainability is important also in terms of capacity to assure that work is the student’s own. The invigilated examination is an efficient way of achieving this.

If the end of semester exam remains the most heavily weighted assessment (assessment of learning), then feedback throughout semester (assessment for learning) is useful for students’ revision and self-monitoring of their progress, translating into improved exam performance.

Is there capacity for a shift in attitudes to assessment within university property law units both to make student learning paramount and to support education in skills as well as content? The open-ended responses regarding the desire to implement new or different assessment indicate that property law teachers do hold a range of views about assessment and its relationship to learning but that implementing assessment along these lines is not presently viable.\textsuperscript{42} Recognition that a change in practice might improve assessment of skills, increase the variety of assessment, and improve the amount and quality of feedback provided to students, all represent a desire to assess for student learning. These kinds of reasons are consistent with literature discussed above. While such attitudes are heartening in terms of the potential of the law curriculum to encompass contemporary best practice in assessment, it seems that there are still significant barriers to implementation.

\section*{IV. Conclusion}

To the extent that the compulsory property law unit can be seen as a microcosm of the law degree in general, the results of this survey are somewhat concerning. While it is noted that there is some diversity in assessment, covering some skills and therefore not limited solely to discipline content, the overall picture is a heavy reliance on content-focussed assessment of learning via end of semester exam.

It may be that property law teachers feel able to justify this focus. After all, property law is often taught in the early years of a law degree and emphasis on the fundamental legal skill of problem solving, assessed by way of an exam, may be seen as entirely appropriate. In addition,
the property law unit is just one of many law units. It may be thought that other law units are better suited to adopt alternative assessment practices.

However, there are a number of property law teachers who see the potential of a diverse range of assessments to facilitate student learning and to promote the development of skills as well as subject content, but feel constrained in their ability to implement such change. On balance, this survey seems to show that property law – and, possibly also, the degree as a whole – has not necessarily advanced in terms of assessment practice since 2002. As an essential component of curriculum, assessment is not necessarily keeping pace with the imperatives of the contemporary law degree. The reasons for this seem to be no different from concerns expressed in 2002: concerns regarding resources, time and attitudes of law academics towards legal education.\textsuperscript{43} Perhaps, finally, the time has come for these ongoing barriers to effective and appropriate assessment design to be confronted and addressed.

\textsuperscript{43} Johnstone and Vignaendra, above n 3. See also in general terms, in James, McInnis and Devlin, above n 4
Section 5: Assessment and outcomes
1. The assessment in property law units may include a variety of assessment types. How much of the final grade is allocated to the following: Please choose the appropriate response for each item:

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2. Approximately what percentage of the final grade is allocated to other types of assessment not listed here? Please write your answer here:

3. How many written assignments are students required to submit? Please choose only one of the following: [Choices included: N/A, 0, 1, 2, 3, 4, 5 or more]

4. How many in-class tests are required of students? Please choose only one of the following: [Choices included: N/A, 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 or more]

5. How many online quizzes are required of students? Please choose only one of the following: [Choices included: N/A, 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 or more]

Section 6: A few more general assessment and outcomes questions
1. Where there is a final exam, what is the approximate proportion of marks allocated to the different question types listed below: Please choose the appropriate response for each item:

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</table>
2. What are the key outcomes for the unit and at what achievement level (advanced, intermediate, introductory)? Please indicate how the assessment aligns with the key outcomes. Please write your answer here:

3. Are there other ways you would like to assess but don’t? If YES, please give details in the box provided.

4. Why would you like to adopt these preferred assessment practices? Please choose all that apply:
   - [ ] Provides a more legitimate, accurate and truthful assessment
   - [ ] Provides a greater variety in assessment
   - [ ] Provides for the assessment of skills
   - [ ] Provides more effective feedback
   - [ ] Provides for a more closely aligned method of assessing the desired outcomes
   - [ ] Improved efficiency
   - [ ] Saves money
   - [ ] Other:

5. Do you anticipate being able to adopt these preferred assessment practices in the future? Please choose only one of the following: [Choice of yes or no]

6. Why you would be able to adopt the preferred assessment practices? Please choose all that apply:
   - [ ] Time available
   - [ ] Funding available
   - [ ] Human resources available
   - [ ] Requisite expertise available
   - [ ] Other:

7. Why would you NOT be able to adopt the preferred assessment practices? Please choose all that apply:
   - [ ] Lack of time available
   - [ ] Lack of funding available
   - [ ] Lack of human resources available
   - [ ] Lack of requisite expertise available
   - [ ] Other:

8. Do you have any other comments regarding the teaching of property law in the 21st century? Please write your answer here:
TAX LAW TEACHING: THE MOVE FROM TRADITIONAL MODELS OF CURRICULUM TO PRODUCTIVE AUTHENTIC FORMS

MICHAEL BLISSENDEN AND DAVID NEWLYN*

I. INTRODUCTION

Curriculum can be viewed as one of three message systems used in the learning environment. The remaining two message systems are pedagogy and assessment. The formal concept of curriculum is relatively new to the academic world. It has been examined in detail by well-known educational scholars including Tyler, Taber, Wheeler, Nicholls, Skilbeck, Walker and Stenhouse, principally in the second half of the twentieth century. Curriculum has been viewed traditionally as ‘what is taught’ as opposed to the pedagogic concepts of ‘how you teach’ and ‘how you examine what you have taught’ (otherwise commonly referred to as ‘assessment’).

This paper explores the historical constructs of the concept of curriculum and their formal representations, and then examines the move towards the more holistic approach of authentic or productive curriculum, in the context of the teaching of taxation or revenue-based units in Australian law schools.

II. WHAT EXACTLY IS CURRICULUM?

Defining the term curriculum has attracted a considerable attention from many academic writers in the educational field of research and study. Curriculum is often regarded as ‘what is taught’. However this is a very facile view of the formal concept of curriculum because depending on its contextualisation, the term ‘curriculum’ can have many different meanings. Although the intention of this paper is not to focus directly upon the various dialectical meanings, a brief analysis is necessary to set the historical and educational contexts of this formal concept.

The formal concept of curriculum is less than seventy years of age having developed primarily in the second half of the twentieth century. From the time of this formal development and

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1 See especially Ralph Winfred Tyler, Basic Principles of Curriculum and Instruction (The University of Chicago Press, 1949); Daryl K Wheeler, Curriculum Process (University of London Press, 1974); Decker Walker and Jonas Soltis, Curriculum and Aims (Teachers College Press, 1986); Lawrence Stenhouse, School Based Curriculum Development (Heinemann, 1975); Lawrence Stenhouse, An Introduction to Curriculum Research and Development (Heinemann, 1978); Hilda Taba, Curriculum Development: Theory and Practice (Harcourt Brace and World, 1962); Audrey Nicholls, Developing a Curriculum: A Practical Guide (George Allen and Unwin, 1978); Malcolm Skilbeck, School-Based Curriculum Development (Harper and Row, 1984).


3 See especially the discussion given to the value of the curriculum compared with non-regulated systems in Murray Print, Curriculum Development and Design (Allen and Unwin, 2nd ed, 1993), at 1-10.
examination by academic scholars there has been a struggle to continually define and redefine the parameters of the term. Smith and Lovat make the point when they state:

The word itself (curriculum) is used in many different contexts, by principals in schools, by teachers, by curriculum writers in education systems, and even by politicians. It can mean different things in each of these contexts.

This problem has been noticed by others beside Smith and Lovat. Skilbeck also attempts to define the concept of curriculum and outlines his reasons for acknowledging it as a very difficult task. Encapsulated in the following quote is Skilbeck’s tacit acknowledgement that it is impossible to give a precise definition of the term, again due to the notion of contextualisation:

Because curriculum is such a commonplace term within education and is increasingly used in the wider public arena, definitions will just be a kind of shorthand for positions or viewpoints which can be quite varied and (or) elaborate.

It is evident therefore that the term has a multitude of different meanings amongst different user groups. Although, even within some of these various groups there can be confusion over the precise meaning of the term. Marsh and Stafford indicate that within the education community there can be confusion as to how broadly the term can be construed. These two authors state that the term is repeatedly confused with the concepts of syllabus and instruction. Consequently it can be contemplated that if there is such confusion within one of the main user groups for the curriculum concept, it is hardly surprising that the term is so heavily contextual.

There is clearly a problem if we seek to provide a concrete definition of the term. But some solace can be taken from the viewpoint of Stenhouse who has suggested that ‘definitions of the word curriculum do not solve curricular problems’. Indicated in this quote is that it is unnecessary to be drawn into the academic debate over the nature, boundaries and parameters of this concept. This paper does not seek to enter into this continuing debate of the need to formally define the term curriculum. It is important to make clear that the curriculum is an essential part of delivering information, content and instructions to students in an effective and efficient way. Similarly, one could state that curriculum structures the experiences that lead to student learning outcomes. Or as Preston and Symes put it:

The curriculum is an important reference point in education, containing a prescription of what knowledge and frames of thinking are deemed valuable and useful at a particular point in time by influential and powerful sections of society.

Further complicating matters is that many modern academic scholars have taken what has been the isolated view of curriculum and linked it to the concepts of pedagogy. This is probably the

4 For a discussion of the formal notion of curriculum see Franklin Bobbit, The Curriculum (Mifflin Co., 1918) 42.
6 Skilbeck, above n 1, 20-24.
7 Ibid 21.
8 Marsh & Stafford, above n 2, 1.
9 Ibid.
10 Stenhouse, above n 1, 1.
antithesis of the view held by Preston and Symes, who hold a traditional view of curriculum being ‘an organisation of knowledge for instructional and educational purposes…’ \(^{13}\) Many other writers in the field do not hold the same viewpoint. We see this illustrated quite well by Brady and Kennedy who discuss the inextricable link between curriculum and pedagogy.\(^{14}\) On this basis it is by a recognising that it is via a curriculum that knowledge and skills can be communicated to individuals and groups that leads to the proposition of how this can be most effectively accomplished in taxation or revenue law units.

**III. TRADITIONAL MODELS OF CURRICULUM**

Curriculum models are used to examine the different elements of a curriculum and how those elements interrelate. Curriculum models assist designers to comprehensively and systematically set out the rationale for the approach to constructing the delivery of learning content.

Considerable literature exists on the historical development of different models of curriculum and their inherent worth.\(^ {15}\) It is not the intention of this paper to explore those details in depth. However a synthesis of that content is offered here in order to demonstrate how these traditional models of curriculum differ from the newer productive/authentic forms of curriculum outlined later in this paper.

From the slightly simplistic viewpoint of a hypothetical specialist in educational research, two polarised curriculum models emerged from the work of a number of educational theorists in the mid part of the twentieth century and these created the basis of the formation of the formal development of the notion of curriculum examination. These models are described here as ‘Product’ and ‘Process’.\(^ {16}\) The product model has a specific emphasis on thorough planning and specific intentions, whereas the process model has a different focus, this being on activities and general effects. The following table represents some of the features of each of these two models of curriculum theory.

**Table 1: The Product and Process Models of Curriculum development**

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<thead>
<tr>
<th>Product Model</th>
<th>Process Model</th>
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<tr>
<td>Logical</td>
<td>Flexible</td>
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<tr>
<td>Chronological order</td>
<td>No defined objectives</td>
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<td>Objectives based/driven</td>
<td>Thematic</td>
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<tr>
<td>Content driven</td>
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<tr>
<td>Rigid</td>
<td></td>
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<tr>
<td>Precise assessment</td>
<td>Assessment not based on objectives</td>
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</table>

The earliest known developer of the product model was Tyler in 1949\(^ {17}\) and his work was later expanded upon by Taba\(^ {18}\) and others including: Nicholls\(^ {19}\) and Wheeler\(^ {20}\). The product model is premised on the development of formal objectives, which then leads to the development

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\(^{13}\) Preston &Symes, above n 11,77.


\(^{16}\) Allan C Ornstein & Francis P Hunkins, *Curriculum foundations, principles and issues* (Allyn and Bacon, 5th ed, 2009) prefer to use the terms Technical and Non-technical for their delineation of models.

\(^{17}\) See especially Tyler, above n 1.

\(^{18}\) Taba, above n 1.

\(^{19}\) Nicholls, above n 1.

\(^{20}\) Wheeler, above n 1.
of learning experiences based on required content which in turn leads to assessment of these experiences based on the stated objectives. Tyler’s model can be expressed as the following four step process:

1) Statement of objectives
2) Development of content
3) Development of learning experiences
4) Assessment of stated objectives

The hallmarks of the product model are its inflexibility and logical and sequential structure. The starting point for the development of a curriculum must always be with the statement of the objectives. If new content is to be delivered or new assessment methods are to be introduced this necessitates the entire process being reinitiated. This has consequences for the studying of tax or revenue-based law units which could be described, at times, as undergoing rapid and significant change to content due to common law, statute law and policy changes. Although clearly a benefit of this model is the delivery of transparent outcomes for students and external stakeholders.

The process model of curriculum is quite different to the product model described above. It is predicated on the belief that education is primarily concerned with the process of intellectual or cognitive development, rather than specific objectives.21 As Kelly puts it ‘it is based on the belief that to have been educated is to have been helped to develop certain intellectual capacities rather than to have acquired factual knowledge…’22 Its principal proponent was Stenhouse, who in the 1970’s developed the model as a direct reaction to the inflexible nature of the product model.23 Stenhouse provided a very different model which did not focus on prescriptive objectives.

The major components of Stenhouse’s model are:

1) Content
2) Methods
3) Evaluation

In an attempt to explain the basis of the process model Brady indicates it has the following characteristics:

1) no initial statements of objectives;
2) a reduced emphasis on content than method;
3) doesn’t endorse the notion that evaluation is of pre-specified objectives.24

As a fundamental basis, the model has no initial statement of objectives, is centred on the view that education is concerned with the holistic development of a student rather than memorising specific facts or pieces of knowledge.25 With no pre-specified objectives, a problem arises in the teaching of tax or revenue-based units with assessment and evaluation. This may be of concern where units need to be accredited by external authorities, who may need to directly see that specific knowledge and information has been delivered to students.

On this basis, these models are quite different from each other. Product models have been criticised because they are inflexible and do not allow for the dynamics of a classroom or other learning environment, as well as the need for dramatic change when an updating of content is required.26 Process models have been criticised because they are too flexible and do not allow for the assessment of pre-specified objectives, which can cause a problem in standardisation

22 Ibid.
23 See especially Stenhouse (1975), above n 1 & Stenhouse (1978), above n 1.
25 Kelly, above n 21, 17.
of learning outcomes and their measurement. Form curriculum models have been criticised extensively because they fail to take into account the dynamics of the classroom or other learning environments and from the viewpoint of Wheeler do not work in practice.28

IV. FROM TRADITIONAL MODELS TO AN AUTHENTIC/PRODUCTIVE VIEW

The preceding discussion of the traditional formal models of curriculum reveals some problems when the theory of these models is translated into practice in the classroom or other learning environment. Within the last twenty to thirty years there has been recognition by some education scholars that the theory has been unhelpful when attempting to use it as a basis for interactions in practice. Specifically there has been a concern over the nature of the diametrically opposed major and traditional models of product and process and their fixation on the debate over the need for objectives and/or object based assessment.

The move from these formal traditional models of curriculum has meant a shift toward what has commonly become known as productive or authentic curriculum. These recent developments in curriculum have been sparked by the recognition of a need to change towards more authentic and productive teaching practices, which focus not necessarily primarily on objectives, content or assessment, but more on a philosophical way of delivering learning.

There are several arguments put forward for this development. One of the central arguments is that with traditional process and product models of curriculum the results have often seen the development of a curriculum which is fundamentally stale, mundane, unimportant or boring and more importantly is perceived to have no real world application to the individual learner. In particular, even considering the flexible nature of the process model, the problem with traditional curriculum models is that they can translate into a situation where students do not acquire a useful set of competencies but instead a random collection of facts, which can be dissociated from each other in time and purpose and meaning. Brady and Kennedy describe this traditional view of the formal notion of curriculum as the antithesis of student-centred. That is, it revolves around the views of the designers of the curriculum, which may not necessarily correlate to the needs and learning aspirations of the students.29

The other key and perhaps more persuasive argument for advocating a move from the traditional to the more progressive productive/authentic forms, is that evidence has emerged about the performances of students in numerous United States schools which shows that their achievements were hampered by educational administrators adhering to traditional product and process models of curriculum. Further evidence suggests that students performed better when being taught under these newer forms.30 Preston and Symes develop this point further in the higher education environment when they indicate that a problem with traditional formal curriculum models may exist, by providing evidence that more than 50 per cent of the knowledge acquired by university students in fast-developing subjects such as engineering and medicine is obsolete within five years of graduation.31 This may be very similar to the teaching in the areas of tax and revenue law units where rapid change to content also occurs.

V. THE DIFFERENCE BETWEEN TRADITIONAL MODELS OF CURRICULUM AND AUTHENTIC/PRODUCTIVE_forms

One of the fundamental differences between the traditional formal models of curriculum and the development of productive/authentic forms of curriculum is that the formal models of curriculum
are very much process or product driven, or models of what processes or products should be included in developing curriculum. By contrast productive/authentic forms of curriculum really ask about the nature or quality of what is put into that process.

Wehlage, Newmann and Secada describe the terms productive and authentic as ‘commonly referring to something that is real, genuine, or true rather than artificial, fake, or misleading.’²² Productive/authentic forms of curriculum focus on the development of skills including problem solving, collaboration, self-awareness, flexibility as well as an ability to deal with complexity.

The most well-known study into productive/authentic achievement was undertaken by Fred Newmann.²³ Newmann characterises his vision of productive/authentic achievement as standing for ‘intellectual accomplishments that are worthwhile and meaningful.’²⁴ This means that authentic achievement should result in the construction of knowledge and that knowledge’s value beyond the learning environment. Clearly there is some similarity here with the process model as described above. The primary difference seems to be that the authors of information in the productive/authentic area wish to not only distance themselves from the ongoing debate between the process and product views of curriculum but also wish to extend the notion of student-centered learning based on a holistic view of the student as a citizen of the world and link the concept of curriculum to pedagogy.

In simple terms the ideas behind productive/authentic achievement focus on the bigger picture of where you want your students to be at the end of a course, rather than specific facts that you would wish them to know. Or as Brady and Kennedy put it, the difference between traditional models of curriculum and productive/authentic achievement is that productive/authentic achievement focuses on the intellectual quality of the students’ work.²⁵ Productive/authentic achievement is specifically designed to develop deep learning by students. What is being developed in a productive/authentic form is a thinking oriented curriculum, which Brady and Kennedy describe as having the following four key components:

1) Teaching for thinking – schools and teachers create learning environments that are safe, caring and encourage risk-taking by students. The environment is rich and stimulating for all students to explore, investigate and enquire.

2) Teaching of thinking – schools and teachers teach the thinking skills associated with different subject areas.

3) Teaching with thinking – schools and teachers support the development of students’ thinking skills through the completion of rich tasks that encourage and challenge them.

4) Teaching about thinking - schools and teachers support to reflect, regulate and self-assess.²⁶

Inherently this is a very different way of thinking about the development of a curriculum when contrasted with those formal traditional theoretical constructs of the models of curriculum described earlier in this paper. This is a way of thinking about curriculum which is not only practical but student-centered. We move from theory that may or may not be technically correct and is fundamentally rooted in academic rigour, to something which is practical and achievable in a learning environment.

We move from what traditional theories would list as objective to what productive/authentic forms regard as more holistic accomplishments. From the viewpoint of product-based models of curriculum, an example to illustrate this difference in the field of science might be as follows: the product model question of ‘What year did scientists discover the concept of

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²² Wehlage, Newmann & Secada above n 30, 22
²³ Ibid.
²⁵ Ibid, 280.
²⁶ Laurie & Kennedy , above n 14, 84.
global warming?’ to the productive/authentic form of ‘How can I improve the world I live in?’.

Another useful example to illustrate this difference in the field of English literature might be indicated by the product model question of ‘Who was the main character in the Oscar Wilde play The Importance of Being Earnest?’ to the productive/authentic form of ‘Why is this play still relevant in the modern world?’.

In the context of the field of tax or revenue law, a useful example might be indicated by the product model question of “How this receipt or gain is recognised as income under the relevant taxing Acts” to the productive/authentic form of “Why some receipts or gains are treated differently between different taxpayers under the relevant taxing Acts?” Another useful example might be indicated by the product model question of “How a travel expense from home to work is treated under the relevant taxing Acts?’ to the productive/authentic form of ‘Why are there differences between the deductibility of some travel expenses between various taxpayers?’

The following table demonstrates the differences between the traditional models of curriculum and those features associated with productive/authentic forms:

**Table 2: representing the different features of the traditional models of curriculum and the productive/authentic forms**

<table>
<thead>
<tr>
<th>Features of traditional model</th>
<th>Features of productive/authentic form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aims/objectives</td>
<td>Intellectual quality</td>
</tr>
<tr>
<td>Learning experiences</td>
<td>Quality learning environments</td>
</tr>
<tr>
<td>Content</td>
<td>Significance for students</td>
</tr>
<tr>
<td>Assessment</td>
<td></td>
</tr>
</tbody>
</table>

The productive/authentic form of curriculum described here is very much a student-focussed approach to curriculum planning that looks for solutions to problems and issues outside of those that might be provided by the more traditional forms of curriculum theory. They distinctly focus on the premise of mastering thinking skills, rather than mere information.

In the context of taxation law a useful example might be where the Government announces a change to tax policy such as the taxation of superannuation contributions and pay outs. This area changes regularly and there is little value in students learning mere knowledge about the system of taxation of superannuation. Instead it is better for students to understand the basis for the superannuation in the overall context of retirement incomes, and government policies in relation to the taxation of certain sectors of the workforce. Only then will students be able to respond to this volatile area of the law now and into the future.

Another useful example would be in the area of deductibility of travel expenses and particularly the category of travel directly between two places of work. By focussing on the underlying basis for the introduction of section 25-100 *Income Tax Assessment Act 1997* (Cth) (‘the Act’) and the need for an additional legislative response to the general section 8-1 *Income Tax Assessment Act 1997* (Cth) deduction provision, students master critical thinking skills and are able to fully appreciate the need for such legislative intervention to formally allow for deductibility of direct travel between two places of work. This is in contrast to the traditional model where students would merely learn the existence of section 25-100 allowing for the travel between two places of work deduction but not providing an opportunity for students to fully appreciate the importance of the political process that led to its introduction into the *Income Tax Assessment Act.*
VI. VALUE OF THE PRODUCTIVE/AUTHENTIC FORM

The value of a productive/integrated curriculum is espoused by numerous educational academics including Thornley and Graham, Hayes, Mills, Christie and Lingard, Wilks and Lingard and Mills. Newmann, Marks and Gamoran at the Centre for the Organizing and Restructuring of Schools in the United States of America, have spent considerable efforts to systematically detail the benefits of the productive/authentic forms of curriculum. These three authors spend some considerable time critiquing traditional approaches and strongly suggest that they fail to actively engage students in a way that productive and authentic forms can.

Patrick Slattery takes a detailed look at the value of this newer form of curriculum development and compares it to the historical models espoused by traditional theorists such as Tyler and Stenhouse, as described earlier in this paper. It is Slattery’s view that the historical models provided by the traditional theorists give a valuable starting point for the discussion of curriculum, but they do not represent the modern challenges of how the dynamics of the classroom and other learning environments operate. Slattery also espouses the need to critically reflect on those historical models as they provide the necessary grounding, but to seize the moment for a movement towards the innovation and progressivism offered by these newer forms of authentic/productive curriculum rather than clinging to the historically conservative traditional models of curriculum.

Perhaps it is Brady and Kennedy who indicate in a most straightforward manner that productive/authentic forms of curriculum can be very successful with all students studying a variety of different discourses, and result in improved academic and social outcomes for students.

VII. DIFFICULTIES ASSOCIATED WITH CHANGE

Any type of change is often associated with difficulty. This may be because it means that a person is required to do something that the person does not wish to do or because people are generally content with the current status of things and do not necessarily objectively see the need for any change to be made. Brady asserts that one of the primary reasons that teachers are reluctant or resistant to change their curriculum design or methodology is because they are

44 Ibid.
45 Brady and Kennedy, above n 34, 281.
generally satisfied with the status quo. But as Lovat and Smith suggest, curriculum and change are inextricably linked.

Educators need to be critically aware of the theoretical underpinnings of their activities. In this instance this means that educators need to not only be aware of those traditional curriculum models described earlier in this paper but also of emerging newer forms of curriculum design such as productive/authentic forms described here and embrace these. This does not necessarily mean that every educator needs to change every time something new comes along. Rather it tacitly infers that educators need to be aware of and to make an informed choice for themselves as to how to proceed. This means a fully informed and educated decision is required about whether to change in a small or large wholesale fashion, and this adds to the credibility and professionalism associated with the teaching of tax or revenue-based law units.

This point leads to the recognition of the difficulties that will be encountered in relation to how to measure the relative successes of a move from traditional formal based models of curriculum to those newer productive/authentic models which have been described here. It is not the intention of this paper to fully analyse this question, although it is something with which many in the field of curriculum research and design have been preoccupied, as can be seen in the discussions of Marks, Newmann and Gamoran who indicate the difficulties associated with measuring the specific success of productive/authentic curriculum. Although this discussion occurs with some qualification as they indicate that the concept has merit.

VIII. IMPLICATIONS FOR THE TAX/REVENUE LAW CURRICULUM

Taxation Law is a dynamic area of the law with constant change in both policy and legislative framework. Most undergraduate tax courses or units are structured around the concepts of income, deductions, capital gains, entities with some exposure to FBT and GST. This structure is inherently placed within the traditional product model in that it allows for content to be covered and to ensure that students have an understanding of the core principles of the law, especially from a Commonwealth law perspective.

However with constant change to the tax law base and with the Commonwealth government’s desire to expand the number and type of taxes, this approach may not be satisfactory. As students need to be able to respond to changes that are going to happen in the near future the productive/authentic form of curriculum will facilitate this process.

If a change is made to the approach we take to the teaching of tax law, then students will be better placed to see the whole picture of where tax law is going. So rather than being reactive to tax law policy and legislation, the curriculum should be structured to be proactive and stimulate the intellectual thinking of students.

Instead of studying general income concepts (ordinary income) and then capital gains (statutory income) as distinct content topics, the better approach would be to ask would any particular gain be income and then, be taxed as income. Such an understanding will allow for students to respond to subsequent policy changes to the workings of ordinary and statutory income. In short, the concepts of ordinary and statutory income will not change but rather, the mechanics of whether an item of gain can be taxed at all will be understood and applied. The productive/authentic curriculum model will enable students to respond in such a fashion when dealing with their clients and their income tax affairs.

48 Lovat & Smith, above n 2, 202.
50 Helen M Marks, Fred M Newmann and Adam Gamoran in Newmann above n 30, 69, but see general discussion of this concept of measuring the success of any curriculum at 49 – 73.
The other area of interest for practitioners and their clients is deductions. The underlying notion of what qualifies as a deductible expense will not change over time. However instead of students learning about the content of deductions, such as in the case of the complex deductibility area of travel expenditure, and then trying to apply that to a specific fact situation, it would be better for students to focus on the rationale behind the concept of travel deductibility so that they will be better placed to respond to new situations that will arise over time.

A good example of this point relates to the deductibility of travel expenditure directly between two unrelated jobs that is finishing one job and travelling directly to the second job. Students are taught that expenditure incurred in travel to and from work is not a deductible expense but are then taught that in the situation of travelling directly between two jobs that this expense is deductible. However there is no focus on providing a rationale for this distinction and instead students are just taught about the content process, namely that the expenditure has been given deductibility due to the insertion of a statutory provision in the *Income Tax Assessment Act 1997* (Cth) being ss 25-100. From the productive/authentic curriculum model perspective, students should be instructed as to why the relevant legislative provision was introduced and why it may be necessary for further legislative provisions to be introduced in the future to deal with new fact situations that may arise with the manner in which taxpayers incur travel expenditure.

IX. CONCLUSION

The primary goal of all educators is to do everything possible to ensure the success of the students in the units for which they are responsible. An educator who has an understanding of the theory behind the practical work of the classroom can give significant benefit to students. We do not assert there is one right or correct way of developing curriculum in tax law or revenue-based units. Rather we seek to detail how a knowledge and understanding of the theoretical constructs of both traditional and newer forms of curriculum development can assist this process. This paper has examined the traditional theoretical constructs of the formal concepts of curriculum and has demonstrated how a move towards an adoption of a more productive/authentic form of curriculum can have benefits for students who are studying taxation or revenue law based units. The emphasis of this paper has been on how an acceptance of the newer forms of productive/authentic forms of curriculum can result in real academic learning and achievement for students.
Mandy Shircore*

ABSTRACT

The vulnerability of mentally ill persons to serious or fatal harm in confrontations with police is compounded by over-stretched mental health services in Australia and an inadequately trained police force. Despite criticism by some commentators, lawyers and human rights groups, to the use of guns and other potentially lethal devices by police to restrain mentally ill persons, there is little tangible evidence that the landscape for the mentally ill is improving. The ability of tort law to provide any justice for mentally ill people and their families harmed by the system is complicated by the uncertain boundaries of the scope of the duty of care owed by the police. This paper considers recent cases in which the police have been sued in negligence in circumstances where a confrontation has ended in a mentally ill person being shot by police. In particular it looks at the policy arguments that have been raised for and against imposing a duty of care on police, the factors that impact on duty determination and how and in what circumstances a duty of care may be said to arise.

I. INTRODUCTION

Police encounters with people suffering from mental illness are often complex, unpredictable and may be dangerous. While the vast majority of the estimated 148,000 annual interactions in Australia between police and people with a mental illness end constructively,1 there continue to be a number of incidents that result in serious or fatal consequences for the person with mental illness. In fact, according to the Australian Institute of Criminology, of all persons fatally shot by police between 1 January 1990 and 30 June 2011, 40% were people with a mental illness.2 In recognition that traditional police tactics have been unsuccessful in dealing with people with mental illness, a number of jurisdictions have adopted new and specialised training procedures.3

Failure by police to provide an integrated and appropriate response to a man, who whilst suffering from a psychotic episode was shot by police, has been the subject of a recent negligence action in the Australian Capital Territory.4 Like so many police negligence cases before, the ACT police attempted to defend their actions in Crowley v The Commonwealth5 by denying that they owed the plaintiff a duty of care. The ‘no duty’ argument was based chiefly on the ubiquitous policy arguments first raised in the seminal case of Hill v Chief Constable of West Yorkshire.6 Originally devised in Hill to shield police from a claim that they had failed to

* Mandy Shircore, Senior Lecturer, James Cook University. The author wishes to express thanks to Nichola Corbett-Jarvis and the anonymous referees for their valuable comments on an earlier draft of this article.
2 Ibid.
3 For example in Victoria police are being provided with additional coaching after an internal review found that ‘previous training was flawed and increased the risks of violent confrontations’, see John Silvester, ‘Police to revamp training for handling mentally ill’, (The Age, Melbourne, 25.2.2012), http://www.theage.com.au/victoria/police-to-revamp-training-for-handling-mentally-ill-20120224-1tu12.html. In New South Wales and the ACT a four-day Mental Health Intervention Team training program was implemented in 2007 to assist police in dealing with people with mental illness, see New South Wales Police, Community Issues Mental Health http://www.police.nsw.gov.au/community_issues/mental_health.
4 Crowley v The Commonwealth (2011) 251 FLR 1 (‘Crowley’).
5 (2011) 251 FLR 1
6 [1989] AC 53 (‘Hill’).
protect a member of the general public from being harmed by an unknown third party criminal, the policy arguments adopt the familiar line that imposition of a duty will result in defensive practices being adopted by police and constitute a drain on police resources.\(^7\) Despite limited scrutiny of their validity, the policy arguments both in Australia and the United Kingdom have continued to be applied to an increasing array of police conduct, so much so that they have been criticised by some commentators as creating a defacto police immunity.\(^8\)

It is arguable that the ACT Supreme Court in *Crowley* has gone some way towards stemming the pervasive reach of the *Hill* policy considerations by providing welcome guidance as to the appropriate boundaries of the duty of care owed by police, principally as it relates to positive acts of the police as opposed to police investigatory omissions. In finding that the *Hill* public policy considerations had been previously misunderstood and as a consequence too widely applied in a previous police shooting case, the court in *Crowley* held that the police owed a duty of care to the mentally ill plaintiff and were negligent in their response to his psychotic episode.

Focusing on the three Australian negligence cases that have dealt with the police shooting of a mentally ill person, this paper analysis how the courts have dealt with the pivotal question of the existence and scope of the duty of care owed by police. Although involving similar fact situations, each of the three cases represents a different approach to the *Hill* policy considerations, with varying results. As such the law in this area remains unsettled. Furthermore while the law discussed may be said to apply to police activity more generally, the focus is directed to these confrontations as they represent vastly different factual situations to that envisaged by the original *Hill* decision and as such should and do encompass different legal considerations.\(^9\)

The paper begins with a broad overview of the *Hill* considerations and their application in Australia before turning to a discussion of the police shooting cases. The paper concludes that the recent *Crowley* judgment adopts an approach that sits most comfortably with the current methodology of the High Court to novel duty situations and offers appropriate limits to the *Hill* policy considerations. Importantly the case also provides a measure of accountability to ensure police act reasonably and appropriately in dealing with some of the most vulnerable and marginalised members of the community, the mentally ill.

**II. THE DUTY OF CARE CONUNDRUM AND THE CONTINUING LEGACY OF *HILL V CHIEF CONSTABLE OF WEST YORKSHIRE***

Over the past two decades in Australia, there have been a number of civil suits instigated by disgruntled members of the public for various alleged police flaws, the majority of which have failed at the first hurdle of the negligence claim, duty of care.\(^10\) The arguments militating against a duty finding have been based in large part on the policy arguments first enunciated in *Hill*.

In *Hill*, the mother of the last victim of a serial murderer brought an action against the police alleging negligence in their failure to apprehend the accused prior to the death of her daughter.\(^11\) The court denied the police owed a duty of care to the victim, due to the lack of proximity. As

\(^7\) *Hill* [1989] AC 53, 57.


\(^{11}\) For an overview of the Australian cases dealing with police negligence cases see Paul Marshall, ‘Police liability in negligence : The Application of the Hill Immunity in Australia’ (2007) 15 Tort Law Journal 34; See also Shircore above n 8.

\(^{11}\) For a detailed critique of the investigation in *Hill*, including the reasons why the plaintiff brought the claim, see Joan Smith, *Misogynies: Reflections on Myth and Malice* (1989) 117-151.
The daughter was one of a large number of potential victims she was not at a distinctive risk, no ‘special relationship arose’ and thus no duty to protect her existed. Although lack of proximity was sufficient to dispose of the action in *Hill*, Lord Keith created further barriers for plaintiffs, by enunciating a number of public policy grounds supporting a ‘no-duty’ finding. Similar to policy arguments once used to support advocates immunity, Lord Keith held police should not be liable for actions arising from the investigation and suppression of crime, on the basis that it ‘may lead to the exercise of a function being carried on in a defensive frame of mind.’ Along with this defensive practice argument, Lord Keith also held that police policy and discretion, both integral to police officers’ duties of investigation, should not be questioned by the court. Police resources, he said, should not be diverted from police operational functions to the time and trouble of litigation.

There has been much criticism of both the rationale for the *Hill* policy considerations and their application to allegations of police failings, particularly in fact situations that differ vastly from *Hill*. Despite warnings from the European Human Rights Court that the *Hill* policy considerations should not be used as a blanket immunity for police in the United Kingdom, the House of Lords has continued to provide strong support for the defensive practice argument, in contexts that differ factually from *Hill*. Although the High Court of Australia has not had the opportunity to consider the application of *Hill* directly, support has been shown for the policy considerations.

In *Sullivan v Moody* the High Court noted:

In *Hill v Chief Constable of West Yorkshire*, the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkell pointed out that the conduct of police investigation involves a variety of decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate.

In respect to a person under investigation by the police, Gummow and Kirby JJ stated in *Tame v New South Wales*:

It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer’s duty ultimately based in the statutory framework and anterior common law by which the relevant police service is established and maintained, fully to investigate the conduct in question.

Consistent with these statements, state courts have applied the *Hill* grounds to an expanding array of police negligence cases, often without a clear pronouncement of the ambit of the exclusionary grounds. So wide has been the application of the *Hill* considerations that they

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13 See for example Laura Hoyano, ‘Policing Flawed Police Investigations: Unravelling the Blanket’ (1999) *The Modern Law Review* 912, in which she suggests that Lord Keith took this step to ensure the path to liability was ‘blocked’ for future plaintiffs.
14 In *Hill*, Lord Templeman similarly referred to policy grounds as the reason for denying a duty of care was owed.
17 See for example Shircore and McIvor above n 8.
19 See *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495; *Chief Constable of Hertfordshire Police v Van Colle and Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50.
20 (2002) CLR 251, [57].
have been referred to by some courts and commentators as the ‘doctrine of police immunity’, to which ad hoc exceptions have developed.22

The circumstances in which a duty of care has been denied at a state level in Australia include:

• Allegations of police negligence in failing to investigate or prosecute a crime in which the plaintiff was the complainant.23

• Where the plaintiff is a person under investigation,24 including where the plaintiff claimed the police were negligent in failing to arrange prompt drug analysis with the result that the accused’s detention in custody was prolonged. To subject administrative police tasks to a duty of care was held to have dire resource implications warranting ‘immunity’ to the police. 25

• Where the plaintiff was a victim of criminal conduct. In such cases the ‘general rule ... that one man is under no duty of controlling another man to prevent his doing damage to a third’26 has operated to defeat claims brought by victims of criminal conduct.27 Although it must be noted, that there have been two instances in which the state courts have held, in refusing to strike out the plaintiff’s statement of claim, that it was arguable that the police had assumed responsibility to an identified individual who had relied on police protection, thereby giving rise to a possible duty of care.28

• Allegations of negligence in the use of information which then exposed the plaintiff to the death penalty.29 This was based on the purpose and function of the police to investigate the matter and the conflicting obligations that imposition of a duty would place upon the officers.30

• Where the plaintiffs have alleged negligence in the police handling of a matter involving a family member, with the result that the plaintiff has suffered psychiatric harm. These included claims by the plaintiffs of police negligence in identifying their deceased mothers after a traffic accident. The result of the negligence being that each of the deceased was identified as the other, with one incorrectly buried and the other incorrectly cremated.31 Another involved a claim made by a family that the police had been negligent in the handling of a missing person investigation, resulting in a five year delay in identifying a body as a missing person.32

• Where off-duty police officers attending a nightclub, witnessed a patron of the club being abusive and violent and failed to act to restrain him prior to his viscous assault on the plaintiff.33

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22 See for example Cran v New South Wales (2004) 62 NSWLR 95, where Santow JA refers continually to the police immunity from owing a duty of care in relation to investigations, except possibly where the police have expressly assumed responsibility to an individual. More recent Australian cases have stated however there is no police immunity in Australia. See for example Peat v Lin [2005] 1 Qd R 40; New South Wales v Tryst [2008] NSWCA 107 (Campbell J.A.)


26 Smith v Leurs(1945) 70 CLR 256, 262 (Dixon J). See also Modbury Triangle Shopping Centre Pty Ltd v Anzil(2000) 205 CLR 254.


32 Cumming v New South Wales [2008] NSWSC 690 (unreported judgment).

33 Peat v Lin[2005] 1 Qd R 40.
• Where police officers alerted an absconding parent that they were aware of her whereabouts, allowing her the opportunity to remove the children from the plaintiff.34

Despite these cases, there is some evidence that Australian courts have become more circumspect in their approach to the Hill principle. In two separate instances involving actions initiated by victims of domestic violence, state courts refused to strike out the plaintiff’s claim as it was held to be arguable that the police had assumed responsibility to provide some protection for the particular victims, thereby negating or limiting the effect of the Hill policy considerations.35 More recently in NSW v Tryst, Campbell JA refused to accept that the Hill policy considerations applied to a factual situation outside of the context of Hill.36

The Crowley case similarly signals that Australian courts are carefully considering what is and should be the ambit of the Hill policy considerations. Despite an earlier New South Wales Court of Appeal case that had held the Hill policy considerations applicable to a police shooting case, the ACT Supreme Court in Crowley was prepared to limit the effect of the Hill principles within an analysis that considered all the salient features of the case. The Crowley case and the two shooting cases that preceded it are considered in detail in the following section.

III. POLICE SHOOTING CASES

At the outset it should be noted that the police shooting cases involve vastly different factual situations to that of Hill. In two of the cases the injury was caused to the plaintiff directly through the police shooting, while in the other case the plaintiffs were family members of the man shot by the police. It is somewhat surprising that the Hill policy considerations were considered relevant to the shooting cases. Hill was concerned with the discretionary decision making of police involved in a police investigation. Furthermore, in Hill both the criminal third party and the victim were unknown to the police. The alleged police negligence involved an omission to act (failure to apprehend the criminal third party), and it was this omission that caused the plaintiff’s harm. In the shooting cases, on the other hand, the police negligence involved apprehending a mentally disturbed person and during the operation, discharging a firearm directly wounding (in one case fatally) the disturbed person.

In the first of the cases Zalewski v Turcarolo,37 the Victorian Supreme Court (Appeal Division) found police liable in negligence and battery after they had shot and injured the 22 year-old plaintiff, who had a history of mental illness. On the day of the shooting, the plaintiff had become depressed, was suffering from psychotic delusions and had taken his father’s shotgun into his bedroom and shut the door (the implication being that the plaintiff was contemplating self-harm). The plaintiff’s father had entered the room to ask the plaintiff what he was doing, but after being asked to be left alone, the father called the police requesting assistance. Upon arrival at the house, there was no attempt by police to determine whether the gun was loaded or to negotiate with the plaintiff from outside his room. Instead within minutes, the police had entered the bedroom with their guns drawn and shot the plaintiff, seriously injuring him. The plaintiff claimed that the police failed to correctly assess the situation and to act in accordance with training and instructions.

The Victorian police argued that even if they were negligent in their conduct towards the plaintiff, they were immune from liability based on public policy considerations, namely because ‘the absence of such an immunity would lead to investigative operations being carried on in a detrimentally defensive frame of mind’.38 Hansen J noted that any immunity granted to the police did not apply to all police activities, as had been conceded by Lord Keith in Hill.39

37 [1995] 2 VR 562 (‘Zalewski’).
Police officers, it was said, may be liable for ‘on the spot’ operational activities, including for example negligent driving, referred to in the UK case of Knightley v Johnes40 as incidents of ‘specifically identified antecedent negligent conduct’.41 Finding that the Zalewski case differed from Hill, which had involved failure of police to apprehend an unknown criminal, Hansen J held that the basis for the immunity did not exist ‘because Zalewski did not act in accordance with his training and instructions’ in what was considered as an incident of antecedent negligent conduct.42

More than ten years later in NSW v Klein,43 the New South Wales Court of Appeal expressed doubt about the correctness of the Zalewski decision. In the Klein case, the relatives of a man shot and killed by police claimed psychiatric harm caused by the alleged police negligence in dealing with the mentally ill man. The man had been at his grandmother’s house when in a disturbed psychotic state he surrounded himself with knives. When approached by his mother he became aggressive. After she called the police, the man set a fire in the house. The fire brigade was called, however they were unable to enter the house to extinguish the fire while the disturbed man remained inside. The statement of claim did not specify what occurred next, other than to state that the disturbed man was later shot by police outside the house.44 On appeal the court struck out the plaintiffs’ claim on the basis that the police did not owe them a duty of care.

Although Klein concerned claims of psychiatric harm caused to the plaintiffs as a result of being in the vicinity of the police shooting, the court considered how courts in Australia had dealt with the Hill policy grounds since the Victorian case of Zalewski.45 While not going so far as to declare that Zalewski had been wrongly decided, Young CJ was persuaded that the Hill policy grounds had received widespread acceptance in Australia since Zalewski, noting in particular the comments by the High Court in Sullivan v Moody,46 Tame v Annett47 and D’Orta-Ekenaie v Victoria Legal Aid.48 In doing so Young CJ doubted the precedent value of Zalewski.49 His Honour noted that the few cases in the United Kingdom and Australia where a duty had been held to exist involved ‘exceptional circumstances’ or situations where the police had assumed responsibility to a particular individual, for example by taking control of the situation.50 As the police had not assumed responsibility for the plaintiffs in Klein, the court was prepared to strike out the plaintiffs’ claim, because as Young CJ stated ‘the core principle in Hill’s case is so strong that the hopelessness of the plaintiffs’ case is plain no matter what the facts.’51 As noted by Penfold J in the Crowley case discussed below, what the court meant by ‘the core principle’ in Hill’s case was not clearly explained.52

In May 2011, in Crowley v The Commonwealth,53 after a detailed examination of the facts and history of police negligence cases in Australia and the United Kingdom, Penfold J in the Supreme Court of the ACT held police liable in negligence for the shooting injury to the plaintiff, Jonathan Crowley. On the day of the shooting, after contact with mental health workers, the plaintiff had left his parents’ house carrying a kendo stick.54 After some unusual

40 [1982] 1 All ER 851.
43 [2006] Aust Torts Reports 81-862 (‘Klein’).
52 Crowley (2011) 251 FLR 1, 98.
53 (2011) 251 FLR 1 (‘Crowley’).
54 A kendo stick is a bamboo stick used in the practice of martial art known as kendo.
and threatening interactions with members of the public, the police were called to locate the plaintiff. Upon discovering the plaintiff in a suburban street, two police officers pulled up in their car close to the plaintiff and after alighting from the vehicle yelled at the plaintiff to put down his weapon and get on the ground. The plaintiff failed to comply and instead advanced towards the police who attempted to disarm him by spraying him with capsicum spray. When this did not work and the plaintiff attacked the officers with the kendo stick, one of the officers shot the plaintiff. Similar to the Zalewski case, the police negligence was found to consist of inadequate preparation and failure to follow appropriate training and procedure in dealing with the mentally disturbed plaintiff in the circumstances.

Penfold J in Crowley’s case noted that developments in Australia since the 1995 case of Zalewski raised the question of whether Zalewski, so similar on the facts to the case of Crowley, was still good law. 55 In an exhaustive analysis of the police negligence cases, Penfold J held that the Hill public policy grounds as accepted in Australia, were intended to apply to police investigative work, that is, work that involves the investigation of crime leading to the apprehension of criminals.56 Thus a case involving positive police conduct, or operational police work, causing damage to specified individuals, as occurred in Crowley and Zalewski could fall outside the Hill principle.57 Penfold J considered that the court in Klein had defined police investigative work too widely, in effect applying the no duty finding to any conduct that could be considered remotely related to investigative work.58

Penfold J considered investigatory work, as intended by the Hill line of cases, applies to police work that raises issues such as: the allocation of resources; choices made by police officers in the lines of inquiry; the care and efficiency with which lines of inquiry are pursued; the records made in the course of inquiry and the management of information generated during an investigation, including in the course of an apprehension.59 Factors which would warrant a no duty finding would therefore include:

[T]he difficulty of identifying a class of persons to whom the duty would be owed, … the risk of subjecting police to irreconcilably conflicting duties, and … the public policy impacts such as the constraining effect of such a duty on the proper and effective conduct of investigations.60

In finding that the Hill policy grounds did not apply to the Crowley case her Honour stated:

I propose to determine this action on the basis that liability for physical injuries caused as a result of police negligence, even if that negligence occurs in the course of police action that is directly related to a current investigation, is to be determined by reference to whether in the circumstances of the particular case the police officers involved have assumed a duty of care, rather than by reference to a general absence of any duty of care in relation to anything that happens in the course of a police investigation.61

She stated further:

There are no doubt various ways in which police may assume a duty of care in a particular situation; for present purposes it is sufficient to say that where police have taken control, or are attempting to take control, of a situation in reliance on their authority and powers as police officers, it is reasonable to find that they have assumed a duty of care to anyone who is directly caught up in their exercise of authority.62

55 Crowley (2011) 251 FLR 1, 89.
56 Crowley (2011) 251 FLR 1, 95-6.
57 Crowley (2011) 251 FLR 1, 103.
58 Crowley (2011) 251 FLR 1, 95.
59 Crowley (2011) 251 FLR 1, 104.
60 Crowley (2011) 251 FLR 1, 105.
61 Crowley (2011) 251 FLR 1, 106.
62 Crowley (2011) 251 FLR 1, 106.
A. Preserving The Coherence In The Common Law

Following the current approach of the High Court to novel duty determinations,63 Penfold J also considered whether a finding that the police owed a duty of care to the plaintiff, would be inconsistent with other police duties and thereby disturb the coherence in the common law.64 The defendants had argued that any specific duty owed to the plaintiff (an individual offender or suspect) would conflict with their general police duties to prevent crime and protect the public. However Penfold J refused to accept that owing a duty of care to individuals caught up in operational situations (including suspects and offenders), would conflict with more general duties, noting in particular that a common law duty would in fact be consistent with Australian Federal Police policy documents which include the principle that ‘the safety of the police, the public and offenders or suspects is paramount’.65

Her Honour noted that a duty of care could be owed to more than one person in a given situation and that exercising judgment in complex situations, with a number of peoples’ welfare to consider, did not necessarily involve conflicting considerations and duties. This case could be distinguished from Sullivan v Moody66 where the interests of the children were paramount and any duty owed to the fathers would necessarily conflict with the duty owed to the children.

Accordingly Penfold J found that once ‘the police officers got out of their car and started giving orders to Jonathan, they were clearly exercising their authority as police officers and taking control of the situation…. [in doing so they]…assumed a duty of care to those willingly or unwillingly caught up in that situation, being at least Jonathan.’67

Any suggestion that the finding of a duty of care would detract from the primary role of publicly funded entities by diverting attention to the trouble and expense of litigation would be to ‘reject the currently wide-spread expectation that publically-funded bodies should be accountable both for the expenditure of public funds and more broadly for the exercise of the powers and discretions conferred on them for the purpose of their functions, an expectation that is reflected in Australia in the proliferation of methods of scrutinising the expenditure of public moneys and methods of challenging both specific and systemic exercises of public powers’.68

After an exhaustive consideration of the evidence, which included examination of the police training procedures and police policy manuals, Penfold J held that the two police officers involved in the confrontation with Jonathon had breached their duty of care to him by failing to plan and assess the situation adequately (which included a failure to follow police procedural principles) and confronting Jonathon in the manner in which they did, although no breach was found in relation to the use of weapons by the officers involved.

IV. Conclusion

In finding that the police owed a duty of care to the plaintiff in Crowley, the ACT Supreme Court has rejected the reasoning of the NSW Court of Appeal in Klein. In doing so, Penfold J has attempted to articulate the boundaries of the Hill public policy grounds and reconcile the many cases that have considered the application of the grounds as they have been applied to an increasing array of police conduct. By following the current approach of the High Court to novel duty of care questions, Penfold J has rejected any notion that police enjoy immunity from negligence actions and from which exceptions must be argued. Instead her Honour has analysed the existence and scope of a duty of care in terms of the legislative framework of the police services, coherence of the law, issues of control and the effect of public policy grounds.

64 Crowley (2011) 251 FLR 1, 107.
65 Crowley (2011) 251 FLR 1, 108.
66 Crowley (2011) 251 FLR 1, 110.
67 Crowley (2011) 251 FLR 1, 112.
68 Crowley (2011) 251 FLR 1, 112.
By limiting the ambit of the *Hill* grounds to carefully defined investigative duties, her Honour has determined that a duty of care may arise where police exercise their authority, take control of a situation and in doing so cause harm to persons directly caught up in the exercise of such authority. Such an analysis accords with the few recent state cases in which there has been a refusal to strike out the plaintiff’s claim on the basis that the police had taken control of a situation and assumed responsibility to the plaintiff.69 While both the House of Lords in the United Kingdom and the Canadian Supreme Court have been afforded the opportunity to reassess the continued effect of the *Hill* policy grounds as they apply to more contemporary police conduct,70 the Australian High Court has yet to directly consider the issue. With the *Crowley* case currently under appeal, it may yet provide an appropriate vehicle for High Court determination.71

Should the determination in *Crowley* be upheld, police will be required to ensure that they assess and execute confrontations with people suffering mental illness in accordance with appropriate procedures and training. Although outside of the scope of this paper, this may involve establishing systems that involve greater integration with mental health service providers and a more co-ordinated response to dealing with people experiencing psychotic episodes.72

The task faced by police in apprehending and dealing with people suffering from mental illness and psychotic episodes is an unenviable one. Compounding the problem is that the mental health system is overstretched and training procedures for police have tended to be inadequate. But as *Crowley* demonstrates, the common law can provide a measure of accountability to ensure that police operate in a reasonable manner to minimise the possibility of continued adverse outcomes.

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71 At the time of writing, the appeal has been heard by the ACT Court of Appeal and judgment reserved.

72 One of the findings in the *Crowley* case was that the ACT Mental Health Service was negligent in failing to pass on information concerning Jonathon Crowley to the police, which may have assisted in his apprehension.