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TABLE OF CONTENTS

FOREWORD

It is my great pleasure to welcome readers to the 2016 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.

Producing a journal like this requires the assiduous efforts of a number of people whose collective efforts have made this journal possible. I would like to acknowledge some of the key contributors who have made this issue of JALTA 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 Magdalene D'Silva, Hon. Associate, Faculty of Law, University of Tasmania, for her efforts in proofreading and to David Brennan for his efforts in typesetting. Lastly, I need to record a special thanks to Lisa O'Farrell, who was the ALTA Administrator for her initial efforts on JALTA and to Alice Richardson who took over as ALTA Co-ordinator and assumed responsibility for the completion of this journal. Since joining the ALTA family, Alice has worked tirelessly on all aspects dealing with JALTA and I can safely say that without Alice's great work JALTA would not be produced in a timely and professional manner. Well done, Alice!

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

70 YEARS OF ALTA IN THE FURTHERANCE OF LEGAL EDUCATION IN AUSTRALASIA AND OF THE WORK AND INTERESTS OF UNIVERSITY LAW SCHOOLS

*Emeritus Professor David Barker AM**

I Introduction

The oldest of ad hoc law associations—ultimately named the Australasian Law Teachers Association (ALTA)—was established at Sydney Law School on 5 June 1946 when a meeting took place of all Deans and full-time teachers of law in Australian universities, together with some part-time teachers. As was stated at the meeting:

> In Australia, there has not been in the past, at least to the knowledge of present Faculty members, any federal organisation of the law schools as such. Individualism has its advantages, but in the post-war world, with its problems of teaching personnel, content of the curriculum, and increasing student numbers, there is a need for the Universities to pull together and assist each other as far as possible. The traditions of this country are such that there is no possibility of rigid uniformity in the solution of the problem of legal education—but sharing of experience might remove some of those differences which impose such hardship on the student who, for personal reasons, must move from one State to another before this course is completed.[1]

The meeting also declared that the objects of the Association as expressed in the Constitution, would be as follows:

(a) the furtherance of legal education in Australia and of the work and interests of University law teachers;
(b) the encouragement and organisation of legal research and the publication of contributions to legal knowledge;
(c) the promotion of active co-operation of the University law schools of Australia with one another, with law schools elsewhere and with University, professional, and other learned bodies in Australia and elsewhere;
(d) the maintenance of close relations between the Universities and the legal profession; and
(e) co-operation with professional legal associations and other bodies in the work of law reform.[2]

The first President of the Association was Professor G W Paton who held this position from 1946 to 1948. At the time of its foundation the original name of the Association was the Australian Universities Law Schools Association (AULSA), with 'Australian' being replaced in 1962 by 'Australasian' to encourage the greater involvement of New Zealand law schools and law academics. This remained as its title until a name change to the Australasian Law Teachers Association (ALTA) was approved at the Association's Conference Annual General Meeting at the University of Sydney in July 1988.

The account of the initial meeting in 1946 is helpful in capturing the views of legal academics at that time. There is a sense of irony in Professor Paton's report of the proceedings: 'At a preliminary meeting, the world could not be re-moulded, but some energetic preparatory work in the circulation of documents enabled the broad issues to be discussed.'[3] These broad issues revealed the view that: 'Whatever the demand for more technical subjects, the *cultural* subjects

* Australasian Legal Information Institute (AustLII), Faculty of Law, University of Technology Sydney. This article is based on materials included in the author's recent PhD Thesis titled 'A History of Australian Legal Education' (submitted to the School of Law, Macquarie University).

1 George Paton, 'Australian Universities Law Schools Association' (1946) 20 *Australian Law Journal* 99.

2 Ibid.

3 Ibid 100.

should find a place in the law course.'[4] It was also recognised that 'to overload the full-time teachers with lecturing leads to inefficiency and inhibits original research.'[5]

There was also a statement relating to what the relationship would be between the State universities and the new university proposed for Canberra: the Australian National University (ANU). In their statement, the members of AULSA stressed their concerns about excessive teaching and administrative loads on full-time members of staff, which inhibited them from undertaking research:

> This conference welcomes the proposed establishment of one or more research chairs in Law in the Australian National University as a recognition of the importance of expanding legal research activities at all the Australian Universities as a matter of national importance. In making this statement the conference emphasises the restriction on research by University law teachers which arises out of their being over-burdened with teaching and administrative work. The conference, while appreciating the valuable contribution to legal education made by practising members of the profession in their capacity as part-time lecturers, therefore stresses the importance of creating more Chairs and full-time lectureships in Law.[6]

In assessing the influence of AULSA and its successor ALTA, on the development of legal education, it is helpful to consider their activities from 1946 to the present.

II Principal Activities

A *Establishment of a Committee of Law Deans*

In the Minutes of AULSA's Annual General Meeting held at the University of Western Australia on 25 August 1978, the President's Report contained the following Item under the title 'Committee of Deans':

> As a result of a request from the Australian Legal Education Council, the Executive [of AULSA] proposed the establishment of a Committee of Deans for Australian Law Schools. After correspondence between the Executive Vice-President and the Deans of various law schools it has been proposed that the proposed Committee of Deans should remain outside the AULSA organisation but should liaise with AULSA and report to the Annual General Meeting of the Association. The Committee Deans had met during the Conference and a report would be made later.[7]

B *Introduction of the Australasian Law Teaching Clinic*

The first national law teaching clinic in Australia (the NSW Law Teaching Workshop) was conducted at Mount Broughton NSW in July 1987, by Professor Neil Gold and Mary Gerace (who were both of the University of Windsor, Canada) under the auspices of AULSA. This teaching clinic was coordinated by Professor Jack Goldring of the Macquarie Law School.

Following the success of this inaugural venture, in 1988 the Annual General Meeting of AULSA requested that Professor Goldring organise another Teaching Workshop to be held later in the same year. A small committee was established and plans for this workshop were formulated. It was decided that the workshop should be named the Australasian Law Teaching Clinic, and to ensure that it conformed to the terms of the AULSA Charter, it included: Australian, New Zealand and Papua New Guinea law teaching institutions. At about this time, Professor Goldring took up a three-year appointment as a Commissioner of the ALRC, and so Ben Boer and Graeme Cooper took over the role of coordinating the renamed Australian Law Teaching Clinic, assisted by Marlene Le Brun, Richard Johnstone and Richard Chisholm. The Clinic

4 Ibid.
5 Ibid.
6 Ibid.
7 Australasian Universities Law Schools Association, 'Minutes, AGM' (1978) 3.

was again conducted at Mount Broughton, with the materials being provided by Ben Boer and Graeme Cooper.[8]

The Clinic was the forerunner of a number of Law Teaching Clinics, later renamed the ALTA Law Teaching Workshop. Michael Adams, who attended the Clinic in 1992, has described how it 'brought theory to the practice of teaching law, and … was an amazing experience to hone skills and look at assessment and issues of presentations.'[9] Another outcome of the Australian Law Teaching Clinic was the 1994 publication of *The Quiet Revolution* by Marlene Le Brun and Richard Johnstone, which was about the improvement of student learning in law, and in which the authors acknowledge the influence of the Australasian Law Teaching Workshop:

> The most successful development, however, has been the Australasian Law Teaching Workshop, which over the last several years has taken the work that began in Canada and extended it to particular applications for the region. Indeed, this book is the culmination of the efforts and commitment demonstrated by staff of the Workshop who were determined to ensure that appropriate text and materials were available to teachers in Australia.[10]

The activities of the ALTA Law Teaching Workshop were terminated at the ALTA Annual General Meeting in Fremantle 2003. This meeting decided that because of the number of teaching courses being conducted by the Universities, there was no further need for a specialist teaching workshop of the kind operated by ALTA. However when ALTA conducted a survey of its members in 2007, on future services that it might provide, the ALTA Executive was surprised when a majority of members requested a revival of the Law Teaching Workshop. The Executive responded by providing a major teaching workshop exercise on the day preceding the ALTA Annual Conference for 2009 at the University of Western Sydney.

C *The Legal Education Review*

The publication of the first edition of the *Legal Education Review* (LER) in 1989 was an outcome of the ALTA Conference held at the University of Sydney Law Faculty in August 1988. One could question why it took approximately 35 years from ALTA's original inception, for such a journal to evolve. But the 1988 Conference had been a major milestone in the development of ALTA, and the LER incorporated many of the articles and comments that had been delivered at the 1988 Conference.[11] The most controversial of these had been made by: Gerald Frug of the Faculty of Law, Harvard University;[12] Robert W Gordon of the Faculty of Law, Stanford University;[13] Catharine MacKinnon of Osgood Hall and Yale Law Schools;[14] Margaret Thornton of Macquarie Law School;[15] and Lucinda Finley of the Law School, State University of New York at Buffalo.[16] Since its first edition the LER has become a highly regarded law journal having been published on a regular basis until the present time.

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8 Ben Boer, 'The Australasian Law Teaching Clinic: Its Past, Present and Future' (1989) 1 *Legal Education Review* 145.

9 Interview With Michael Adams, Dean of Law, University of Western Sydney (Sydney, 8 December 2013).

10 Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Co, 1994) ix.

11 'Editorial' (1989) 1 *Legal Education Review* 1.

12 Gerald Frug, 'A Critical Theory of Law' (1989) 1 *Legal Education Review* 43.

13 Robert Gordon, 'Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59.

14 Catherine MacKinnon, 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85.

15 Margaret Thornton, 'Women and Legal Hierarchy' (1989) 1 *Legal Education Review* 97.

16 Lucinda Finley, 'Women's Experience in Legal Education: Silencing and Alienation' (1989) 1 *Legal Education Review* 101.

III Transition

In 1988 not only did AULSA become ALTA but ALTA was transformed by a further amendment to the Constitution that was approved at the Annual General Meeting when full membership was granted to all teachers of law and PLT courses in tertiary institutions in its constituent jurisdictions. Previously, full membership had been confined to law teachers in universities.

This constitutional amendment avoided the problems that had previously arisen in the United Kingdom Society of Legal Scholars, where full membership had been refused to polytechnic law teachers and other tertiary law teachers outside the university sector. This had led to the excluded law academics forming their own law teachers' association, the Association of Law Teachers, resulting in a continuous split between the two academic law associations which has persisted until the present.

In an interview, Rosalind Mason, who was one of the first beneficiaries of this constitutional change and coming from a College of Advanced Education at that time, has described how she was affected by the enthusiastic nature of the 1988 Conference and how it eventually led to her becoming Chairperson of ALTA in 2006.[17]Another outcome of the changes instituted at the 1988 Conference was that the practice of member law schools submitting their Annual Reports to the Annual General Meeting of the Conference, gradually disappeared.

IV Conclusion: Ongoing Outcomes and the Future

Although Professor Paton recognised in 1946 that the world of legal education could not be immediately remoulded, he would nevertheless have been surprised if he could have foretold the status of ALTA in 2015. ALTA operated out of permanent headquarters on the Kuring-gai Campus (Lindfield) of the University of Technology, Sydney, with a paid administrator/coordinator until 2015, when the association moved to the ANU College of Law. It has a General Executive which embraces representatives from most states and territories in Australia and also a New Zealand Executive. It publishes two major journals annually: the LER and the *Journal of the Australian Law Teachers Association* (JALTA). The LER is a refereed journal and Michelle Sanson, a former editor, has expressed how being in this role was 'a great experience in terms of knowing who all the movers are in legal education and [seeing] where the law is developing.'[18] JALTA was launched to assist members who publish papers in the ALTA Conference proceedings by providing a double-blind peer reviewed journal. This satisfies the current institutional requirements for refereed journals with respect to higher education research data collection purposes. Both the journals are distributed electronically on an annual basis to members. ALTA also sponsors a third publication called the Legal Education Digest (LED) which is distributed electronically to members on a tri-annual basis.

The focal point for most members is the Annual Conference which is normally hosted by a member law school, takes place over three days and is attended by 150 to 200 members: approximately a quarter of the membership. As well as the featured speakers who deal with ongoing legal issues in the plenary sessions, a major part of the conference is the activities of the 30 interest groups that focus on contemporary matters of interest in legal education. There are also sponsored awards such as the Lexis Nexis–ALTA Award for Excellence and Innovation in the Teaching of Law, and the CCH–ALTA Best Conference Paper Award.

The successful culmination of the 70th Annual Conference in July 2016, exemplified the ongoing success of this major event in the Association's calendar. The event was hosted in New Zealand by the Victoria University Wellington Law School and attended by 145 delegates with in excess of 100 conference paper presentations. The Dean of the Victoria University Law School, Professor Mark Hickford, the then President of ALTA, presided over the Conference with the Chair of the Conference Committee Associate Professor Alberto Costi. Apart from

17 Interview With Rosalind Mason, Professor and Head, Law School, QUT (Sydney, 23 August 2013).
18 Interview with Michelle Sanson, Senior Lecturer, UWS School of Law (Sydney, 12 February 2014).

the milestone of the 70th Anniversary of the establishment of ALTA in 1946, the Association honoured its distinguished supporters in New Zealand: the Hon. Sir Geoffrey Palmer and Dame Sian Ellis, Chief Justice of the New Zealand Supreme Court, as Honorary Life Members of ALTA. A similar honour was also conferred on two longstanding New Zealand Executive Committee Members, Associate Professor Alexandra Sims and Dr John Hopkins.

There were also important innovations introduced at the conference meeting of the ALTA Executive Committee under the leadership of the Committee's Chairperson, Professor Stephen Bottomley. These would involve greater contact and influence by Interest Group Convenors and Law School ALTA Representatives which should have a beneficial impact on the future involvement of ALTA members in the activities of the Association. With a membership base in excess of 850 members, as well as strong links with government bodies and other national and international key agencies, ALTA has gained an influential position with respect to the promotion of legal education, research and scholarship throughout Australia, New Zealand and the South Pacific Region.

THE SWINGING SIXTIES AND BEYOND – THE INFLUENCE OF THE SECOND WAVE UNIVERSITY LAW SCHOOLS IN THE DEVELOPMENT OF AUSTRALIAN LEGAL EDUCATION

*Emeritus Professor David Barker AM**

I Introduction

During the three decades after the establishment in 1960 of the Australian National University (ANU) Faculty of Law there was an impetus to expand Australian law schools. Perhaps the expanding economy at the time increased the demand for additional lawyers. There was also a view '[t]hat any course at a university should be open to all who were qualified for it and wished to undertake it'[1] which was supported by various government reports on tertiary education at the time. This perception also reflected a change of attitude in the school leavers of the 1960s who were the initial post-war generation (the 'baby boomers'). Increasingly, the majority stayed at school until Year 12 (then sixth form) and were the first members of their families to go to university. This was partly due to the creation of fee-free tertiary education after the election of the Whitlam Government on 5 December 1972, which led to the expansion of Australian law schools.

There was also a noticeable change during this period in law teaching in Australia. Not only was this reflected in the increased number of tertiary law teachers (due to the increase of law students and an expansion of law schools), but also in the calibre of law teachers. Up and until that time there had been a trend of law teachers being engaged part-time, balancing teaching with practising law—the latter being their primary focus. However, from 1960 onwards there was a greater focus on learning skills incorporating a more conceptual approach to the study of law. These changes in the nature and quality of law teaching required a shift in the qualities and approach of those appointed as law teachers. The majority were now required to serve full-time with little or no time to devote to legal practice. As Michael Coper has observed, up until this time the focus of legal teaching 'was strongly professional and vocational.'[2]

The increased emphasis on conceptual learning replicated what had occurred in the United States in 1870 when Christopher Langdell introduced the 'Casebook' method of teaching into Harvard Law School. This led to the appointment of what was described by Robert Stevens as 'the first of a new breed of academic lawyer, a law graduate with limited experience of practice who was appointed for his scholarly and teaching potential.'[3] There was a similar pattern in the previous composition of North American law teachers: 'law professors had been either practitioners taking a few hours away from the office to conduct classes, or full-time teachers who had had extensive experience as practitioners before appointment.'[4]

This shift in the experience of law teachers lead to differences in the approach to teaching law in the law schools established during this period, which in this paper will be called the

* Australasian Legal Information Institute (AustLII), Faculty of Law, University of Technology Sydney. This article is based on materials included in the author's recent PhD Thesis titled 'A History of Australian Legal Education' (submitted to the School of Law, Macquarie University).

1 Peter Balmford, 'The Foundation of Monash Law School' (1989) 15 *Monash University Law Review* 139, 155.

2 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

3 Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983) 38.

4 Ibid.

'Second–Wave' law schools. These were the first moves away from what were regarded as the prevailing forms of legal education, which emphasised:

> that studying law is mainly a matter of acquiring knowledge; that coverage is more important than depth; that what legal subjects one covers in primary legal education is more important than whether they are good vehicles for intellectual training; and that one is finished with academic study, critical analysis and even reading as soon as one graduates.[5]

These views would be gradually replaced by what has been described as the 'truisms' of legal education transformed into practical working principles.[6] This new thinking advocated:

> that education is a life-long enterprise; that most higher education should be self-education; that the main role of undergraduate education is learning how to learn; that standard distinctions between academic and practical, theory and practical, theory and practice, liberal and vocational are false dichotomies that are mischievous as well as misleading; and that any body of lawyers worth preserving must take seriously its claims to be a learned profession.[7]

However, it would be a mistake to suppose each of the 'Second-Wave' schools was established with the same objectives. Nevertheless, the law schools under scrutiny in this paper illustrate the statement made in 1978 by Michael Kirby in his then role as the first Chair of the Australian Law Reform Commission (ALRC) that: 'there is not a shadow of doubt that legal education both in content and method will change rapidly in the last quarter of this century.'[8] In support of his view, Kirby quoted Professor Derham, the foundation Dean of Monash University (Monash) Law School who had told a conference in 1976:

> We are now … in a period of profound and rapid change in our society … The work of bringing our 'black letter law' into tune with the needs of the time is arduous and exacting work calling for high scholarship and developed legal skills … If it is not done, not only lawyers but the law itself will fall into disrepute.[9]

II Monash University Law School

An extra law school in Victoria outside the University of Melbourne, was established in 1963 because Melbourne's original law school was unable to satisfy the demand for an expansion in legal education within the State.[10] When Monash was founded in 1958,[11] becoming the first university in Victoria since the University of Melbourne was established in 1853, it was intended that the teaching of law would commence in 1965.

However the opening of the Monash Law School was brought forward from 1965 to 1963 following a letter from Professor Zelman Cowen, the Dean of the Law Faculty at the University of Melbourne, to the Vice-Chancellor of Monash, Dr Matheson. The letter stated that Melbourne Law School had received in excess of 600 applications from potential law students but that it would only be able to accept half this number in accordance with a quota set by the University of Melbourne for first-year entry in 1961.[12] Zelman Cowen expressed a preference for a second law school in Victoria, which was supported by Vernon Wilcox, a senior partner in a leading firm of city solicitors in Melbourne; GC Wyatt, the President of the Victorian Law Institute; and

5 William Twining, 'Preparing Lawyers for the Twenty-first Century' (1992) 3(1) Legal Education Review 1, 2.
6 Ibid 9.
7 Ibid 2.
8 Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales, 1978) 9.
9 Ibid.
10 Balmford, above n 1, 146.
11 *The Monash University Act 1958* (Vic).
12 Balmford, above n 1, 146.

Sir Edmund Herring, the Chief Justice of Victoria, who was also the President of the Victorian Council of Legal Education.[13]

There was another interesting development when the opening of Monash Law School was being discussed. This was the unprecedented action by the Victorian Council of Legal Education in establishing a temporary law course in 1962 under the aegis of the Council of the Royal Melbourne Institute of Technology (RMIT), with participating students allowed to use the libraries of the Supreme Court of Victoria and the Law Institute of Victoria. Although temporary, the course operated for 21 years. During this time, 545 students completed the course and qualified for admission, while others subsequently transferred to Monash Law School where they completed their academic requirements for admission.[14] The Council of Legal Education's qualifying course from the 1960s to the 1980s allowed RMIT (now a university) to claim that it was the legitimate successor to the legal practitioners' course formerly taught at its institution.

Monash's Professorial Board recommended: 'That a Dean of the Faculty of Law be appointed as soon as possible, with the first duty of making recommendations to the Council upon the best way of establishing a Faculty of Law (and that) law students should not be accepted until adequate additional finance is available.'[15] Monash was in the process of making a submission on finance to the Australian Universities Commission, the main governmental body at that time, so that it was able to amend its application to request financing for the staff and buildings of the new law school. While the Australian Universities Commission was able to fund the staffing of the law faculty, it was unable to support a new building to accommodate the new law school during the 1964–66 triennium. Although no funds were available for the construction of a new law school building, the funding for the staffing of a law program encouraged Monash to proceed to establish the law school.

The selection of a dean of high standing and eminence was axiomatic in enabling the new law school to set high standards in education and to attract well qualified and experienced law academics. In this respect, the appointment of Professor (later Sir) David Derham, the then Professor of Jurisprudence at the University of Melbourne, was an inspired choice. Having accepted the position in October 1963, Professor Derham was required to remain at the Melbourne Law Faculty until 1964, but this did not prevent him from immediately developing a curriculum for the new Monash Law School.

A *Alternative Approach to the Law Curriculum*

The focus of the new law program at Monash was on transferable legal skills, incorporating small group teaching. The new Dean proposed the following four subjects for the introductory first year of the law school program: 'An introductory legal subject; Criminal Law—to introduce students to a case law subject; British History; and one subject to be chosen from Economics 1, Politics 1, and Philosophy 1, or a Language subject or a Literature subject.'[16] This innovative first-year program led to a three-year degree entitled BA (Law), which subsequently became a degree of Bachelor of Jurisprudence, as Professor Derham had envisaged. In addition, the Dean envisaged that these first-year candidates might also proceed to a Bachelor of Laws (LLB) (Pass degree), taken over four years, or an LLB (Honours) over five years. This meant that Monash students could be awarded a combined BA/LLB based on four years of study. The philosophy underlining this proposed law program was contained in a statement by Professor Derham that: 'All lawyers should be pounded with advanced law and educated.'[17]

13 Ibid 148.
14 Ibid 150.
15 Ibid 152.
16 Ibid 165.
17 Ibid 167.

B *The Law Library*

Professor Derham characterised the approach and qualities of other foundation deans of this era in that he had a highly individualistic and innovative approach to teaching law, which was far removed from that of traditional law schools. The establishment of the new library at Monash was an excellent example of this approach.

Professor Derham sought the approval of the Monash Professorial Board for the appointment of Professor Frank Beasley, who was retiring from a Chair of Law which he had held at the University of Western Australia since 1927. Professor Derham informed the Board that not only did Professor Beasley have contacts with: 'Every law library in the world' but also that: 'Few men knew more than [him] about the sources and the techniques of building up a collection of law books.'[18] The Board approved, appointing Professor Beasley to a special lectureship involving the law library.

To stock the library, Professor Derham arranged the acquisition of law libraries from two former judges of the Supreme Court of Victoria, Sir Charles Gavan Duffy, deceased, and Sir Charles Lowe, who had retired. By the end of its first year in 1964, Monash Law School possessed a substantial library of 10,000 volumes, which increased to 138,000 volumes by 1989.[19]

C *The Commencement of Teaching*

One of the major problems faced by Monash in attracting staff and students was its relative remoteness, 24 kilometres by road, from the centre of Melbourne. This was exacerbated by the need to involve legal practitioners, who obviously were based near the courts, and students who needed to develop connections with the legal profession mainly situated in the central business district (CBD). Professor Derham highlighted his approach to solving the 'Topography' problem in his 'Plan for a New Law School':

> Monash University is so far away from the centre of legal activities in Melbourne that it is not possible for a law school primarily concerned with full-time university students, and established in the Monash grounds, to meet the need in teaching for continuous influence from those engaged in the actual practice of the law by making practitioners responsible for much of the teaching in the school, as has been done in other Australian Law Schools. It is clear that full-time academic members of the profession will have to be responsible for all courses conducted at Monash, and that new methods for meeting the need for close contact with actual practice will have to be devised.[20]

In appointing staff to the new law school, the foundation Dean took care to balance the need for full-time staff with the benefit of involving practitioners, who could only teach part-time. Because of his previous involvement with the University of Melbourne, Professor Derham was able to attract both full-time staff and current members of Melbourne Law School who were able to teach part-time, together with a limited number of barristers and solicitors, who were willing to fit in part-time teaching with the demands of a legal practice.[21]

There was some anticipated instability regarding the admission of students because most students applying to Monash Law School preferred an offer from Melbourne Law School. In the first week of the first year of enrolments at Monash, after 150 applicants had accepted offers and enrolled, many withdrew once they received a late offer from Melbourne. This had a knock-on effect at Monash Law School as it had to make further offers to maintain its target number of 150 first-year law students. The students who had been selected for the first-year course were

18 Ibid.
19 Ibid 168.
20 Ibid 170.
21 Ibid 172.

interviewed by a member of full-time staff so that they would be fully aware of the nature of the proposed law program, particularly the first-year courses.[22]

Despite these setbacks there was a feeling of optimism within the new law school which was reflected by Professor Derham in his introduction to the first edition of *In Gremio Legis* ['In the bosom of the law'], the new Monash student law society publication.

> The Monash Law School began in a tremendous hurry. Students were enrolled at the beginning of 1964 before even the natures of their degree courses were fixed for the future. They have no place of their own in the University. They still face years of 'camping' in other faculties' buildings before proper facilities can be provided for them. In such circumstances it has been very pleasing indeed to see the growth of a vigorous and ambitious law students' society constituted by the energy and interest of the students themselves.[23]

D *Subsequent History*

The optimism shown by Derham for the future of Monash Law School was, as its subsequent history indicates, well founded.[24] Like most law schools the type and nature of its improvements depended on the character of the law dean.

The two Deans who immediately followed on from Derham only served for a comparatively short period of time. Louis Waller, the direct successor to Derham, had a term of only two years whilst Enid Campbell's was even shorter; one year (1971). However she was unique in that she was the first woman to be appointed as the Dean of any Australian law school.

David Allan, the first to serve a full term as Dean after Derham, was described as 'a dynamic and innovative dean', responsible for inaugurating: 'Australia's first LLM [Master of Laws] by coursework, a Centre for Japanese Law, a continuing legal education program and the clinical education program.'[25] The latter incorporated community law centres where law students could give supervised legal advice to clients as part of their law degree. Patrick Nash, his successor as Dean from 1977 to 1980, was recognised for developing the law school's focus on Asia.

The opening year of Robert Baxt's appointment as Dean in 1980 was marked by the Law School being recognised as the largest in Australasia, with 1673 undergraduates and 52 full-time academic staff. Baxt, who completed two terms from 1980 and 1988, stamped his authority both within Monash Law School and externally as an authority on commercial law. He set up a multidisciplinary course in competition law, and later cooperated with Harold Ford of the Melbourne Law School and Bob Officer of the Faculty of Economics, in establishing a new course in securities regulation.

Charles Williams presided over the expansion of Monash Law School. Williams did this by internationalising the law program, incorporating exchanges with overseas university law schools in Malaysia and Italy.

Stephen Parker, a former Chair of the Council of Law Deans, was appointed in 1999 from Griffith University Law School to rejuvenate legal studies at Monash Law School, an exercise which he completed successfully, leading to his appointment as Deputy Vice-Chancellor of Monash, followed by him becoming Vice-Chancellor of the University of Canberra. His successor in 2004 was Arie Freiberg, another professor to complete two terms as Dean, who again not only raised the standard of Monash Law School by the active promotion of a research culture but also established a substantial surplus with respect to its finances.

The current Dean of Monash Law School is Bryan Horrigan who commenced his term in 2012, and is a corporate law specialist. On his appointment to Monash Law School in 2008 as Louis Waller Professor and Associate Dean, Research, he focused on further developing

22 Ibid 173.

23 David Derham, 'Introduction' in *Gremio Legis* (1964) .

24 Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University Publishing, 2014).

25 Ibid 91.

commercial law within the faculty, which led to the establishment in 2010 of a Commercial Law Group.

In speaking at a function to celebrate the fiftieth anniversary of the founding of Monash Law School, Chief Justice Robert French commented on its success, stating that: 'The history of the Monash University Law School over the past fifty years is worthy of celebration, not just by the Law School itself, but also by the community it serves.'[26]

III University of New South Wales Law School

There was an interesting parallel with the establishment of the second law school in Victoria when another school was created, in similar circumstances, in New South Wales (NSW) a few years later. Just as the University of Melbourne Law School had not been able to accept all qualified applicants for entrance, in 1964 the University of Sydney Law School found itself in an identical situation. A report by the Martin Committee, which was then reviewing the future of tertiary education in Australia, stated that: 'Lawyers seeking admission to independent practice should, wherever possible, have an education founded upon full-time studies at university level.'[27] Following this, representations were made to Professor (later Sir) Philip Baxter, the Vice-Chancellor of the University of New South Wales (UNSW), for it to establish a second law school in NSW.

A *Laying The Foundations*

Compared with the establishment of other law schools—where often there had been opposition or even hostility to such a proposal—there was support, even enthusiasm, from both the NSW Bar Association and the NSW Law Society for the creation of a law school at UNSW. As always with the setting up of a new university faculty, funding was problematical. Although the proposed UNSW Law School received support from the Australian Universities Commission, initially the NSW government was not supportive, with C B Cutler, the Deputy Premier and Minister for Education, informing the UNSW Vice-Chancellor in March 1966 that no state funds would be available at that time for such a proposal.[28] However, there was subsequently a change of attitude on the part of the NSW government with an undertaking that such funding would commence in 1970.[29]

B *Selecting a New Dean of Law*

The appointment of the inaugural Dean of Law at UNSW involved a change of approach in the profile for the position and the manner of selection. Part of this has been attributed to the attitude of Sir Philip Baxter the UNSW Vice-Chancellor, who was of the view that such positions should be occupied, where appropriate, by members of the practising profession and not necessarily by university academics. One of the persons consulted was Professor David Derham, the Foundation Dean of Monash Law School, to whom Sir Philip explained that UNSW wished to appoint as the Foundation UNSW Dean of Law a 'senior member of the profession who could spend some time planning the course and the Faculty.'[30] The selection process also involved wide consultation with all the holders of leading judicial positions in NSW. The consensus view of those consulted was that the most appropriate person for the position was J H (Hal) Wootten QC. However, it was thought that he would not accept the position because of his current

26 Chief Justice Robert French, 'Pericleans, Plumbers and Practitioners Book Launch' (Speech Delivered at the Monash University Law School 50th Anniversary, Melbourne, 28 June 2014).

27 Commonwealth of Australia, 'Report of the Committee on the Future of Tertiary Education in Australia to the Universities Commission (The Martin Report)' (1964) Volume II 49.

28 Marion Dixon, *Thirty Up: The Story of the UNSW Law School 1971-2001* (University of New South Wales, 2001) 2.

29 Ibid.

30 Ibid

financial needs with a family of four children to educate. This supposition was reinforced by the fact that in 1969 it was common knowledge that he had already turned down two offers of a judicial position.

Nevertheless, the newly appointed Vice-Chancellor of UNSW, Professor Rupert Myers, decided that it would be worth approaching Hal Wootten with the offer of Foundation Dean. Wootten's response to the offer was: 'The only thing I knew about legal education was how bad my own was,'[31] to which Professor Myers responded: 'That might be a pretty good start.'[32] Wootten accepted the invitation, later stating that he found the offer 'irresistible'.[33]

C *Creating a New and Different Law School*

Hal Wootten's appointment proved another inspired choice for a dean to lead a new Australian law faculty in the post-World War II years. Because of his background as a prominent member of the legal profession he was able to approach, and make demands of UNSW in a way that might not have been acceptable from a conventional law academic. First, he resisted demands for UNSW Law School to commence operating in 1970, which had been the expectation of most of those involved with its formation. Secondly, he persuaded the Vice-Chancellor to permit him to use the year of 1970 to plan the new law school. These arrangements incorporated travel through Australia visiting other law schools and obtaining ideas on the best ways to operate a modern law school. It also offered him the chance to seek out law academics willing to accept the challenges of working in a law school that incorporated new concepts relating to legal education, and to put these into operation. Wootten also extended this study tour to law schools in England, Canada and the United States. He also attended the Annual Conference of the Association of American Law Schools, which took place in San Francisco in January 1970.

The new Dean also used the year's delay as a chance to appoint academic staff who supported his vision. UNSW Law School's records indicate that he selected his original academic staff from an eclectic variety of backgrounds. Robert Hayes, for example, was currently employed at Monash Law School, and brought with him the experience of having taught the innovative common law program at Monash. Whilst in the United States, Wootten had met with George Garbesi of Loyola University, Los Angeles, who had previously established a colourful reputation when teaching for a limited period at the University of Sydney Law School (Sydney Law School) and who then became the first professorial appointment to the UNSW Law School.

Other initial appointments were Richard Chisholm, who had just a completed a BCL at the University of Oxford and who subsequently became a Family Court Judge; Tony Blackshield, a specialist in Constitutional Law; Michael Coper, another specialist in Constitutional Law; and Garth Nettheim, then at Sydney Law School, who was appointed as Professor at UNSW and who would eventually become the third Dean of the UNSW Faculty of Law.[34]

Wootten approached fashioning the Law Faculty in a way that would satisfy his vision for a law school embodying modern law teaching methods, whilst creating a stimulating atmosphere for all involved with developing its reputation, whether as staff or students. The UNSW Law School's history contains a description by Rob Brian, its first law librarian, as to how he worked closely with Wootten in employing unorthodox methods to build up the law collection. In its first five years the collection reached 50 000 volumes, and it would currently be regarded as among the best law libraries in Australia.[35]

The influence of Monash Law School was seen not only in the development of the law library collection but in the original curriculum for the law program. Wootten devised a curriculum that envisaged a five-year combined degree in either Arts/Law or Commerce/Law. The program was

31 Ibid 2.
32 Ibid 3.
33 Ibid.
34 Ibid 5.
35 Ibid 10.

divided into two semesters each year, including among its first-year subjects, legal research and writing, and incorporating an interactive approach to the teaching of all law subjects.[36]

D *Developing the Law School Ethos*

In its early history, UNSW Law School injected dramatic change in the traditional attitudes of most other Australian law schools towards the teaching of law. An illustration of this was the view expressed by Wootten that 'discussion'[37] could play an important part in stimulating participation of law students, aided by the insistence on small classes. With his American background, this approach was interpreted by Garbesi as incorporating the Socratic method of law teaching whereby the teacher involved him or herself in a dialogue with the student. In this development of an interactive method of teaching Wootten sought the advice of Fred Katz, the Head of the UNSW Teaching and Education Research Centre (TERC).[38] This cooperation led to the videotaping of some of the early classes in order to assist staff in developing their teaching technique. At this stage of the school's development there was a radical view prevalent among early staff members, so much so that Garth Nettheim recollects some colleagues even posing the question: 'What are classes for?'[39]

This approach of questioning the conventional norms of legal education is also illustrated by UNSW Law School's introduction of continuous class assessment. A study by TERC indicated that there was a wide discrepancy as to how this assessment scheme was administered by participating academics. Nevertheless, a majority of the students responding to a survey by TERC opted for the scheme to continue.[40]

E *Questioning the Law School Ethos*

One of the advantages of UNSW Law School was that its early group of academics had been recruited or had applied because they shared similar views about the core focus of the new law school. Inevitably, later additions to the academic staff did not necessarily subscribe to these views. In the opinion of Tony Blackshield, a foundation member of the law school, part of this could be attributed to the original staff ignoring the importance of inculcating these newcomers into the virtues of the original vision for the law school.[41]

One of the proponents for change was Ronald Sackville, recruited from the University of Melbourne, who had been appointed as a UNSW Professor at the unusually early age of 28.[42] As soon as he commenced teaching at UNSW Law School in 1972 he challenged many of the basic concepts of the UNSW curriculum stating it was overcrowded with units and incorporated excessive compulsory content.[43] Wootten, the Dean, appears to have been unaffected by these criticisms, regarding them as representing vitality in UNSW Law School:

> It is due less to changes in the law than to the continual quest of active scholars and teachers to find new meanings in their studies, new ways of looking at them, and fresh ways of presenting them. Show me a law school that does not have a bristling Curriculum Review Committee and I won't bother to look at it.[44]

This relaxed attitude of the Dean towards these types of academic controversy would stand him in good stead as the increasing size of the academic staff led to a development of two loose factions. One group favoured the retention of the original progressive forms of curriculum and

36 Ibid 14.
37 Ibid 15.
38 Ibid 17.
39 Ibid.
40 Ibid.
41 Ibid 19.
42 Ibid.
43 Ibid 20.
44 Ibid.

assessment, and the other supported the development of a more traditional approach to legal education. This division of opinion led to mass meetings of both staff and students debating the merits of the various forms of assessments. The students voted in favour of the more traditional forms of assessment. Many members of staff considered that this decision was reached because a majority of the students regarded the alternative methods of assessment as likely to affect the standing of the degree, with a consequent ill-effect on their future employment prospects.[45]

While the progressive element of the law staff regarded this adverse vote as a defeat, they decided to do something positive to promote their radical views. Consequently, the idea of promoting a community legal centre was conceived, which eventually resulted in the establishment of the Redfern Legal Centre.[46]

F *Assessing the Law School in the 1970s*

Research still indicates that 45 years on since the first undergraduate students enrolled at UNSW Law School, they are still differently motivated than those joining more conventional law schools. This viewpoint is supported by the results of a 2015 survey of 219 new undergraduate students carried out by TERC. The survey indicated that at least half the students had a state high school background and that there were very few who had parents with either a tertiary education or a background as lawyers. The survey also revealed that the motivating factor for most students enrolling at UNSW was their interest in law and legal work, with little emphasis on the financial rewards that they might enjoy as qualified lawyers. Another factor had been the opportunity to study the combined degree course in Commerce and Law, a program unique at that time to UNSW.[47]

In the 1970s, the inclusive nature and informality of the teaching combined to create an atmosphere of social consciousness. The fact that UNSW Law School was located in huts on the UNSW campus, with some teaching taking place on fine days outside on the lawns surrounding the law school buildings and even continuing in a nearby public house, somehow created a sense of social consciousness. This contributed to UNSW Law School quickly gaining a reputation for the promotion of social justice, which manifested itself in the establishment of numerous organisations committed to social change such as a Prisoners Action Group, NSW Society of Labour Lawyers and the Feminist Legal Action Group.[48]

The end of the visionary period for UNSW Law School was signalled when, after four years in the position, Wootten resigned as Dean on 28 June 1973, formally handing over the position to Harry Whitmore. Two months later, Wootten was appointed as a Justice of the Supreme Court of NSW.[49]

Whitmore, as successor, was faced with the challenge of introducing a more managerial approach to a rapidly expanding law school, both with regard to the dramatic increase in student numbers and, consequently, in academic staff, which by 1974 needed to be augmented by at least another twenty academics.[50] At the same time, he needed to balance the requirement for a more structured organisation of UNSW Law School's activities, while endeavouring to retain its pioneering approach to the progressive development of its curriculum and assessment. However, he remained Dean for only a short time, resigning with effect from 31 October 1975 when he was replaced by Garth Nettheim.[51]

Both Whitmore and Nettheim oversaw UNSW Law School during a time of social and political upheaval, which had an effect on the activities of the School. The most significant of these was the dismissal, on 11 November 1975, of Prime Minister Gough Whitlam by the

45 Ibid 21.
46 Ibid.
47 Ibid 23.
48 Ibid 33.
49 Ibid 39.
50 Ibid.
51 Ibid 46.

Governor-General Sir John Kerr. Both of these notable personalities were well-known to many of the staff, especially those like Tony Blackshield who had a background in constitutional law. One outcome of the dismissal was a student demonstration against Sir John Kerr when he visited the UNSW campus in 1976. This led to the arrest of several students, including at least one staff member.[52]

G *Recruiting Prominent Law Academic Staff Members*

During this period of political unrest, both Whitmore and Nettheim were recruiting more academic staff. A number of staff, such as Mark Weinberg, Mark Aronson and Michael Chesterman, were appointed. They were exceptionally well-qualified and were to have a profound effect on UNSW Law School and Australian legal education.

Balanced against these appointees were more experienced arrivals, such as Ivan Shearer who had worked as an adviser to the Lesotho Government and subsequently served two terms as Dean of the Law School. Another was David Weisbrot, a United States law graduate who had previously been Dean of the University of Papua New Guinea Law Faculty, and later became President of the ALRC. He has explained how it was a unique time to be involved in Australian legal education and what a great experience being a member of the UNSW Law Faculty proved to be.[53]

Finally there was Michael Coper, first appointed as a teaching fellow, then lecturer at UNSW, then Commissioner of the Inter-state Commission and, more recently, as Dean of the ANU College of Law—a role in which he was highly successful and long-serving. These examples are a microcosm of the quality of the earlier staff of UNSW Law School.

However, an ever-increasing staff meant that deans also had to deal with the consequential problem of acquiring more and better accommodation. The effect was a move by UNSW Law School in February 1976 from the hutted accommodation and other buildings to more permanent accommodation in the UNSW Library Tower.[54]

H *Launching Co-curricular Activities*

Two events that epitomise the early radical approach of UNSW Law School are the publication of the first edition of the UNSW Law Journal and the founding of the Redfern Legal Centre.

The publication of the Law Journal had been envisaged when Whitmore was Dean; a sum of $2000 had been earmarked for its production and an editorial committee established. However the first edition was not published until early 1976 when Nettheim became Dean. At that time, it had a special quality which made it stand out among other Australian law school journals and reviews; it was a student-edited publication similar to that of American law school reviews. The first edition had a foreword by Sir Laurence Street, the Chief Justice of the Supreme Court of NSW and an article by Sir Garfield Barwick, the Chief Justice of the High Court of Australia.[55] It continues the Law School's focus on social issues and it has established a high reputation for the quality of its articles and book reviews.[56]

The other event was the founding in March 1977 by some UNSW legal staff of the Redfern Legal Centre, which was described as a 'shopfront' legal service for the local community. [57]

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52 Ibid 48.

53 Interview with David Weisbrot, Chair of the Australian Press Council (Sydney, 8 November 2013).

54 Dixon, above n 28, 48.

55 Sir Laurence Street, 'Foreword' (1975) 1 *University of New South Wales Law Journal* 1; Sir Garfield Barwick, 'Problems in Conservation ' (1975) 1 *University of New South Wales Law Journal* 3.

56 Dixon, above n 28, 54.

57 Ibid 62.

I *Assessing the Later Years*

The motivation to improve the quality of teaching and research at UNSW Law School has continued. During the three decades since the first Deanship of Nettheim, UNSW Law School has been led by a galaxy of talented law academics including Professors Ronald Sackville, Donald Harding, Ivan Shearer, Michael Chesterman and Paul Redmond. Each of these Deans left their mark, enhancing the Law School's reputation.

To Sackville may be attributed the introduction of the Socratic form of teaching. With Harding it was the creation of a clinical teaching facility, the Kingsford Legal Centre, which came into operation on 27 June 1981 and also served as a community legal centre. Ivan Shearer used his reputation as a leading international lawyer to enhance the standing of the Law School within the area of international law. Michael Chesterman was recognised for his expertise in developing the law of contempt, including defamation and free speech, which became a major topic in new courses at UNSW Law School. Finally, Paul Redmond's influence can be measured in his expertise in business associations and corporate law, together with the co-authorship of the text *Lawyers*, which was associated with a compulsory course taught at the Law School entitled *Law, Lawyers and Society*.

Interviews with Andrew Mowbray,[58] who was at UNSW Law School during Sackville's Deanship, and Sophie York,[59] who was a student when Shearer was Dean, confirmed that small group teaching was still being used and that the high quality legal training provided at the Law School provided a solid foundation for legal practice. The Hon Sir Gerard Brennan, the then Chief Justice of the High Court of Australia, at the 25th Anniversary of the Law Faculty Dinner, 18 July 1996, paid this tribute to the Law School:

> I congratulate not only the University, the Deans, the Faculty and the visiting lecturers, but also the students who have together made the Law School an integral part of a community of learning. The repute stands high. The prospects of the future are higher yet.[60]

The most recent former Dean, Professor David Dixon, presided over a law school that had 2675 students and 82 permanent staff[61] which in 2006 relocated to a new purpose-built building on the main university campus. In addition, it now has a campus in the Sydney CBD which is mainly utilised for teaching postgraduate and senior undergraduate students. In comparison to other Australian law schools, UNSW Law School has maintained its dedication to small group teaching and also its unique Socratic approach to learning.

The current Dean is Professor George Williams AO who is a well-known media commentator on legal issues who has written and edited 34 books on a variety of legal topics. He has also appeared as a barrister in the High Court of Australia in many cases over the past two decades.

Excluding the Kingsford Legal Centre, UNSW Law School has twelve other research schools[62] of which the most prominent would be the Gilbert and Tobin Centre of Public Law.[63] It claims to play 'a prominent, independent role in public debate on issues vital to Australia's future, including Charters of rights, federal reform, reconciliation and native title, refugees' rights and migration law and the challenges of responding to terrorism'.[64]

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58 Interview with Andrew Mowbray (Sydney, 16 September 2014).

59 Interview with Sophie York (Sydney, 1 August 2013).

60 Gerard Sir Brennan, '25th Anniversary of the University of New South Wales Law School' (1997) 20(1) *University of New South Wales Law Journal* 210, 212–13.

61 University of New South Wales, *Law: Facts in Brief* <http://law.unsw.edu.au/about-us/facts-brief>.

62 University of New South Wales, *Law: Centres* <http://www.law.unsw.edu.au/centres>.

63 University of New South Wales, *Law: Gilbert + Tobin Centre of Public Law* <www.gtcentre.unsw.edu.au/>.

64 Ibid.

The Kingsford Legal Centre is also recognised as the authority for charting the annual record of judges' dissenting judgments in the High Court of Australia.

IV Macquarie University Law School

Macquarie University (Macquarie) was formally established in 1964 when the *Macquarie University Act 1964* (NSW) was enacted. The first Vice-Chancellor was Alexander George Mitchell who served in this position until 1975. Macquarie Law School was established in 1972, during his term of office.

Reportedly 'Ern Wetherell, [NSW] Minister for Education in 1964 stated Law was to be the glamour faculty at the new Macquarie University.'[65] Just as with the earlier founding of UNSW Law School it was stated that other law schools in NSW could not satisfy the demand by those wishing to study law. The other reason for the establishment of this Law School was the need for a distance law program.

In accordance with the general teaching philosophy of Macquarie it was intended that— like all other studies offered—law would be interdisciplinary. As with other new law schools at this time the emphasis was to be on small group teaching because '[m]uch depends on students having ample opportunity … to participate in lively exchanges of ideas and points of view.'[66]

A *Early Academic Staff Appointments*

In 1973, Peter Nygh was appointed both a Professor and the Foundation Head of Macquarie Law School. His was one of the first appointments. With a Doctor of Laws (LLD) from the University of Sydney and a Doctor of Juridical Science (SJD) from the University of Michigan he was a highly regarded lawyer in the traditional mould.[67] His expertise was family law, comparative law and private international law, being the author of the leading textbook on the latter subject, *Conflict of Laws in Australia*.[68]

The following year John Peden, the grandson of Sir John Peden, the former long serving Dean of the University of Sydney Law Faculty, was appointed also as a Professor of the Law School.

Both Nygh and Peden brought to Macquarie Law School a firm intention to create an alternative law school in Sydney, as had happened earlier at UNSW. This was exemplified by Peter Nygh in his public lecture delivered in 1975 entitled 'Lawyers for 1975': 'Lawyers are not at the moment equipped by training to enquire into the operation of the law in the real world and to weigh the various policy options which might be available.'[69]

Unconsciously, Macquarie Law School replicated much of what had taken place at the UNSW Law School in its earlier years. The staff came from either the more traditional Australian law schools or from overseas. Gill Boehringer, an American academic, came from Queen's University Belfast, although he had previously taught at the University of East Africa in Tanzania. Two other academics, Peter Kincaid and Michael Noone, had formerly been teaching at the University of Papua New Guinea whilst another, Michael Sassella, came from the University of Birmingham, United Kingdom.[70]

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65 Bruce Mansfield and Mark Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989* (Macquarie University, Hale and Ironmonger, 1992) 276.

66 Ibid.

67 Margaret Herd (ed), *Who's Who in Australia* (Information Australia Group, 1999) 1280.

68 Peter Nygh, *Conflict of Laws in Australia* (Butterworths, 1st ed, 1971).

69 Rosalind Croucher and Jennifer Shedden, *Retro 30: Thirty Years of Macquarie Law School* (Macquarie University, 2005) 14.

70 Ibid.

B *The Formative Years*

Teaching of the first cohort of law students began in 1975. This included the provision in February of the first residential summer school for external (distance) students whilst the teaching of internal students commenced in March. Soon after, a group of students formed the Macquarie University Law Society (MULS) and, in September 1978, a combined group of academics, students and lawyers established a community legal centre for low income earners located in Macquarie Street, Parramatta—'Macquarie Legal Centre'.[71] Again, as with UNSW Law School, there was an emphasis on tutorial-based seminar teaching to the complete exclusion of lectures, with 30 per cent of the total mark being based on class performance.[72]

In the early eighties there was deliberate attempt to reconstruct the Macquarie law curriculum. This resulted in a new full-year course entitled 'History and Philosophy of Law', with the Torts course being replaced by a new subject — 'Standards of Legal Responsibility' and Criminal Law by 'Personal Injury'. These changes to the curriculum could be largely attributed to the influence of two early appointments to the Law School, Gill Boerhinger and Drew Fraser both from North America. This shift in emphasis on the nature of law teaching at Macquarie created more than the normal tensions which arise with the advent of any change in the curriculum of a degree program.

At the same time there had been a change in the leadership of the Law School. Peden replaced Nygh as Dean in 1979, and was himself replaced by Professor John Goldring in 1981, who served as Dean until 1987. This combination of events led to considerable discord among the academic law staff, which attracted a great deal of publicity within the media particularly in *The Australian*. Its education reporter Christopher Dawson subsequently took it upon himself to run a regular weekly series following the events in the Law School in great detail. It also had unfortunate consequences for the Law School because in 1986 the Pearce Committee was conducting a review as part of a national assessment of legal education undertaken by the Commonwealth Tertiary Education Commission (CTEC). In its recommendations the Committee stated that Macquarie Law School '[s]hould be closed, phased out or divided due to irreconcilable differences.'[73]

It is crucial to analyse the reasons for these disputes and why they attracted such strong criticism from the Pearce Committee. Problems at Macquarie arose on the appointment of Gill Boerhinger and Drew Fraser, who considered that it was detrimental for Australian law schools to deliver a doctrinal and vocational form of legal education based on legal positivism. They based their teaching philosophy on a pre-World War II curriculum pioneered by the Legal Realists at Columbia and Yale universities who 'sought to integrate law and the social sciences.'[74] A further movement, based on the work of the Legal Realists, known as Critical Legal Studies (CLS) developed in the United States after World War II.'[75] As described by Frank Carrigan, an ongoing law academic at Macquarie and supporter of CLS, 'a major theme of CLS was hostility to legal positivism.'[76] Thus the division between two competing philosophies created incompatible differences between the protagonists representing the opposing views. Professor Bruce Kercher, who was at Macquarie Law School at this time, has described these events and their eventual outcome.

71 Ibid.
72 Ibid 37.
73 Ibid 76.
74 Frank Carrigan, 'They Make a Desert and Call it Peace' (2013) 23 *Legal Education Review* 313, 316.
75 Ibid 317.
76 Ibid.

> There was a lot of exaggeration in the press too. Eventually it broke into two factions and in the middle sat the majority of staff who watched the bombs fly overhead. Most of us ducked and tried to avoid the flak and got on with teaching and research.[77]

As the Law School History recounts: 'The irreconcilable differences were reconciled, or at least a truce was in place by the late eighties. The school survived the battering of the press and weathered the storm.'[78]

C *Renewal and Consolidation*

The subsequent history of the Law School indicates that following Macquarie's restructuring in 1999 the Law School became a 'Division of Law' which incorporated the Departments of Law, Environment Law and Business Law. There was a further re-organisation in 2009 when the Division of Law was replaced by 'Macquarie Law School' with Business Law being transferred to the Faculty of Business and Economics.

Whilst there was a rapid change of deans in the 1990s including Tony Blackshield and Gill Boehringer, Rosalind Croucher's appointment as Dean from 1999 to 2008 led to the Law School returning to some form of normality in the relationships between its various academic staff members. It is appropriate to recognise that the supporters of CLS at the Law School felt that they had been marginalised by structural changes, and that this was detrimental to the future academic standard of the Law School. These views have been articulated by Gill Boehringer[79] and two other members of the Law School, John Touchie and Scott Veitch.[80]

The current Dean of the Law School is Natalie Klein who was appointed in 2011, following on from Peter Radan (2009–2010). She is a highly regarded international law academic who presides over a Law School which has recorded a dramatic expansion in the area of legal research and publications.[81]

V University of Technology Sydney Law School

The UTS Faculty of Law was originally established at the NSW Institute of Technology (NSWIT) in January 1975.[82] It was intended to replace the law extension course which was taught under the auspices of the Legal Practitioners Admission Board. However, for various reasons the law extension course has remained in operation.

Law had already been a component of the current Bachelor of Business degree at NSWIT and Dr R L Werner, its President, was asked to develop a course for a law degree. For this he sought the cooperation of Dick Godfrey-Smith, a Principal Lecturer in Law in the Business Faculty, together with David Flint, a Lecturer in Law and Pamela Neville, an Administrative Officer in the Registrar's Division.[83] The outcome was a practice-oriented course with a substantive core complemented by a number of parallel skills subjects. It was originally intended that the law degree would be offered on a part-time basis with a full-time component becoming operational at some future time.

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77 Croucher and Shedden, above n 69, 76.
78 Ibid.
79 Gill Boehringer, 'Infamy at Macquarie: Economic Rationalism and the New McCarthyism' (1999) 24(1) *Alternative Law Journal* 31.
80 John Touchie and Scott Veitch, 'The Decline of Academic Reason' (1999) 24(1) *Alternative Law Journal* 26.
81 Luke Salem, '40 Years of Macquarie Law' (2012) 18(4) *The Brief, Macquarie Law Society* 22.
82 George Marsh (ed), *A History of the UTS Law Faculty 1977-1997* (Faculty of Law, UTS, 1997) 1.
83 Ibid.

A *The Early Years*

Following an international search, Geoffrey Bartholomew, an eminent academic lawyer, then a Professor of Law at the University of Singapore was appointed as the Foundation Dean in 1976.[84] Unlike the recruitment experience on the founding of UNSW Law School and Macquarie Law School, many of the academics who were to become the initial members of the NSWIT Law School were already lecturing in law in NSWIT's Faculty of Business, although there were a few such as Colin Ying (University of Singapore) and Douglas Glass (UNSW) who were recruited from other tertiary institutions.[85]

There were two features of the NSWIT law degree that distinguished it from the other Sydney metropolitan law schools. First, its course structure incorporated both core and skills subjects. Secondly, the composition of its student body was different, being composed mostly of mature age students, particularly women, because of the part-time nature of the course.[86] Although the course was structured as part-time over six years, some students were able to accelerate their studies by taking additional subjects or claiming exemptions, so that the first NSWIT LLB degrees were awarded on 15 May 1981. Coincidentally, the NSWIT Chancellor awarding the degrees was the former Foundation Dean of the UNSW Law School, the Hon Justice Hal Wootten.[87]

An early innovation of the Law School was the introduction of the Summer Program in 1983–84. This meant that students could undertake elective subjects during the long summer recess. The NSWIT Law School appears to have been the first faculty of any Australian university to introduce such a program. This has now become a regular feature of most university programs, being replicated in the form of a third semester during the academic year.[88]

B *Subsequent Developments*

The UTS Law School has become recognised for its innovative approach to teaching and learning. This has partly arisen because of its location within a university of technology enabling it to offer 'practice-oriented education with a focus on integrated exposure to professional practice.'[89] When the Faculty disaffiliated from the College of Law in 1996 this led to the phasing out of the Skills Program and the incorporation of practical legal training (PLT) as an integral part of the undergraduate LLB program.[90] Another innovation was the introduction of the Masters of Law and Legal Practice (MLLP) degree in 1997. One outcome of this initiative was that the Law School became the first in Sydney to offer in 2009, the Juris Doctor (JD) graduate-level law qualification based upon the United States graduate degree.[91]

Two other postgraduate coursework programs reflected its innovative approach. The first was the introduction of a Masters of Intellectual Property which was the 'first (and until 2012 the only) university course to satisfy all the "board exam" requirements of the Professional Standards Board of Patent and Trade Mark Attorney.'[92] The second was the introduction in 1997 of the first Australian Masters course in Dispute Resolution which adopts both an interactive and a theoretical approach to its teaching.[93] Intellectual property has been reflected as an area of

84 Ibid.
85 Ibid 2.
86 Ibid 1.
87 Ibid 3.
88 Ibid 4.
89 Jill McKeogh, 'The Faculty of Law: Engage, Educate, Empower' in Debra Adelaide, Paul Ashton and Annette Salt (eds), *Stories From the Tower, UTS 1988-2013* (Xoun and University of Technology, Sydney, 2013) , 54.
90 Ibid 55.
91 Ibid 56.
92 Ibid.
93 Ibid.

expertise in respect of the two recent deans of the Law School, Jill McKeogh (2005–2012) and Lesley Hitchens, the current Dean.

One of the most highly recognised activities of the UTS Law Faculty is its collaboration with the UNSW Law Faculty in supporting the Australasian Legal Information Institute (AustLII), which is located at UTS. This is claimed to be the largest free legal information database in the world.[94]

VI Queensland University of Technology Law School

The Queensland Institute of Technology (QIT) as the Queensland University of Technology (QUT) was then known, opened in 1977.[95] Like UTS, QIT owed its eventual university status to the outcome of the Dawkins Reforms. QIT and NSWIT were the first non-university tertiary institutions in Australia to offer Bachelor of Laws courses. Because the titles of both these institutions embrace the term 'technology' there has been an attempt to explain the relevance of this description in connection with the teaching of law. Professor Dennis Gibson, a former QUT Vice-Chancellor explained it in these terms:

> A recent meeting of vice-chancellors of the five Australian Technology Network universities (all descended from former state institutes of technology) came up with the following working definition of technology in an attempt to encompass the extraordinary complexity of activity at these institutions: the application of creative thinking and ingenuity to the solution of definable and practical problems in all fields of human endeavour. In its commitment to creativity and practical problem solving, law at QIT/QUT—first the school and then the faculty—has exemplified this broad 'technological' tradition.[96]

The original premises for the Law School were located on the ground floor of a building which formed part of the Technical College quadrangle on the Gardens Point Campus of QUT. It had been described as 'modestly refurbished in garish orange with cheap green carpet which invited mowing in the wet season.'[97]

The initial academic members of the Law School were the newly appointed Head, Tom Cain, who had previously been responsible for administering the Law Extension course at the University of Sydney; David Gardiner who had also been teaching on the extension course; Ian Campbell (also from Sydney); and two local Queenslanders—Carmel McDonald and Jim Herlihy. This small group was recruited to undertake the teaching of the first intake of 110 full-time students who commenced their studies at the beginning of the 1977 academic year.[98] In addition to accommodating students studying for what was originally designated as a Bachelor of Arts (BA) in Law degree (subsequently converted to an LLB) at the request of the Queensland Law Society, the Law School commenced a Legal Practice course in 1978 to accommodate 13 foundation students. This was provided as an alternative to articles of clerkship and laid the foundation for a future practical legal training course at the Law School.[99]

The practical legal training course was originally founded on the Ormrod continuum of legal education and training.[100] This refers to the English and Welsh-based criteria for legal education established in 1974 by a Committee chaired by Sir Roger Ormrod, an English High

94 Ibid 57.
95 Dennis Gibson, 'The University and the Law School' (1997) 13 *Queensland University of Technology Law Journal* 1.
96 Ibid 1.
97 David Gardiner, 'The Law Faculty over Twenty Years' (1997) 13 *Queensland University of Technology Law Journal* 15, 15.
98 Ibid 16.
99 Ibid 17.
100 Allan Chay, 'Wal's Legacy: QUT'S Practical Legal Training Course' (1997) 13 *Queensland University of Technology Law Journal* 36.

Court Judge.[101] Besides establishing a group of seven core subjects (later increased to eight by the addition of the subject European Union Law) for any law degree leading to a qualification as a legal practitioner, it provided a practical training stage in the first part of this continuum, with the second part incorporating a year of supervised practice in legal employment. The Law School acknowledged its ongoing influence on the QUT PLT course as follows:

> Although the Ormrod model has been superseded in the discussion of legal education at a theoretical level, it still provides an accurate depiction of what actually occurs in mainstream practice in legal education and training in Australia.[102]

'[T]he original objectives of the Course were those adopted at the Australian Professional Legal Conference in 1974.'[103] These objectives were to:

> Stress the development of professional values, skills, and technical and procedural competence in designated practice areas [and] to prepare students as general practitioners rather than as specialists.[104]

Forty years later such a statement would be regarded as indicating an extremely narrow view of the objectives of legal education.

A *Developing the Part-Time Student Intake*

Reflecting on Tom Cain's background as the original director of the NSW Law Extension Course it is not surprising that QUT made early provision for the teaching of part-time law courses. As Cain states: 'We had a separate set of lectures and seminars, mostly in the evening, to suit the convenience of the part-time internal students, which was uncommon in 1977.'[105]

Apart from the part-time internal course there was a part-time external course, which was illustrative of Cain's forward-looking attention to detail and planning. Whilst the external students were taught by the same lecturers and tutors as the internal students, their teaching was supplemented by local coordinators and tutors. The students were supplied with individual subject study guides prepared by the lecturer in charge of the course and they were also given written exercises. In addition, they were supported by the establishment of basic law libraries in various parts of the state and by a number of weekend study schools in Brisbane. First and second-year students were assisted by telephone tutorials conducted by a tutor located in Brisbane. From 1983 a photocopying service was provided and in 1985 the quarterly student newsletter commenced.

Such was the success of the QIT/QUT external part-time course that the Pearce Committee commented in its Report: 'QIT's efforts in its external course were commendable and we think that it should take over sole responsibility for external legal studies in Queensland.'[106]

This commendation was to cause problems for the Law School when in 1987 there was a recommendation by the CTEC that QIT should take responsibility for the conduct of all external law studies throughout Australia. Tom Cain gave this proposition a great deal of thought but turned it down on the basis that it would upset the balance of the courses in the Law School. His reasons for refusal are interesting, considering that today most tertiary institutions would be tempted to adopt an expansionist role to such a proposition. These were that, a Law School of a reasonable size can run a good external LLB course when the number of external students is about 15 per cent of the total number of LLB students, without upsetting the balance of courses

101 United Kingdom, 'Report of the Committee on Legal Education' (1974).
102 Chay, above n 100, 36.
103 Ibid 37.
104 Ibid.
105 Tom Cain, 'Reflections as Foundation Dean' (1997) 13 *Queensland University of Technology Law Journal* 3, 7.
106 Ibid.

and losing staff.[107] This is when the number of external and part-time internal students is not more than 35–40 per cent of the total number of students.

B *QIT/QUT Law Library*

Tom Cain's influence as Foundation Head of the Law School is illustrated by the manner in which the Law School gained control over the new law library at QIT. This is commented upon by David Gardiner in his reminiscences of the early days of the Law School. When describing the problems of the move by the Law School into the new main library building at QIT he states:

> We were not the sole occupier of the premises and our strata title neighbours were not necessarily ones we should have been associating with and what was more they were the dominant occupants and controlled the body corporate. This was of course the University Librarian and the rest of Main Library and there was many a campaign and skirmish associated with the Law Library's operations being in conflict with those of Main Library.[108]

To Cain there was obviously no questioning as to whether the law library should come under the control of the Law School. In many tertiary institutions control of the law library has been a contentious issue for the Head of the Law School and the University Librarian, often requiring intervention and arbitration by the Vice-Chancellor or the Academic Board. Cain did not become embroiled in such discussions or arguments and said that:

> The Law School Library was the heart of the Law School. There were several reasons for it being part of the Law School and for the Law Librarians being members of my staff. I wanted to determine the content of the Library and the classification of books used. I also decided that we would acquire books rather than audio-visual material and that, in general, it would be a reference and not a lending library. I also decided that we would adopt the Moys classification, a feature of which is its separation of primary (statutes and law reports) and secondary (other) materials. Most of all, I wanted the Law Librarians to have a teaching as well as a librarian role and to conduct courses for the students on how to use a law library.[109]

C *Evolution and Growth*

This heading is adapted from an article by David Gardiner, which describes the development of the Law School after Tom Cain had retired as Foundation Dean in 1989 and when he was appointed as his successor. Despite the Pearce Report complimenting the QUT Law School on some of its practices when it was published in 1987, Gardiner was of the view that there was feeling for change among the majority of the Law School staff. This was reflected in the tripling in the number of the courses available, which included those offered by a new School of Justice within the Faculty together with a doubling in student numbers. The Law Faculty was also involved in a crucial curriculum review which incorporated a number of key changes to some former rigid curriculum requirements for admission to practice in Queensland and nationally. In 1992, the Law Faculty for the first time hosted the Australasian Law Teachers' Association (ALTA) Conference.

On his appointment in 1997 as Pro-Vice-Chancellor (Planning and Resources) of QUT Gardiner was replaced as Dean by Professor Malcolm Cope. The new Dean was faced with further increased student enrolment with dwindling resources due to cuts in QUT's operating grants and the consequent reduction in the operating grant to the FacultIn 2004, Michael Lavarch was appointed as Dean and Professor of the Faculty. He had been Attorney-General of Australia from 1993 to 1996 and Secretary-General of the Law Council of Australia from 2001 to 2004. During his term as Dean, which ended in 2012, he presided over an ongoing increase in students studying law at QUT, which totalled 3500 in 2011. The Law Faculty, in 2009, also hosted its

107 Ibid 8.
108 Gardiner, above n 97, 17.
109 Cain, above n 105, 8.

second ALTA Conference. But Lavarch's chief role within legal education was to initiate a major development in the promotion of continuing legal education and legal profession reform. For his replacement as Executive Dean in 2013, QUT again appointed someone outside the law academic mainstream—John Humphrey, a Senior Partner in King & Wood, a leading Brisbane law firm.

VI Conclusion

The period covered by this paper marked some significant landmarks in the development of legal education, much of it brought about by the establishment of five new law schools. There was a change in the type of law academic now being attracted to teaching law. Many law students were graduating without the intention to practise law and yet the legal profession wished law schools to continue to focus on training for professional practice.

The two decades between 1960 and 1980 encompassed a period of steady growth for Australian legal education although it was principally focused within NSW, with three new law schools, and Victoria and Queensland, with one each. Monash and UNSW law schools were established because the original law schools of Melbourne and Sydney were unable to deal with the unexpected expansion of students seeking to undertake law studies in Victoria and NSW. There was an equally strong reason for the founding of Macquarie Law School, which was required to incorporate a distance degree course for rural NSW law students. The quota for these students was 100 in 1975, and 125 in 1976.[110]

NSWIT/UTS received its enhanced status as a degree-awarding law school because of the perception of the Bowen Committee that its law degree, with its focus on part-time law courses, would eventually replace the Legal Practitioners Admission Board University of Sydney Law Extension Course. On a similar basis, QIT/QUT, apart from its intake of full-time law students, made provision for internal and external part-time law students.

Compared with the later established law schools throughout Australia, these five 'Second-Wave' law schools, as they became known, had the advantage of being able to develop in a sequential manner with targeted groups of students awaiting enrolment in their programs.

A further more significant development with which the Second-Wave law schools should be associated has been described by Michael Coper as: 'The emergence of the idea of legal education as the study of law as an intellectual discipline in its own right.'[111] This development brought about a changing attitude in some law students who, in comparison to those graduating from the more traditional law schools, have:

> little or no desire, at least initially, to engage in mainstream legal practice. These students come to law as an intellectual discipline rather than as vocational training, or are seeking the broad generic skills that a good legal education has such strong potential to impart and that are widely deployable across a range of occupations.[112]

There was a further paradox during this period as described by Paul Redmond:

> Arguably, the most significant development in legal training during the last decade has been the abolition of the apprenticeship system of articles of clerkship in favour of formal, institutionalized academic and skills training … The recent creation in New South Wales of three further tertiary institutions conferring law degrees has hastened the movement there towards a higher proportion of graduate entrants.[113]

110 Committee of Inquiry into Legal Education in New South Wales, '*Legal Education in New South Wales* (The Bowen Report)' (Government Printer, 1979) 160.

111 Coper, above n 2, 392.

112 Ibid.

113 Paul Redmond, 'Some Objectives in the Academic Study of the Legal Profession ' in Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales, 1978), 199.

The challenge for legal educators was to create a law school ethos that, in Coper's words, 'combined the study of law as an intellectual discipline with the idea of legal training for professional practice.'[114] That challenge was addressed in the enormous growth of law schools during the 'Third-Wave' period which followed from 1989 onwards and provided for the establishment of a further unprecedented number of law schools.

114 Coper, above n 2, 392.

A PROBLEM-BASED LEARNING CURRICULUM AND THE TEACHING OF THE CRIMINAL LAW

*Brianna Chesser**

Abstract

This paper evaluates the adoption of a problem-based learning model for Criminal Law. Problem-based learning is uniquely well-suited to the complex and self-contained criminal law curriculum. The pilot program has been active for three years, and has been continually revised and refined. The new model has been received positively by students and staff, particularly after incorporation of a flipped classroom methodology. There remain several identifiable areas for improvement, both structural and pedagogical. Student satisfaction and academic achievement have improved commensurately with the integration of problem–based pedagogy.

I Introduction

The teaching of criminal law is mandatory in all law schools in Australia. This course is often taught in the earlier years of the law degree and in some cases, it is a first year, first semester subject. Criminal law curricula are also required to meet the standards for admission to practice in various states, as is mandated by the Council of Legal Education. Whilst this course is arguably, one of the most interesting to teach, it faces some unique difficulties in that this subject must often compete with years of exposure to sensationalised media coverage and popular representations of what criminal law should be and do, rather than what it is, or does.[1] The criminal law classroom provides an excellent opportunity to challenge students to change pre-conceived notions by separating facts from legally relevant facts and to apply the law to hypothetical scenarios.

Academics have long since accepted that as part of our role, we must assist students to think independently and to solve problems.[2] Traditional teaching methods are well established in criminal law, as with other areas of law. Information about key legislation and facts are transmitted to students, usually in the form of lectures or large group seminars that provide context for the readings which the student completes before attending class. Academics only provide hypothetical problems for students after this process, which are designed to lead them back to particular crimes and cases. The purpose of these problems is to test the students' degree of acquired knowledge. Academics in criminal law may therefore seem to some, to have always relied on some variation of the problem-based learning (PBL) method. However this is not the case because whilst problems are solved, the traditional teaching method is quite different to PBL and is in fact the reverse. PBL reverses the traditional transmissive approach by using the discussion and analysis of a problem as the beginning of the process of learning. This dichotomy is discussed in greater detail in the section below.

Unlike our counterparts in medical academia, lecturers in criminal law have not yet utilised PBL methods to their fullest extent. This could be perhaps due to resistance among teaching and leadership academic law staff, to make significant, unconventional changes to long-established

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1 Roger Fairfax Jr, 'Challenges and Choices in Criminal Law Course Design' (2013) 10 *Ohio State Journal of Criminal Law* 2, 659-661.

2 John Bransford, Robert Sherwood, Ted Hasselbring, Charles Kinzer and Susan Williams, 'Anchored Instruction: Why we need it and how technology can help' in Don Nix and Rand Spiro (eds) *Cognition, Education, and Multimedia: Exploring ideas in High Technology* (Routledge, 1990) 115.

'traditional' methods of teaching in legal education, or the cost of implementing a full PBL curriculum. However what is clear is that law degree curriculum reform is necessary in order to effectively adapt to meet the changing needs of contemporary cohorts of law students studying criminal law.[3]

This paper will examine the use of the PBL method in a flipped criminal law classroom, and will discuss the implementation and success of a pilot PBL curriculum in the Thomas More Law School (TMLS) of the Australian Catholic University (ACU).

II What is Problem Based Learning?

The PBL method has been used in medical academia for many years,[4] with the first educational institution to pioneer faculty-wide PBL in Medicine being the University of Maastricht.[5] This form of PBL was based on the 'anchored instruction model',[6] rather than on a 'cognitive apprenticeship model'[7] where complex scenarios were used to teach a variety of skills.[8] In practice based vocational professions such as law, linking theoretical concepts and practical situations is difficult when they are taught and thus learned, discretely. The role of PBL is to bring theoretical concepts and practice, together.[9] Although the PBL model was initially created for trainee doctors, in the late 1970s American law professors began to recognise the possible utility of this method in law schools.[10] The PBL method was introduced in American law schools as the first major alternative to the case-based model of instruction.[11] The key advantage of using the PBL method for teaching in law school, is training students to 'think like lawyers' by encouraging their role as a legal problem solver, through creating tasks that are very similar to real world legal problems.[12] Indeed, one of the primary aims of PBL is to develop 'active learning' amongst students. PBL has students use worked examples as an initial mode of instruction, in the hope that they will perform better than those who are simply asked to undertake the process for the first time, without any worked example. Here, the academic acts as a guide to help students absorb knowledge, rather than just to supply answers.[13] The ultimate goal, is to encourage students to apply acquired knowledge flexibly.[14]

3 Susan Sturm and Lani Guinier, 'The law school matrix: reforming legal education in a culture of competition and conformity' (2007) 60 *Vanderbilt Law Review* 515, 517-519.

4 David Gijbels, Filip Dochy, Piet Van den Bossche and Mien Segers, 'Effects of problem-based learning: a meta-analysis from the angle of assessment' (2005) 75 *Review of Educational Research* 27, 28-29.

5 Henk van Berkel, 'Assessment in a problem-based medical curriculum' (1990) 19 *Higher Education* 123.

6 The anchored instruction model situates instruction within authentic contexts and tasks. See for example, Janet Mannheimer Zydney, Arne Bathke and Ted Hasselbring, 'Finding the optimal guidance for enhancing anchored instruction' (2014) 22:5 *Interactive Learning Environments* 668

7 The Cognitive apprenticeship model focuses on practice performing tasks (eg. facts analysis) and the use of metacognitive strategies. See for example Susan Williams, 'Putting case-based instruction into context: examples from legal and medical education' (1992) 2 *Journal of the Learning Sciences* 367, 369-375.

8 Susan Williams, 'Putting case-based instruction into context: examples from legal and medical education' (1992) 2 *Journal of the Learning Sciences* 367, 369-375.

9 Debbie Lam, 'Problem-based learning: an integration of theory and field' (2004) 40 *Journal of Social Work Education* 371, 372.

10 The PBL model has since been used in a variety of faculties, including engineering, business, education and mathematics faculties, in tertiary settings at institutions all over the world.

11 Gregory Ogden, 'The problem method in legal education' (1984) 34 *Journal of Legal Education* 654.

12 Ibid.

13 Henk van Berkel, above n 6, 123-124.

14 David Gijbels, Filip Dochy, Piet Van den Bossche and Mien Segers, 'Effects of problem-based learning: a meta-analysis from the angle of assessment' (2005) 75 *Review of Educational Research* 27, 30.

A *Definition and Application*

'A teaching and learning method which puts a problem first, and in which further learning is conducted in the context of that problem.'[15] PBL is a fundamentally student-centric model where learning is conducted in small groups and where teachers act as facilitators[16] with problems that encourage students to develop independent problem-solving skills. PBL is sometimes described in other ways, for example as 'problem-focused' or 'issue-based'.[17] The PBL model has seven key steps:

1. Students receive the hypothetical problem;
2. Students define the problem and identify relevant legal issues;
3. Students brainstorm, using prior knowledge to create possible solutions;
4. Students try to create a personal theory/case;
5. Students work out what issues they need to learn more about;
6. Self-directed study; and
7. Sharing findings with the group.[18]

The key role of PBL is to trigger law students' awareness that these issues exist,[19] and to create an interest in them by highlighting their real-world ramifications.[20] In the PBL model, the discussion and analysis of a problem starts the process of learning, rather than acting as the end point.[21] Here the PBL hypothetical sets out a factual scenario that raises legal issues which the student has not yet studied. This process takes the place of a traditional lecture delivery mode. In this way, students are interacting with real-world skills,[22] thereby increasing their motivation to learn.[23] Importantly, utilising the PBL method does not mean that courses would be devoid of any lecture material or 'real content', as each problem scenario should be carefully crafted to lead students to particular cases and particular legislation. Essentially, problems form the organising focus for the course and act as the stimulus for learning. The process of PBL encourages free enquiry in students[24] and mimics that which they will find in every day legal practice where students may come across a problem to which that they do not immediately know the answer.[25]

The question remains whether the adoption of the PBL model could really work in a law school. One such example of a successful implementation in a law school comes from the law school at the University of York, England. The York Law School (YLS) was established in 2007 and designed an undergraduate Bachelor of Laws (LLB) program, based largely around

15 York Law School, 'Guide to problem-based learning' (2012) University of York Law. This definition comes from the York Law School, which uses the problem-based learning model and the guided discovery method to administer all first year law courses, where students are placed into 'firms' with one 'senior partner', the lecturer, and one 'junior partner', the tutor, per 'firm'. This form of problem-based learning is considered the best practice model due to its whole of school approach.

16 Howard Barrows, 'Problem-based learning in Medicine and Beyond: a brief overview' (1996) 68 *New Directions for Teaching and Learning* 3, 5-6.

17 Debbie Lam, above n 10, 371, 374.

18 Jos Moust Henk van Berkel and Henk Schmidt, 'Signs of Erosion: reflections on three decades of problem-based learning at Maastricht University' (2005) 50 *Higher Education* 665, 668.

19 Eric Werth, 'Student perception of learning through a problem-based exercise: an exploratory study' (2009) 32 *Policing: An International Journal of Police Strategies & Management* 21.

20 Laura Donohue, 'National Security Law Pedagogy and the Role of Simulations' (2012) 6 *Journal of National Security Law & Policy* 489, 521-523.

21 David Gijbels, Filip Dochy, Piet Van den Bossche and Mien Segers, above n 15.

22 Debbie Lam, above n 10.

23 Karim Nasr and Bassem Ramadan, 'Impact assessment of problem-based learning in an engineering science course' (2008) 9 *Journal of STEM Education* 16.

24 Suzanne Kurtz, Michael Wylie, and Neil Gold, 'Problem-based learning: an alternative approach to legal education' (1990) 13 *Dalhousie Law Journal* 797, 799.

25 Henk van Berkel, above n 6, 128.

the principles of PBL.[26] At the YLS, the PBL cycle changes or adapts problems in a weekly cycle. Students are introduced to a problem scenario at the beginning of the week and they are aided by a tutor who facilitates a structured conversation in order to illuminate the necessary learning outcomes for the problem.[27] Professor Caroline Hunter, Head of the YLS, states that if the problems are designed well, the learning outcomes will emerge as questions from the subsequent discussion.[28] This program has not yet been officially evaluated, but preliminary indications of its success can be found by looking at student engagement, student success and the employability of students from the YLS.

B *Problem-based learning versus problem-solving*

As lawyers, we have a tendency to emphasise the importance of problem-solving, and the hypothetical problems used in traditional approaches reflect this, with an emphasis on advising the client or constructing an argument for one side or the other.[29] While the problem-solving method is more expansive than case learning,[30] it is not quite as expansive as PBL. Both problem-solving and the PBL method promote meta-cognitive learning and a self-awareness of learning processes, and while there is a correlation between the two processes, there is also a critical distinction.[31] Most law subjects draw on problem-solving techniques to contextualise student learning, where the facts of a particular case may be disclosed to allow students to construct arguments on those facts, before revealing the actual decision that was made by the court in the case. However, the PBL method is concerned with much more than simply teaching a student to solve a problem,[32] as its principal goal is developing knowledge and understanding through the use of real world or hypothetical problems from the *outset of a course*, where these problems serve as a springboard for achieving a deeper knowledge and understanding of legal rules. Here, the problem acts as more than a learning activity; it forms the basis for the course structure.

C *PBL and the Flipped Classroom*

As its name suggests, flipping the classroom describes the inversion of expectations in the traditional classroom. The 'inverted' or 'flipped' classroom is a pedagogical model that replaces the traditional in-class lecture format with pre-delivered instructional materials and an in-class learning workshop.[33] As with the PBL method, the purpose of the flipped classroom model is to encourage students to be active learners rather than passive receivers of information. This can take numerous forms, including interactive engagement, just-in-time teaching,[34] and peer instruction.[35] The use of a flipped classroom breaks the 'cycle of bulimic learning'; a pattern of taking in information, regurgitating, and forgetting.[36] Flipped classrooms use multimedia

26 York Law School, 'Guide to problem-based learning' (2012) University of York Law.
27 Ibid.
28 Caroline Hunter, 'How to use problem-based learning' (2013) UNSW Law School Visit.
29 York Law School, 'Guide to problem-based learning' above n 29.
30 Gregory Ogden, above n 12, 662-664.
31 Cheryl Preston, Penee Wood Stewart, and Louise Moulding, 'Teaching "Thinking Like a Lawyer": metacognition and law students' (2014) *Brigham Young University Law Review* 1053, 1073.
32 John Craig & Sarah Hale, 'Implementing problem-based learning in politics' (2008) 7 *European Political Science* 165.
33 Catherine A Lemmer, 'A view from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student' (2013) 10 *Law Library Review* 2, 461-491.
34 Students respond to web-based questions before class, and the academic uses this feedback to inform his or her teaching.
35 Dan Berrett. 'How 'flipping' the classroom can improve the traditional lecture' (2012) *The Chronicle of Higher* Education 12, 1-14.
36 Cristina Rotellar & Jeff Cain, 'Research, Perspectives and Recommendations on Implementing the Flipped Classroom' (2016) 80 *American Journal of Pharmaceutical Education* 1, 1-2.

resources to support self-directed learning[37] by blending e-learning and face-to-face in-class instruction, a model that suits the delivery of a PBL curriculum. PBL is complemented by the use of a flipped classroom to introduce information to students prior to the face-to-face classes.[38]

D *Possible Barriers to Adopting the PBL Method*

Both the flipped classroom and PBL methods are well supported in theory and development, but their implementation leads to several key issues. Law students are traditionally reluctant to participate in group-based activities; scholars point to a tendency for students to put less effort into group-based assignments and to a possible reduction of higher achievers' grades when placed in group activity.[39] There is also the eternal problem of some students putting more effort into group-based assignments than others and the possibility of complaints about lack of structure and guidance.[40] However, this form of group activity mimics what most lawyers face early in legal practice, and they work in close conjunction with colleagues in what is essentially a team environment. Following the PBL model does not mean that students are left to their own devises as students operate under the close supervision and guidance of academics. PBL in a flipped classroom encourages both individual students and groups of students, to find their own way to communicate and organise problem-solving.[41]

One key misconception with the use of the PBL model in a flipped classroom is that as these methods are student centric, the curriculum is somehow less important, giving way to the whim of the student who is learning whatever they wish. However, the stability of the curriculum is of the utmost importance to the success of these methods; here the curriculum is supported by the collection of problems that are designed to stimulate learning in a way that is consistent with the needs of the curriculum.

A further criticism relates to the difficulty in assessing the success of a PBL course due to the esoteric nature of skills imparted[42] such as: problem-solving aptitude, critical thinking and self-directed learning.[43] However these skills are already assessed on a regular basis in Australian law schools and are reflected in graduate attributes and learning outcomes for assessment tasks. For example, effective problem solving and specifically, 'Thinking Skills' are Threshold Learning Outcomes for all LLB Courses,[44] which are usually reflected in individual subjects in some way, either through the University's graduate attributes, or the learning outcomes for individual assessment tasks.

III Case Study: Teaching Criminal Law in the Thomas Moore Law School (TMLS)

Designing a new curriculum, developing new teaching tools and skills is a difficult and time consuming task for any new law school. The Thomas More Law School at the Australian

37 Andrew Tawfik & Christopher Lilly, 'Using a flipped classroom approach to support problem-based learning' (2015) 20 *Technology, Knowledge & Learning* 299, 300.

38 Edward Westermann, 'A half-flipped classroom or an alternative approach?: Primary sources and blended learning' (2014) 38 *Educational Research Quarterly* 43, 44.

39 Anne Hewitt, 'Producing skilled legal graduates: avoiding the madness in a situational learning methodology' (2008) 17 *Griffith Law Review* 87, 106-113.

40 David Tait and Robert de Young, 'Displaying the law: a cross-disciplinary learning experiment using the internet and multimedia technology' (2000) 14 *International Review of Law, Computers & Technology* 191, 197.

41 John Craig & Sarah Hale, above n 35, 172.

42 Eric Werth, 'Student perception of learning though a problem-based exercise: an exploratory study' (2009) 32 *Policing: An International Journal of Police Strategies & Management* 21, 24.

43 David Gijbels, Filip Dochy, Piet Van den Bossche and Mien Segers, above n 15, 32-34.

44 The Council of Australian Law Deans has listed 'Thinking Skills' as a threshold learning outcome for both undergraduate LLB and postgraduate JD courses.

Catholic University was established in 2012 and accepted its first cohort of students in 2013. The need to create an entire law school curriculum provided opportunities to experiment with new approaches to teaching and learning. The TMLS asks students to attend a lecture, workshop and tutorial for a total of four face-to-face hours per core subject per week. As is the case in other law schools, some units within the TMLS have been separated from their natural pair; for example in the TMLS, Evidence is a stand-alone subject, and Criminal Law and Procedure is covered in another joint unit. This project, funded by an ACU Teaching Development Grant, piloted the use of a specially designed 'brief of evidence' to contextualise student learning within a practical context, in line with the PBL model.

A *The Unit: Criminal Law and Procedure*

The Criminal Law and Procedure Unit[45] (Unit) in the TMLS, with its blended academic/professional teaching teams, provided an ideal environment within which to experiment with fundamentally student-centric models of teaching. This Unit:

> deals with the nature, purpose and justification of the criminal law and the various forms of conduct that constitute crimes in those Australian jurisdictions where criminal law is largely supported by the common law (in contrast to those jurisdictions which have a codified criminal law). This Unit also examines the procedures used to detain, prosecute and bring to trial, persons charged with criminal offences.[46]

This Unit is currently taught to a mixed cohort of first year and second year LLB students across two campuses of the ACU, Melbourne and North Sydney.[47] The cohort consists of largely domestic school leaver students, and material is delivered via a blended-learning program that includes four hours face-to-face per week[48] combined with online learning activities. The learning outcomes for the criminal law and procedure unit are:

1. Describe and critically evaluate the nature of Criminal Law and its justifications (GA1, GA2, GA3, GA4, GA5, GA9).
2. Describe and critically evaluate the offences created by the Criminal Law in Victoria and New South Wales (GA4, GA5, GA6, GA9).
3. Apply the Criminal Law to factual situations and thereby advise clients and others of their rights and liabilities (GA3, GA4, GA6).
4. Compare and contrast Victorian and New South Wales Law with that in certain other jurisdictions and evaluate its effectiveness (GA1, GA2, GA3, GA4, GA6).

The learning outcomes link to ACU's graduate attributes; GA1- GA6, and GA9.[49] This Unit was created and is implemented with the consulting assistance of legal practitioners who are usually senior members of the Victorian legal profession, to assist the National Unit Coordinator to prepare course materials and provide accounts of legal practice experiences to enrich the course.

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45 The Criminal Law and Procedure Unit was created in 2012 and was delivered for the first time in 2013.

46 TMLS, 'LAWS106 Criminal Law and Procedure Unit Outline' (2016) ACU.

47 The TMLS runs both an undergraduate LLB and a graduate entry LLB program. Students enrolled in the undergraduate stream will complete this Unit in the first semester of their second year, whereas students enrolled in the graduate entry stream will complete this Unit in the first semester of the first year of the LLB program.

48 Each week, for a core subject, students are asked to attend four hours face-to-face. In the Criminal Law and Procedure Unit, this consists of a two-hour lecture (substantive criminal law content), a one-hour workshop (procedural content) and a one-hour tutorial.

49 The relevant graduate attributes for ACU are:

GA1	demonstrate respect for the dignity of each individual and for human diversity;
GA2	recognise your responsibility to the common good, the environment and society;
GA3	apply ethical perspectives in informed decision making;
GA4	think critically and reflectively;

The legal practitioner-academic team collaboration is an important element of this Unit and was drawn upon heavily to modify the existing curriculum to incorporate the PBL model.

Unlike the YLS, which created a PBL curriculum from the outset, when the current Unit was first delivered at the ACU in 2013, the traditional passive transmission model was utilised and the collaborative legal practitioner-academic teaching team was not used to its full potential. For example, in 2013 the academic was responsible for the delivery of the two-hour lecture (substantive criminal law topics such as fatal and non-fatal offences) and the legal practitioner brought in other experienced criminal law specialist members of the Victorian legal profession, to teach the workshops (procedural elements of the course) which required students to follow a hypothetical criminal case from the arrest stage through to the appeal stage. Although law students were engaged directly with members of the Victorian legal profession, it was possible in any given week, for law students to end up with an hour of very interesting but non-examinable 'war stories' about criminal law practice. Students soon worked out however, that these 'war stories' were not examinable so they dwindled their attendance at legal practitioner run workshops. It became evident that the Unit's curriculum needed to change if we were to improve student engagement and achievement.

B *The Pilot PBL Curriculum*

After the first iteration of this Unit in 2013, a practice reference group[50] was formed to evaluate the curriculum and to create a set of PBL problems that could be used to contextualise the unit content.The practice reference group assisted in writing two 'briefs of evidence'[51] that would see students introduced to their 'clients' at the beginning of the semester. Brief one covered the first six weeks of the course and consisted of three statements; two witness statements and a statement from the informant.

A further witness statement and a coroner's report were released in week four. The first brief covered: fatal offences (murder and manslaughter), non-fatal offences (assault), arrest, search and seizure, police investigation, bail, complicity, and defences (mental impairment, intoxication, duress and self-defence). The second brief initially consisted of two statements: one made by the complainant and one made by the accused. However after much discussion, the practice reference group decided that only the complainant's statement would be included, as this allowed students to practice a client interview situation. This second brief covered: sexual offences (rape, sexual assault), non-fatal offences (intentionally causing injury and assault), property offences (burglary, aggravated burglary and theft), the criminal trial, arrest, bail, sentencing and appeal.

The content was delivered to students via the online learning page before the lecture, and was introduced in a short video. The workshop presented an opportunity for the teaching team to focus on the issues that had arisen out of the brief that week. In this way, the substantive law topic was linked to the relevant criminal procedure for the first time.

Despite the perceived success of these changes it became clear that further changes from the teaching team would be necessary to fully commit to the PBL model. For example, although the

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GA5 demonstrate values, knowledge, skills and attitudes appropriate to the discipline and/or profession;

GA6 solve problems in a variety of settings taking local and international perspectives into account; and

GA9 demonstrate effective communication in oral and written English language and visual media.

50 The practice reference group was essentially a group of experts that included: members of the judiciary from the Victorian Court of Appeal, the Victorian Supreme Court and Magistrates' Court, as well as, barristers and solicitors in Victoria who specialise in criminal law.

51 Although we labelled these hypothetical scenarios 'briefs', these scenarios were a small collection of statements which fell short of the material that would be provided in a 'real' brief. However, the label has proven to be effective, as it introduced students to some of the vocabulary that they would come across in practice.

intention was to discuss the context in a student-centric way, on some occasions the academic had defaulted into a lecture style spiel about an issue, where the students were once again turned into passive receivers of information. Indeed on closer inspection, it seemed that some lectures had remained largely the same; a short discussion at the beginning and the end served to contextualise the learning with the 'brief of evidence'. This was not the PBL model that was envisaged at the outset of the pilot program and it indicated the pervasive nature of traditional teaching methods.

One of the concerns that was used to justify this departure was that the students were finding it difficult to identify issues relating to the procedural irregularities in the problem scenarios. This is perhaps due to the intricate nature of the procedural rules which often cannot be predicted by students or taught in a largely conceptual way. In order to address this issue, after the first semester of this new method, a criminal law and procedure handbook[52] was written to ensure that students had access to the necessary procedural content in a condensed format, before coming to class.

Despite these departures from the envisaged model, modest improvements were seen in student engagement; attendance had increased from around 75% to 85% and student achievement improved marginally where average grades increased by around four marks.

C *The Pilot PBL Curriculum: Stage Two Implementation*

In the second year of the pilot program, the PBL model was adapted to include a flipped classroom model as well, to address both emerging procedural issues and any defaulting by lecturing staff. Furthermore, a focus group was held with students from the previous year, for feedback on the ease with which they were able identify the key issues from the briefs. As a result of this, the briefs were fine-tuned[53] to increase the likelihood that students would identify the issues without heavy prompting from academic staff. Closing the feedback loop in this way was an effective tool, as students were able to speak freely about their experiences of this Unit's curriculum and be involved in making meaningful changes for the next years' cohort.

It was also clear from the previous years' implementation of the PBL model in the Unit, that students were taking several weeks to adapt to it as this Unit was the only one that used the PBL model in the law school. To facilitate this transition, labelling changes were made to classes, to link the PBL method to practice. For example, tutorial groups were referred to as 'firms' and tutors as 'senior associates.' The learning activities also became more interactive. For example: instead of discussing 'bail application', students were asked to prepare and present an application for bail on behalf of their client. In this way, the content was linked seamlessly through to the learning objectives.

The use of short videos was increased to provide introductions to content, articulated as 'Memos' from the senior partner, or 'professional development announcements' about a new area of the law or a new common law case. The two-hour substantive law lecture times were an opportunity for student firms to discuss the brief in light of the content for that week with their 'senior partner'. The tutorials became opportunities to practice practical legal skills, under the guidance of the 'senior associate'. The one-hour workshops became a capstone for the week's content and sought to consolidate learning. The cases that students had been working on went to 'trial' at the end of semester, in the form of a voluntary revision moot, which provided students with an opportunity to engage with the unit content in yet another way.

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52 Brianna Chesser & Graham Thomas QC *Criminal Law and Procedure Handbook*. (2016) Melbourne: Thomson Reuters. This resource is a condensed version of the relevant procedural rules and associated common law for both Victoria and NSW.

53 Substantive changes also had to be made to the problem content to incorporate the changes to legislation in both the Victorian and NSW jurisdictions.

Student evaluations from 2016 show that overall, students were more satisfied with the subject,[54] student retention improved[55] and student attendance improved to over 90% at all classes. While this feedback on this pilot program has been positive, further data must be collected to determine the long-term sustainability of a model that to date has been resource intensive.

IV Conclusion: Where To From Here?

Although the results of this pilot study have been largely positive, in order to achieve the best results, a full-scale law school adoption should be considered, as was the case in Maastricht.[56] This is perhaps a lofty pursuit considering the cost of such a program and the difficulty of using this method with some law subjects. Optimal class size for the PBL method is six to eight students, and most tutorials in the TMLS are around 20 students.[57] Practically, the input of sessional staff is often necessary to act as the facilitators of the students' firms, and the level of training that is required to ensure that tutors do not give out too much information creates a potential issue as it could restrict the students' self-development.[58] Furthermore, one issue with the use of a PBL flipped classroom approach is that it could mask minimal tutorial preparation by students, which if not corrected by facilitators, could defeat the purpose of using the PBL approach.[59] What is clear is that the criminal law curriculum at the TMLS, is a work in progress; the flipped classroom and PBL methodology have had a positive impact on student achievement and engagement, but as always, more could be done. Ultimately, PBL provides an opportunity to enrich and redevelop the law school curriculum,[60] in particular the teaching of criminal law.

54 Of the 172 students enrolled in the subject in 2016, 98 students responded to the Student Evaluation of Learning and Teaching Survey, 94% agreed or strongly agreed that they understood the requirements and learning objectives for the unit with 95% students strongly agreeing that they were satisfied with the quality of the unit. This is a 10% improvement on previous year's statistics.

55 With only two students in 2016 deciding to complete criminal law in another year for personal reasons.

56 Henk van Berkel, 'Assessment in a problem-based medical curriculum' (1990) 19 *Higher Education* 123, 131.

57 Jos Moust, Henk van Berkel and Henk Schmidt, above n 20, 671.

58 Ibid 672-673.

59 Ibid 670.

60 Suzanne Kurtz, Michael Wylie, and Neil Gold, above n 27, 803-805.

CONSTRUCTIONS OF REFLECTIVE PRACTICE IN DISPUTE RESOLUTION

Susan Douglas[*]

Abstract

Alternative (or Appropriate) Dispute Resolution is increasingly recognised as a core area of legal practice. Reflective practice is a component of the sixth threshold learning outcome for the Australian Bachelor of Laws degree: 'self-management'. This paper reports on an empirical investigation of reflective practice as constructed by a sample of family dispute resolution practitioners. The results demonstrate a clear association of reflective practice with experiential learning or 'learning from experience'. The results also reveal considerable reflective practice wisdom associated with related practice issues including: acknowledging diversity, employing flexibility in practice, dealing with uncertainty, self-awareness and self-care. The results have implications for furthering our understanding of reflective practice in law and dispute resolution

I Introduction

Alternative (or Appropriate) Dispute Resolution (ADR) is increasingly recognised as a core area of legal practice. Reflective practice has arguably become an implicit if not explicit, standard of professional practice across disciplines since the seminal work of Donald Schon.[1] It is a component of the sixth threshold learning outcome for the Australian Bachelor of Laws degree (TLO 6).[2] Reflective practice has for some time already been an essential requirement in the theory and practice of education generally, and is now clearly acknowledged in law and legal dispute resolution.[3]

What is 'reflective practice' and why is it relevant to legal dispute resolution? This paper reports on an exploratory pilot study of the concept of reflective practice as constructed by a sample of family dispute resolution practitioners (FDRP's). The study employed empirical qualitative methods to gather data about how FDRP's understand and engage in reflective practice. The study's results indicate that practitioners in the sample had a limited awareness and understanding of academic work on reflective practice, suggesting a possibly limited appreciation of its theoretical underpinnings.

However the study's results also demonstrate practitioners' clear association of the concept of reflective practice with experiential learning or 'learning from experience'. The results also reveal considerable practice wisdom associated with the idea of reflective practice and related issues, including: acknowledging diversity and employing flexibility in practice, dealing with uncertainty, self-awareness and self-care. The results have implications for furthering our

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1 Donald A Schön, *The reflective practitioner* (Basic Books, 1983); Donald A Schön, *Educating the reflective practitioner* (Jossey-Bass, 1987); Donald A Schön, 'The crisis of professional knowledge and the pursuit of an epistemology of practice' (1992) 6(1) *Journal of Interprofessional Care* 49.

2 Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: BACHELOR OF LAWS, Learning and Teaching Academic Standards Statement December 2010' (Australian Learning and Teaching Council, 11 February 2011) http://www.utas.edu.au/__data/assets/pdf_file/0007/456829/altc_standards_LAW.pdf.

3 See, eg, Judith McNamara and Rachael Field, 'Designing for reflective practice in legal education', (2007) 2(1) *Journal of Learning Design* 66; Judith Macfarlane, 'Mediating Ethically: The limits of codes of conduct and the potential of a reflective practice model' (2002) 40 *Osgoode Hall Law Journal* 49.

understanding of reflective practice in law and dispute resolution. They also affirm existing argument that greater emphasis could and should be placed upon incorporating reflective practice in designing the law degree curriculum.[4]

This article is in six parts. The section to follow contains a review of reflective practice literature and explores scholarly accounts of its relevance to legal dispute resolution (with a focus on mediation practice). The third part explains the research design for the pilot study project and reports on the ontological framework of investigation, the data selection methods, collection and analysis, and the study's limitations. The fourth part presents the study's results. The fifth part discusses the results with implications for professional education, before discussion is concluded.

II Literature Review

TLO 6 addresses self-management, providing that graduates of the Australian Bachelor of Laws degree will be able to: '(a) learn and work independently, and (b) *reflect on* and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development'.[5]

The introduction of reflective practice as a graduate attribute for law follows other disciplines as a requirement for professional preparation. Reflective practice has become a cornerstone of pedagogy in disciplines including: education; health and social care sciences; and management and organisational theory.[6] Reflective practice has become a central concept in depicting professionalism and competence[7] and is integral to continuing professional education.[8] Reflective practice has also been ascribed a range of meanings.[9] In essence, it describes the cyclical interaction of learning and experience employed in professional practice, as identified in the seminal work of Schon.[10]

Schon's early work is an investigation of the question: 'How is professional knowing like and unlike the kinds of knowledge presented in academic textbooks, scientific papers, and learned journals?'[11] Schon's work is an explicit critique of positivism as an epistemology of practice and a corresponding critique of technical rationality.[12] Schon questioned the prevailing view that theories learned at university could be applied, without more, to a given problem in practice with a predictable, desired result. He enjoined scholars to: 'search, instead, for an epistemology of practice implicit in the artistic, intuitive processes which some practitioners do bring to situations of uncertainty, instability, uniqueness, and value conflict.'[13]

According to Schon, the 'high ground' of a technical knowledge base offers helpful insights, but not a conclusive course of action when dealing with the 'swampy lowlands of practice'.[14] As Thompson and Pascal affirm, practice 'is more a matter of art or craft than science – drawing on

4 McNamara and Field, above n 2; Rachael Field and James Duffy, 'Better to light a single candle than to curse the darkness: promoting law student well-being through a first year law subject' (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 133.

5 Kift, Israel and Field, above n 2, (emphasis added).

6 Sioban Nelson, 'The lost path to emancipatory practice; towards a history of reflective practice in nursing' (2012) 13 *Nursing Philosophy* 202, 203; Elizabeth Smith, 'Teaching critical reflection' (2011) 16(2) *Teaching in Higher Education* 211, 211; Neil Thompson and Jan Pascal, 'Developing critically reflective practice' (2012) 13(2) *Reflective Practice: International and Multidisciplinary Perspectives* 311, 312.

7 Nelson, above n 6, 203; Smith above n 6, 211; Thompson and Pascal, above n 6, 311-12.

8 Smith above n 6, 212.

9 Smith, above n 6, 212.

10 Schon, *The reflective practitioner*, above n 1, 54-68.

11 Schon, *The reflective practitioner*, above n 1, viii.

12 Schon, *The reflective practitioner,* above n 1, 31, 40.

13 Schon, *The reflective practitioner,* above n 1, 49.

14 Schon, *The reflective practitioner,* above n 1, viii.

formal knowledge as and when appropriate, but not being wedded to a scientific 'technical fix' approach to practice.'[15] Schon describes reflective practice as an 'act of professional artistry'[16] in which practice wisdom, or knowledge based on experience, has a central role in directing action. Drawing on Schon's work, Gould argues that 'practice wisdom depends upon highly developed intuition which may be difficult to articulate but can be demonstrated through practice.'[17]

Schon proposes two categories of reflective practice: 'reflection-on-action' and 'reflection-in-action'.[18] The first involves a review of what has happened in the past, and the second involves appraisal occurring in the course of activity. The central purpose in both categories is to better understand what is happening or has happened, in order to direct and or improve performance. Reflection-on-action consists of reviewing past actions with the opportunity of appraisal and evaluation in order to identify possible areas to improve performance. In reflection-in-action, use is made of direct feedback to influence and respond to a current situation. Here the use of tacit knowledge is acknowledged as practitioners 'think on their feet'. Schon's typology aims to depict the actual experience of professionals in practice, probing the 'mystique of practical competence'[19] whilst critiquing assumptions of technical rationality.

Schon's typology has been critiqued and extended to include 'reflection-on-future-action'. According to Wilson, Schon's typology is flawed by its failure to consider reflection before action or, in other words, planning for the future.[20] Wilson argues that reflecting on the future is another means of improving performance and a natural human condition. He defines reflection-on-future-action as 'the act or process of reflecting desirable and possible futures with the purpose of evaluating them as well as considering strategies intended to achieve the objective(s).'[21] Similarly, Thompson and Pascal advocate inclusion of a 'reflection-for-action' concept which they define as: a process of planning and thinking ahead to draw on knowledge and experience.[22]

While critique of Schon's typology has extended temporal constructions of reflective practice from the past and in the moment to future planning, the integrity of Schon's thesis remains namely that: professionals continue to learn by experience, rather than mechanically and routinely applying what they have learned at university. In a similar vein, Payne distinguishes between 'explanatory theory' and 'practice theory' in social work.[23] Payne contrasts theories developed through academic research with the practice wisdom professionals acquire as they try to make sense of what they do, how they do it and who they do it with. This approach is consistent with the early work of Schon and Argyris, in which the authors proposed that professional competence is based on the ability to develop theories of what to do in new situations.[24]

Hardy has emphasised this aspect of reflective practice in her investigation of the use of role-plays in teaching mediation. Examining reflective learning, Hardy argues that instead of 'demonstrating the "one correct way" to do things, the teacher can demonstrate how to *discover* an appropriate way to do such a thing.'[25] Referencing Brockbank and McGill's scholarship

15 Thompson and Pascal, above n 6, 313.
16 Schon, *The reflective practitioner,* above n 1, viii.
17 Nick Gould, 'Introduction: Social work education and the "crisis of the professions" in Nick Gould and Imogen Taylor (eds), *Reflective Learning for Social Work* (Arena, 1996) 1.
18 Schon, *The reflective practitioner*, above n 1, 54-68.
19 Schon, *The reflective practitioner*, above n 1, vii.
20 John Wilson, 'Reflecting on the future: a chronological consideration of reflective practice' (2008) 9(2) *Reflective Practice: International and Multidisciplinary Perspectives* 177, 177.
21 Ibid, 180.
22 Thompson and Pascal, above n 6, 22.
23 Malcolm Payne, 'Social work theories and reflective practice' in Robert Adams, Lena. Dominelli and Malcom Payne (eds), *Social Work: Themes, Issues and Critical Debates* (Macmillan, 1998).
24 Chris Argyris and Donald A Schon, *Theory in Practice: Increasing Professional Effectiveness* (Jossey-Bass, 1974).
25 Samantha Hardy, 'Teaching Mediation as Reflective Practice (2009) 21(3) *Negotiation Journal* 385, 393 (emphasis added).

on reflective learning,[26] Hardy applies their concept of meta-reflection to teaching mediation, which consists of reflecting about reflection, or reflection-on-reflection.[27] She notes that meta-reflection is not confined to reflection in or on action but may occur at any time. She provides illustrative examples. If, for example, I was to reflect that I was worried when mediating, I might reflect on that reflection by asking myself why I was worried and how that impacted on my subsequent actions.

The concept of reflective practice has been further extended to constructions of *critical* reflection of which two views are identifiable. According to one view, critical reflection is akin to critical thinking. Ramsden argues that fostering critical thinking is a core aim of tertiary education.[28] Critical thinking has been defined from a variety of perspectives, including philosophy, psychology and education.[29] Many of these definitions are inclusive of a range of cognitive skills. In education, Willingham offers the following definition:

> [S]eeing both sides of an issue, being open to new evidence that disconfirms your ideas, reasoning dispassionately, demanding that claims be backed by evidence, deducing and inferring conclusions from available facts, solving problems, and so forth. [30]

In its ordinary meaning, critical thinking denotes an attitude of sceptical enquiry that questions the underlying assumptions guiding thinking and behaviour. According to an extension of this view, critical reflection encompasses critique of the underlying values directing practice. Where these values remain hidden they may direct practice and impact clients in unintended and perhaps detrimental ways. In the context of mediation practice, MacFarlane argues that reflective practice:

> Focuses on teasing out the values and assumptions behind the choices often made intuitively by mediation practitioners when they face ethical dilemmas in the course of their practice and the values they imply. These values can then be debated, critiqued and diversified across different frames of action. [31]

A second view places critical reflection within the tradition of critical theory. Critical theory pointedly challenges positivism's objectivist epistemology, emphasising instead the value-determined nature of inquiry. Critical theory looks to deconstruct relationships of power with an emancipatory aim.[32] Writing from this perspective, Fook and Gardner describe critical reflection as:

> more than simply thinking about experience. It involves a deeper look at the premises on which thinking, actions and emotions are based. It is critical when connections are made between these assumptions and the social world as a basis for changed actions.[33]

Fook and Gardner propose a model of critical reflection that structures the review of a critical incident. They identify a critical incident as one of significance for the practitioner in raising issues of practice. The model employs reflection to deconstruct assumptions about what happened and why, followed by reconstruction of the incident with strategies for the future.[34]

26 Anne Brockbank Ian McGill. 2007. *Facilitating Reflective Learning in Higher Education*, (The Society for Research in Higher Education, 2nd ed, 2007).
27 Hardy, above n 25, 389-90.
28 Paul Ramsden, *Learning To Teach in Higher Education* (Routledge, 1992); and see Kelley Burton and Judith McNamara ,'Assessing refection skills in Law using criterion-referenced assessment' (2009) 19(1) *Legal Education Review* 171.
29 Jan Fook and Fiona Gardner, *Practising Critical Reflection: A Resources Handbook* (McGraw -Hill Oxford University Press, 2007) 13.
30 Daniel T Willingham, 'Critical thinking: why is it so hard to teach? (2007) *American Educator* 8, 8.
31 Macfarlane, above n 3, 54
32 Patti Lather, 'Research as praxis' (1986) 56 (3) *Harvard Educational Review* 257, 259-60.
33 Fook and Gardner, above n 29, 14.
34 Ibid.

Reflective practice is well recognised in ADR, and specifically in mediation as: an integral part of practice and as a solution, at least in part, to theoretical conundrums including the claimed neutrality of the mediator. Boulle defines reflective practice as a 'tool for the improvement of practice and a way to learn by experience.'[35] It is referenced as a core skill in Brandon and Robertson's generalist approach to conflict resolution,[36] and in Winslade and Monk's exposition of their model of narrative mediation.[37] The most comprehensive consideration of reflective practice appears in Lang and Taylor's work: *The Making of a Mediator: Developing Artistry in Practice.*[38] Drawing on the work of Schon, Lang and Taylor argue that artistry lies at the intersection of skillful interactive abilities in a mediation session and thoughtful reflection after and during a session.

Reflective practice has been argued as an important foil to claims of mediator neutrality.[39] Based upon a study of community mediation, Mulcahy has argued that neutrality should be replaced by an ethic of partiality supported by reflexive practice.[40] Bagshaw has argued that mediators cannot be neutral and that reflective or reflexive practice is a necessary approach to limit the intrusion of mediators' personal standpoints.[41] Astor has argued that reflexive practice is one of a number of principles that can be employed to enable mediators to 'do neutrality'.[42] Reflective practice has also been argued as an important concept for ethical practice in mediation[43] and for culturally sensitive and appropriate practice.[44]

With the notable exception of Lang and Taylor's work, reflective practice in mediation derives much from Schon's work, but remains theoretically underdeveloped for mediation practice per se.[45] This position is held in common with other disciplines.[46] It has prompted Thompson and Pascal to note that it has become a 'buzzword' attached to practices that are oversimplified or only vaguely representative of what is purported by the practice.[47] Notably, while reflective practice is referred to and relied upon, only limited explanation of what it entails is offered in the mediation literature. Furthermore, the terms reflective and reflexive practice are not distinguished and nor are their differing characteristics explained. Reflexivity is a concept used in research methods to direct attention to the influence of the researcher on the subject matter and process of research.[48] It can be distinguished from reflection or critical reflection in

35 Laurence Boulle, *Mediation – Skills and Techniques* (Butterworths Skills Series, Butterworths, 2001).
36 Mieke Brandon and Leight Robertson, *Conflict and Dispute Resolution* (2007, Oxford University Press).
37 John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass, 2000).
38 Michael D Lang and Alison Taylor, *The Making of a Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000).
39 Subjected to over a decade of critique, the requirement of neutrality has been omitted in the most recent version of the Australian National Mediator Accreditation System (NMAS) 2015, http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf
40 Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10(4) *Social and Legal Studies* 505.
41 Dale Bagshaw, 'Self-reflexivity and the Reflective Question: Broadening Perspectives in Mediation' (2005) *The Arbitrator and Mediator* 1.
42 Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studies* 221.
43 See, eg, Samantha Hardy and Olivia Rundle, 'Applying the inclusive model of ethical decision making to mediation' (2012) 19 *James Cook Law Review* 70; Macfarlane, above n 3.
44 See, eg, Susan Armstrong, 'Developing Culturally Reflexive Practice in Family Dispute Resolution' (2011) 22 *Australasian Dispute Resolution Journal* 30.
45 See Hardy, above n 25, 386.
46 Thompson and Pascal, above n 6, 315.
47 Ibid.
48 See Frederick Steier, 'Research as Self-reflexivity, Self-reflexivity as Social Process' in Frederick Steier (ed) *Research as Reflexivity* (Sage, 1991).

providing a focus on uncovering the personal situatedness of the practitioner in order to limit, direct or at least acknowledge the impact of that influence. As Fook and Askeland propose:[49]

> Reflexivity can simply be defined as an ability to recognize our own influence – and the influence of our social and cultural contexts on research, the type of knowledge we create, and the way we create it. In this sense, then, it is about factoring ourselves as players into the situations we practice.

The study was designed to probe mediation practitioners' understanding of reflective practice given its stated importance in the literature. In particular, the study aimed to discover if participants distinguished reflective and reflexive practice and how they understood these concepts.

III Research Design

Review of the literature establishes that reflective practice is recognised in mediation as an important theoretical concept and orientation in practice. It is clear that existing understanding of reflective practice in mediation relies upon Schon's seminal work. At the same time, that understanding remains underdeveloped with limited critical discourse amongst scholars and limited empirical investigation of understanding in practice. With this in mind, the author undertook an exploratory study of the meaning ascribed to reflective practice by a sample of family dispute resolution practitioners (FDRP's).[50]

The research question posed was: 'what do FDRP's understand by 'reflective/ reflexive practice'? As noted above, a focus of the study was to probe if and how practitioners distinguished reflective from reflexive practice.[51] The ontological framework for the study was social constructionism.[52] This framework is consistent with the intent of the study to explore meaning creation. The frame of the study was exploratory, with the aim of exploring what meanings practitioners created rather than testing their understanding. The research reported here was initially envisaged as a pilot study from which data would be used to construct a survey for a larger and wider population. However, while themes in the construction of reflective practice were discernible from the data, discrete meanings suitable for use in a survey were not. The themes elicited have implications for future research and continuing practice education. The sample of FDRP's was drawn from a Family Relationship Centre[53] and a Family Mediation Service,[54] both of which are government funded and auspiced by a well-established community service provider.

Five practitioners participated in the study. Three participants were women and three were men. All five participants have qualifications in the social sciences and social care or counseling as well as FDRP accreditation. The participants' years of experience as mediators ranged between one and seven years with an average of five years. Practitioners were invited to participate in the study by invitation extended to all practitioners at the respective services.

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49 Jan Fook and Gurid Aga Askeland, 'The 'critical' in critical reflection' in Susan White, Jan Fook, and Fiona Gardner (eds), *Critical reflection in health and social care* (McGraw-Hill Education, 2006) 45.

50 Family Dispute Resolution Practitioners practice as mediators accredited under the *Family Law Act* 1975 (Cth).

51 Ethics approval for the study was provided by the Human Research Ethics Committee (HREC) of the Federal Government funded FDR service and the HREC of the University of the Sunshine Coast.

52 'All knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context.' per Michael Crotty, *The Foundations of Social Research: Meaning and Perspective in the Research Process* (Allen and Unwin, 1998) 42 (emphasis omitted).

53 Dealing with matters in relation to children under the *Family Law Act* 1975(Cth).

54 Dealing with property and spousal matters under the *Family Law Act* 1975 (Cth).

The data was collected using face-to-face, in-depth interviews with an average length of 60 minutes. Interviews were chosen to enable the researcher to probe the nuances of meaning and 'rich description' characteristic of this qualitative method.[55] The interviews were semi-structured using questions probing the participants' understanding of the meaning of reflective and reflexive practice and how they translated those meanings into practice. The interviews were recorded and the recordings transcribed for analysis. The data was analysed for themes in the participants' construction of reflective practice using a grounded theory approach.[56] The data was examined for both similarities to, and differences from, constructions in the literature. A grounded theory approach enables interpretation and understanding to be grounded in and developed from the data, rather than by the testing of hypotheses.

IV Results

Overall, participants demonstrated an understanding of reflective practice as learning from experience. The categories of reflection-on-action and reflection-in-action developed by Schon were not explicitly identified by participants. Participants demonstrated an awareness of the concept of reflective practice but not a consistent approach to its meaning or application, and no reference to the existing literature. However, the majority of participants identified their own reflective practice as consistent with Schon's category of reflection-on-action. Four of the five participants identified their practice in the following ways:

> 'Reflective practice is when we look back on something we have done and reflect on what maybe we could have done differently or what we did well.'

> 'For me being a reflective practitioner is about looking at my actions after the event.'

> 'Reflective I would suggest is examining something that occurred in the past and then looking at it from different viewpoints; then I guess analysing the effectiveness of what we were doing at that time.'

> 'Reflection … is looking at how you work with clients and being able to look after a mediation or even during a mediation – but after the mediation primarily – coming out and being able to look how you worked with that client; if there is anything you could have done differently.'

As suggestive of Schon's category of reflection-in-action, four out of the five participants made some reference to reflexive practice as a process 'in the moment'. Response examples include the following:

> 'My understanding of reflexive practice is being able to identify what's in front of you and you have to respond to that…It's reflective because you're actually looking for what's there now in the moment.'

> 'It sounds like it's a reflex action. So for me it's probably about what we're doing in the moment. It's about mindfulness and being more aware.'

> 'For me, the word reflexive represents a different process (from reflection) which is where I reflect-in-action more than on-action. When I'm in a reflexive practice, I might be in with a client and I'll be looking at the immediacy of my interaction with the client and my responses to the client at the time. I might be looking at why I might be having those reactions or be thinking those things that I'm thinking. I might be thinking of the client in context and reflecting on their context that they're in…I think reflexive involves a far more intimate and emotive state as well, because it is very present. It's very present action.'

55 See Alan Bryman, *Social Research Methods* (Oxford University Press, 2001).

56 See Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967).

Notably, the third participant quoted above extends the idea of responding 'in the moment' to consideration of personal situatedness and client context as factors in determining practice choices. A number of themes in the construction of reflective practice are discernible from the data. These are: accommodating diversity and flexibility in practice, dealing with uncertainty, modelling an informed practice for parties, the importance of self-awareness as practitioners, and addressing issues of self-care. Diversity of practice was associated with reflection and assessment of the best model of mediation to use, including aspects of different models. As one participant described:

> 'There's no model that we're forced to use. Obviously there's a process and sticking within that process is an expectation of individual meetings. But there's different ways of doing it. Sometimes for people you might use a facilitated model where you really just stick to that process. Other times, I guess, for myself I know I'll probably use more of a therapeutic model quite a bit if I feel that's appropriate for parents.'

Reflexivity was associated with flexible adjustment to the parties' needs as the process unfolds:

> 'My understanding of reflexive is just being really – I guess flexible during the process. So whether it's during your initial meetings or during the mediation process, being able to make adjustments to the way that you work with people, language – the way you talk to them. The processes you use, being able to adjust that to accommodate the client.'

Reflective practice was seen as a way to develop expertise in the face of the uncertainties of practice:

> 'I find that if you try and plan a mediation ahead too much there's always a curved ball. It's never going to go just as you think. [Reflective practice is] just being able to adjust the work but also coming out and thinking about how it went and how you might be able to make some adjustments in the future.'

Reflection was also identified as something to be encouraged in clients, as a means of gaining insight and effecting behavioural change. In this context, the aim of mediation was identified as more than reaching agreement between the parties, identified as a short term outcome, and extended to changes:

> 'in the way they might view the relationship with the other person or some new skills perhaps, new understanding and insight then that is what will assist them in the long term.'

Similarly, reflective practice was identified as essential in the relationship between practitioner and clients in furthering the 'self-determination' of clients. One participant described a process of reflective questioning by asking:

> 'What's going on in this space between myself and the clients? Is the client getting heard or am I deciding for the client? Am I making judgements on what the clients are saying and doing based out of the place I work from or my socialisation or opinions or my position in life? … My role is not to make decisions for a person, it's not to judge or to be partial or to discriminate or to give advice.'

Self-awareness was a recurrent theme in participants' understanding of reflective practice:

> 'Everybody has views, everybody has buttons, everybody has processes. I think all we can hope for is to temper that the best way possible and that's where the reflective and reflexive processes come in handy because it gives you a chance to have a look at what you're doing and check in with yourself. Whereas reflective is about checking in with others as well, you know, more than checking in with yourself.'

> 'I imagine like any profession that deals with people, there are going to be personal issues that coincide with what you're dealing with. I think after awhile what you tend to do is you're able to park it and then you're able to be professional and then deconstruct it when you need to.'

Participants identified a number of avenues through which reflection could occur. These were reflection-in-action when working with a colleague in co-mediation; and debriefing with a co-mediator after the mediation session, as an established step in the process. Participants noted that co-mediation was not always possible and that they relied on reflection-on-action through formal supervision, informal peer supervision and personal reflections achieved, for example, by journaling. One participant noted that these opportunities were important mechanisms for self-care: '…when stuff comes up…and it's getting me down…'.

V Discussion

Although results of this study reveal that the practitioners interviewed were not familiar with the academic literature examining reflective practice, they nevertheless demonstrated some understanding of the concept as it appears in the literature. It was evident that the participants associated the concept with learning from experience and adjusting to new situations. They identified it clearly with reviewing their experience and performance after mediation sessions, which Schon describes as reflection-on-action. Participants also acknowledged the need to reflect-in-action but identified this more readily either with reflexivity or self-awareness rather than explicitly with Schon's category. Participants either had no comprehension of reflexivity or identified it with reflection-in-action.

The fact that participants were not aware of the relevant literature is illustrative of a disconnect between academic investigation and actual practice. It also signals the importance of working with practitioners to gather data and develop conceptual understanding that is grounded in their actual experience. The results have two important implications. The first is that responses from participants provide justification for employing reflective practice. The themes elicited from the data represent the reasons participants adopted reflective practice, whether or not their understanding of that practice corresponded with the literature. Hence accommodating diversity and flexibility in practice, dealing with uncertainty, modelling an informed practice for parties, the importance of self-awareness as practitioners, and addressing issues of self-care are all good reasons for adopting reflective practice.

The second implication is that a greater sophistication of understanding could be developed that is grounded in practice and accessible to practitioners in order to improve their practice. Reflection on the past, in the present or of the future will vary according to the focus of what is reflected upon. In an effort to improve practice, reflection may focus upon improving a seemingly objective process of the application of knowledge and skills to given practice situations. We would expect that reflection to include a critical focus, to include critical thinking, in which academic theory and practice wisdom is consistently subjected to scrutiny, and advanced by sceptical enquiry in the face of new situations. Extending critical reflection more widely and deeply,[57] would focus attention on the values and assumptions behind particular approaches to practices and uncover issues of power between parties and between the mediator and parties. Reflexivity would point to the standpoint of the mediator herself, to her view of herself in society, her individual beliefs and values and emotional responses. Finally, meta-reflection opens a space and opportunity to take a step back from given mediation sessions and to connect the experience with broader considerations of: personal growth, professional growth, the issues raised by mediations, and the impact upon broader issues of practice. Meta-reflection also opens a space to connect the impact of practice with broader issues of social change.

VI Conclusion

This paper reports on a pilot study of a small sample of FDRP's and their understanding of reflective practice. The results were not intended to be generalisable but were aimed instead to

57 See Thompson and Pascal, above n 6, 321.

illicit categories of meaning creation for further investigation. The results indicate that training of FDRP's needs to give greater attention to the complexity and subtly of reflective practice in order to guide its intentional and effective use. The study draws together the literature on reflective practice and applies it to an example of non-adversarial justice. In doing so, it advances the knowledge base for utilising reflective practice in law.

THE NEXUS BETWEEN ENVIRONMENTAL LAW EDUCATION AND BETTER GOVERNMENT IN NEW ZEALAND AND A SPECIAL PLACE FOR DISTANCE IN ITS DELIVERY

*Richard M Fisher**

Abstract

This paper explores the current status of environmental law education in New Zealand, in both Bachelor of Laws (LLB) and non-LLB contexts. Its relevance to better government is shown by the strong connections between the *Local Government Act 2002* (NZ) and the *Resource Management Act 1991* (NZ) in government decision-making, and by the need for education that is engendered by the extent of current environmental reform, and associated work streams in this area. Environmental law education offered by universities and polytechnics in New Zealand, was studied and compared to current areas of practice. Furthermore, enrolment information for two 'Level Six' environmental law courses taught by distance at the Open Polytechnic in New Zealand, was analysed in order to reveal other study pathways. The results confirm the existence of historically close connections between environmental education, and distance education as a delivery platform. They also suggest new opportunities for greater involvement of environmental law in digital education futures.

I Introduction

The theme of the Australasian Law Teachers' Association 2016 annual conference was the law's role in advancing better government, sustainable economies, and vibrant communities. The purpose of this paper is to respond to that theme in two ways. The first way is to identify the importance of environmental legal education and literacy to address one of New Zealand's most compelling current problems: coalescing the critical mass of government, business, and community leadership, to ensure a sustainable environmental future. The second way is to advocate a special role for distance education as a delivery platform.

A *The Breadth of Environmental Law*

The United Nations Environment Programme defines environmental law as 'a body of law, which is a system of complex and interlocking statutes, common law, treaties, conventions, regulations and policies which seek to protect the natural environment which may be affected, impacted or endangered by human activities.'[1] It is a rapidly evolving, broadly defined area of law, involving interdisciplinary subject areas, guided by a number of key principles. An indication of its breadth can be determined by the expansive definition in New Zealand of 'environment', which includes[2]:

(a) Ecosystems and their constituent parts, including people and communities;
(b) All natural and physical resources;
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by these matters.

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1 United Nations Environment Programme, *Environmental law and multilateral agreements* (2013). <http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Core/Environmental_Law_Definitions_rev2.pdf>.

2 *Resource Management Act 1991* (NZ) s 2.

B The Importance of Environmental Law in Advancing Better Government

The relevance of environmental law to New Zealand's central and local governments, can be confirmed in a number of ways as discussed below.

1 *The Environmental Provisions In Key Guiding Statutes.*

The notion of better government cannot occur without a consideration of the laws governing how government decisions are made. Two of the most important statutes in this regard are the *Local Government Act 2002* (NZ) ('LGA'), and the *Resource Management Act 1991* (NZ) ('RMA'). The RMA's purpose is 'to promote the sustainable management of natural and physical resources'[3]. It has extensive connections to the LGA, particularly the LGA's Part 6 legislation consultation provisions which provide a check on the broad power of general competence to make decisions. A sound understanding of both the LGA and RMA processes is essential for both environmental and governmental practitioners. This can be confirmed by the types of research that underpins environmental law education at tertiary levels.[4]

2 *Current Work Streams and Legislative Reform.*

It is indicative that four of seven of the New Zealand Local Government's (LGNZ) policy priority areas, are wholly or partially related to environmental issues.[5] The list of 2015 to 2016 legislative bill submissions posted on its website, shows that almost half of 76 bill submissions had an environmental focus. The submissions relate to extensive legislative reform that is occurring in New Zealand in a number of areas including: environmental reporting, aquaculture, heritage, emissions trading, national environmental standards and policy statements, hazards management, freshwater reform, and resource management reform.

3 *The Importance of New Zealand's Current Environmental Situation.*

Environmental legislative reform relates to a number of issues facing New Zealand, including water degradation associated with increased dairying, the worrying state of Auckland's burgeoning population, more extreme weather, and the preservation of indigenous natural heritage. The government has attempted to deal with these problems by providing more national direction, and by requiring local governments to concentrate on 'core services' and 'quality infrastructure.'[6]

II Translating Education to Practice

Opportunities for employment in domestic environmental law practice can be determined in part by an examination of work streams related to specific statutes. A basic overview is shown in Table 1 below.[7] In addition to the matters listed in this Table, several other practice areas have direct or indirect connections to the management of natural and physical resources, and/

3 Ibid s 5.

4 See eg, Richard M Fisher, 'New Zealand community boards: history, effectiveness, future prospects' (2015) 20 *Local Government Law Journal* 85; Richard M Fisher, 'Consultation requirements under New Zealand's Local Government Act 2002: lessons to date' (2011) 16 *Local Government Law Journal* 143.

5 Local Government New Zealand, *Priority areas and submissions* (2015) < http://www.lgnz.co.nz/home/our-work/submissions/>.

6 Richard M Fisher, 'New Zealand makes controversial changes to the purpose of local government' (2013) 18 *Local Government Law Journal* 69.

7 Information in this table was compiled by the author during New Zealand Qualifications Authority review of non-LLB environmental qualifications that occurred in New Zealand from 2013-2015. 'Work streams' represent potential employment areas requiring the application of legal knowledge to successfully undertake the most common processes associated with a given environmental statute, typically permissions to undertake activities.

or sustainable development. Examples include: building work, occupational safety and health, disaster management, and general public welfare.

The categories in Table 1 are broad, and may overlap in terms of desired skill sets (for example, 'enforcement'). Furthermore, the skill sets desired by employers may not match educational content, particularly in specialised areas where a job applicant with existing practice experience in document preparation and office skills could be more highly valued than a recent graduate with better content knowledge. Finally, Table 1 does not consider future opportunities for international legal education for environmental career paths that could be created in the next ten to twenty years.

Statute	**Work streams**	**Agencies**
Biosecurity Act 1996 (NZ)	-border control -pest management -enforcement	Ministry for Primary Industries
Conservation Act 1986 (NZ)	-concessions -enforcement	Department of Conservation New Zealand Fish & Game Council
Crown Minerals Act 1991 (NZ)	-minerals programmes -mining permits	New Zealand Petroleum and Minerals
Environment Act 1986 (NZ)	-policy -environmental administration	Parliamentary Commissioner for the Environment Ministry for the Environment
Environmental Protection Authority Act 2011 (NZ)	-emissions trading -marine consents -new organisms applications -resource consent processing	Ministry for the Environment
Fisheries Act 1996 (NZ)	-fisheries management -enforcement	Ministry for Primary Industries Maritime New Zealand
Forests Act 1949 (NZ)	-forest management -enforcement	Ministry for Primary Industries
Resource Management Act 1991 (NZ)	-planning -resource consents -heritage protection -enforcement	Environment Court Heritage New Zealand Ministry for the Environment Regional and District Councils
Wildlife Act 1953 (NZ)	-protection of wildlife	Department of Conservation

Table 1: Key New Zealand environmental laws and associated work streams

A *Is LLB Education Serving the Needs of Environmental Practitioners?*

A general LLB curriculum in New Zealand[8] is likely to include the following subject content areas which are relevant to environmental law practice:

8 Course content was confirmed by a review of providers' course descriptors available online.

1 *Tort Law*

Tort law in New Zealand encompasses the environmental common law which includes a focus on the public and private torts of nuisance[9] that are well-canvassed in introductory tort law courses (notwithstanding the limitations of the common law in dealing with complex environmental problems).

2 *Criminal Law*

Criminal law environmental 'crimes' in New Zealand are largely regulatory offences.[10] The distinction between absolute, strict liability and mens rea offences is a central component of introductory criminal law courses.

3 *Administrative Law*

A substantial portion of environmental litigation in New Zealand is associated with notification decisions under the RMA.[11] The consultation provisions of the LGA also attract significant legal activity. Public participation in decision making, and the right to challenge decision makers, are key principles of environmental law. Consequently, any introduction to administrative law will provide valuable education about Wednesbury principles, and may also canvass processes required to challenge administrative decisions under the *Judicature Amendment Act 1972* (NZ).

4 *Property Law*

Although property law is largely an area of specialist practice, even an introductory property law course provides valuable insight into the 'bundle of rights' associated with concepts of property, and the need to be mindful of extensive legislative overlays. An introductory course also provides the transformative moment when students learn that no one 'owns' anything: all that is possessed is a current proprietary right that is superior to others. This is a key foundation for natural and resource planning.

5 *Legal Research and Writing*

Legal research and writing is one of the most important skills taught to all introductory LLB students, including how to find and cite case law, and how to write, using proper legal formatting.

6 *Specialised Law Courses*

An online review of the websites of all of the six LLB-granting institutions in New Zealand shows that they offer at least one introductory environmental law course, and some offer several courses. All of the environmental law courses in New Zealand are electives. Content-specific course titles that may relate to the work streams identified in Table 1 above include: 'Natural resources law', 'Resource management law', 'Water law', 'Maori land law', and 'Mineral and petroleum law'. More general courses such as: 'Environmental law, conservation, and the public interest' demonstrate the interdisciplinary nature of environmental law practice, and the importance of stakeholder management in environmental dispute resolution[12].

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9 Claire Kirman and Christian Whata, 'Environmental litigation and dispute resolution' in Derek Nolan (ed) *Environmental and Resource Management Law* (Lexis Nexis Publishers, 3rd ed, 2005) 975.

10 Richard M Fisher, 'Prosecution of environmental offenses under New Zealand's Resource Management Act 1991: troublesome policy issues for local government' (2005) 10 *Local Government Law Journal* 119.

11 Kirman and Whata, above n 9, 1015.

12 Kirman and Whata, above n 9.

B *Other Tertiary Education Environmental Law Courses*

Universities and degree-granting polytechnics which do not offer an LLB may nonetheless offer courses in environmental law. The most important non-LLB qualification related to environmental law is a planning degree, taught by institutions accredited by the New Zealand Planning Institute. Higher education law courses at Levels Five and above, might also form part of certificate or diploma studies in environmental studies, which may in turn be staircased to degrees offered by the same institution, or in partnership with another provider.

A review of current non-LLB environmental law at Level Five and above, offered by universities and polytechnics in New Zealand, can be clumped into the following content areas:

- Environmental and planning law.
- Resource management and local government law.
- Natural resources law.
- Conservation law.

The summary data above permits the following preliminary conclusions:

- Environmental law practice involves a multitude of agencies and work streams.
- There is a strong connection between environmental and governmental decision-making, due in large part to the legislative overlay between the RMA and the LGA.
- Environmental law educational content includes general LLB studies, specialist LLB environmental courses, and non-LLB education in environmental science and planning areas.

III Ramping Up Better Government: A Role for Distance Education

A *Pedagogical Connections Between Distance and Environmental Education*

Environmental law education is a component of 'education for sustainability' (EFS): an integrated approach to the study of environmental and development problems that originated in the 1980s[13]. EFS encompasses a multidisciplinary approach to people, communities, and economic development, with a proactive approach to sustaining the life-supporting capacities of natural and physical resources[14]. The presently accepted 'about, in and for' model that applies to EFS involves education *about* the environment (content learning), a provision of case studies *in* the environment (experiential education), and confirmation of learning that will allow graduates to advocate persuasively *for* sound decision making.[15]

The journey of personal transformative change that is an essential component of education for sustainability is also a central pillar in distance education pedagogy.[16] This has been recognized since the 1990s, commencing with the pioneering work of Walter Leal Filho and others. Indeed, one of the first practical applications of distance learning pedagogy occurred in the context of engaging local communities in local decision making for better participatory democracy about managing the environment. Examples include: engaging with Canada's Inuit/First Nations, and

13 Daniella Tilbury, 'Environmental education for sustainability: defining the new focus of environmental education in the 1990s' (2014) 1 *Environmental Education Research* 195.

14 John Blewittt and Cedric Cullingford (eds) *The sustainability curriculum* (Earthscan Publishing, 2013) 11.

15 John Fien, 'Education for the Environment: Critical Curriculum Theorizing and Environmental Education' in William Scott and Stephen Gough (eds), *Key issues in sustainable development and learning: a critical review* (Routledge Publishing, 2004) 93.

16 FarrukhTahir, 'Distance education, environmental education and sustainability: an overview of universities in Commonwealth Asia' (2001) 2 *International Journal of Sustainability in Higher Education* 21.

a variety of 'go local' educational initiatives in India and elsewhere, aimed at engaging local knowledge to effect lasting land management decisions. [17]

B *Distinctions Among Distance Education, E-learning, and MOOCS*

For clarity, this paper distinguishes distance education from e-learning, which the New Zealand Ministry of Education defines as 'learning that is facilitated by the use of digital tools and content'.[18] In contrast, distance education is education where there is a geographical separation of teacher and learner, engaged in planned and guided learning, with the provision to the student of additional learning materials, whether it is print, digital, or a combination of both.[19] The distinction is important because e-learning is not used at most universities and colleges for distance education purposes. Rather, it supplements on-campus teaching and learning.[20] Further, neither e-learning nor more generic 'online learning' follow any particular pedagogy in and of themselves. While they suggest semantically that learning may be taking place, the reality is that e-learning and online learning refer to a mix of technology and delivery, without a connection to a particular body or theory of learning.[21]

In contrast, whether or not distance education is delivered synchronously (in real time) or asynchronously, it retains its most important pedagogical feature which is, the geographical separation of teachers and learners. This 'transactional distance' has resulted in an extensive body of research and theory about the role of distance education, and its value for learners[22].

It is also important to distinguish distance legal education from Massive Open Online Courses (MOOC). MOOCS are a specific type of online course, characterised by: large scale, free and open enrolment, embedded video and related content, no or little teacher-student interaction, and assignments that are evaluated either by peer or automated assessment.[23] The advantages of distance delivery to produce better-informed environmental practitioners include:

- Serving the needs of students who, for whatever reason, cannot attend face-to-face meetings at conventional institutions of higher learning. Typical education students work full-time or part-time, and are quite often 'second chance' students.[24]
- Serving the needs of best practice sustainability education, which is largely about reaching a multitude of stakeholders, with varying levels of education (including some students who seek to take a single course in a specialised area, such as resource management practice, rather than a full degree).
- Promoting better participatory democracy. One of the most pressing challenges facing better government in New Zealand is seeking greater community engagement in local government decision making.[25] As noted above, education for sustainability has a long and rich association with distance education, while serving this need.

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17 Walter Leal Filho and Farrukh Tahir, *Distance education and environmental education* (Peter Lane Publishers, 1998).

18 Ministry of Education, *Taking the next step: the interim tertiary e-learning framework* (Wellington Ministry of Education, 2004).

19 Richard M Fisher, 'Should we be allowing technology to remove the 'distance' from 'distance education'?'(2008) 18 *New Zealand Annual Review of Education* 31.

20 Sarah Guri-Rosenblit, "Distance education" and "e-learning" are not the same thing (2005) 49 *Higher Education* 467.

21 Melody Thompson, 'From distance education to e-learning', in Richard Andrews and Caroline Haythorththwaite (eds) *The SAGE handbook of e-learning research* (Sage Publishing, 2007) 159.

22 Farhad Saba, 'Critical issues in distance education: a report from the United States' (2005) 26 *Distance Education* 255.

23 Philip G Schrag, 'MOOCS and legal education: valuable innovation or looming disaster' (2014) 59 *Villanova Law Review* 83.

24 John R Verduin and Thomas A Clark, *Distance education: the foundations of effective practice* (Jossey-Bass Publishers, 2007).

25 Local Government New Zealand, above n 5.

It may be important to note here that a person does not need to hold a current legal practicing certificate or be qualified as a lawyer, to represent clients in New Zealand's Environment Court, or in quasi-judicial boards of inquiry. The RMA contains a number of provisions dealing with resource consents and planning decisions that favour layperson participation. Even at local council hearings however, it is beneficial to have a knowledge of processes, and a basic understanding of environmental law principles. This need for basic knowledge provides additional leverage for considering the provision of environmental law education in continuing education contexts, outside the 'four squares' of an LLB.[26]

C *Distance Delivery of Legal Education*

What is the current status of distance delivery of environmental law education? This might be better framed as two related questions:

1. What is the current status of distance delivery of legal education?
2. How is it being used for environmental law?

The answer to the first question can be answered simply: 'incipient but growing'. Recent research shows that in the United States, online legal education is now mainstream, with at least one third of higher education students enrolled in online courses.[27] In Australia, almost all law schools have policies mandating the use of online Learning Management Systems for course management. However the extent of its uptake for substantive distance delivery is variable, particularly with regard to mobile learning.[28]

None of the New Zealand law schools at present, engage in distance education delivery as part of LLB study.[29] By extension, the New Zealand Council for Legal Education is only able to recognise distance education law courses for the purpose of admission if they form part of a domestic or overseas law qualification that is otherwise deemed to be equivalent to a New Zealand LLB[30]. Similarly, the American Bar Association does not allow students to take courses online during the first year, and students are restricted to a maximum of fifteen credits in the course of a Juris Doctor degree. Exceptions do exist, notably in California, where state-level accreditation may be granted for study at fully online law schools so as to allow graduates to sit for the state bar.[31]

The future acceptability of distance legal education is likely to track technological advances in its delivery. Issues in technological advancement have been highlighted by MOOC activity, however unrelated it may be to formal distance education. The rise and popularity of MOOCs

26 The notion of 'meaningful access' applies to other areas of law. See, eg, Michael L Perlin, 'Online, distance legal education as an agent of social change' (2012) 24 *Pacific McGeorge Global Business & Development Law Journal* 95; Thomas D Morgan, 'The changing face of legal education: its impact on what it means to be a lawyer' (2012) 45 *Akron Law Review* 811.

27 See, eg, Steven C Bennett, 'Distance learning in law' (2014) 38 *Seton Hall Legislative Journal* 1; Hope Kentnor, 'Distance education and the evolution of online learning in the United States' (2015) 17 *Curriculum and Teaching Dialogue* 21.

28 Stephen Colbran and Anthony Gilding, 'E-learning in Australian law schools' (2010) 23 *Legal Education Review* 10. It is also worth noting that an online Learning Management System may be used in both online and face-to-face teaching, complicating true measures of its uptake for distance delivery.

29 Confirmed by email enquiry to school administrators.

30 New Zealand Council of Legal Education, '*Assessment of overseas law qualifications*' (2015) < http://www.nzcle.org.nz/overseas_qualifications.html>. In response to email enquiries, the New Zealand Council of Legal Education confirmed that it occasionally receives applications that include some distance study course completions, and that both providers of the New Zealand Professional Legal Studies Course (Institute of Professional Legal Studies, and the College of Law) include courses with blended delivery, that is a combination of online and face-to-face teaching.

31 Max Huffman, 'Online learning grows up – and heads to law school' (2015) 49 *Indiana Law Review* 57.

has been explained as an outcome of the current pressures facing higher education worldwide.[32] They include globalisation of education, demand for access, and the change in demographics that now celebrates life-long learning, and easier technological access. Among the issues raised by MOOCS are assessment methodologies, in particular how to credit distance study, and also how to ensure an appropriate pedagogy.

Providers have responded to this challenge in different ways. For example, the absence of an established pedagogy for e-learning does not prevent initiatives to seek best practice in online delivery of legal education. A study of social work law lecturers moving towards blended course delivery over a two year period[33] has shown that online teaching can lead to teacher satisfaction and positive attitudes to change. Factors favouring success include: a personal commitment to teach differently, and that it offers to build capacity through collaboration with others. As another example, Indiana University's School of Law has taken a measured approach to online legal education by adhering to four principles in online course creation and programme development:[34]

1. Partnering with qualified course development experts;
2. Focusing solely on asynchronous delivery, based on its advantages of convenience for study, scheduling, and access to established pedagogical innovations;
3. Following a process of bespoke course design which adheres to previously established learning outcomes; and
4. Insisting on careful peer review and quality control.

One of the most compelling outcomes of Indiana University's initiatives has been the way that 'made to measure' course development has been undertaken while respecting faculty autonomy. In contrast, much third party online course development (notably MOOCs) favours scalability, and less individualism in course development. This depersonalises the enjoyment for teachers, and is likely to be a future tension in promoting online legal education.

As an aside, how does distance legal education respond to the challenges of the Socratic (ie argumentative) teaching method? Modern legal education is derived from case citation, supplemented by argumentative dialogue between teachers and students. The process involves question and answer face-to-face teaching, analysing past case law and attempting to apply the reasoning in it, to more generalised fact situations.

Clearly, this does not translate well to online education delivery, unless there is effective, synchronous communication between a teacher and students. Learning Management Systems such as Moodle and Blackboard, are unlikely to promote the requisite fluidity of interaction. Having said that, the Socratic method is finding disfavour in law schools. While it teaches critical thinking, it is believed to have limited value for future practitioners.[35]

D *Distance Delivery of Non-LLB Environmental Law Education*

In the event that environmental law education was 'ramped up', by making it more available by distance, who would take it, and why? The answer to this question may be available, at least in part, by analysing student enrolment and other demographics for environmental law courses

32 Ioana Literat, 'Implications of massive open online courses for higher education: mitigating, or reifying educational inequities?' (2015) 34 *Higher Education Research & Development* 1164.

33 Suzy Braye, Tish Marrable and Michael Preston Shoot, 'Building collaborative capacity for using and evaluating the impact of e-learning in social work education: the case of law' (2014) 33 *Social Work Education* 835.

34 Max Huffman, 'Online learning grows up – and heads to law school' (2014) 49 *Indiana Law Review* 56.

35 See, eg, Matt Hlinak, 'The Socratic method 2.0' (2014) 31 *Journal of Legal Studies Education* 1. During my own LLB studies at Dalhousie University in the 1990s, only contract law was still taught using the Socratic method. Discussions with Dalhousie teachers at that time indicated that it is no longer widely used in Canadian law schools.

presently taught by distance at the Open Polytechnic in New Zealand (Open Polytechnic). As a result, data were collected and analysed for two environmental law courses taught by distance at the Open Polytechnic. The data included enrolment information, notably work addresses where these were available. Additional information was derived from student evaluation forms, queries to students throughout course delivery, and from the marketing department at the Open Polytechnic.

Analysis of the data confirmed the general demographics for students who study at the Open Polytechnic. Typically, such students are:

1. Mature;
2. Working in full or part-time employment;
3. Seeking part-time study, primarily for professional development.

Those studying environmental law courses at the Open Polytechnic possessed a variety of qualifications at the time of enrolment, ranging from high school graduates to degree holders, including LLBs and Doctors of Philosophy. Summary analysis of student information revealed four major environmental law pathways:

1. Professional development in the context of current employment in the local government sector (20%).
2. Professional development in other environment-related employment (20%).
3. Those seeking entry into categories 1) and 2) (40%).
4. Others (20%).

The 'other' category, although smallest, provided a number of compelling personal narratives. It included categories of students best described as 'the passionate'. These students were personally involved in RMA consents for home and business, or were members of public interest groups associated with single issues, such as nearby windfarm development. Other examples were parents of young children, the retired, and other citizens who were concerned for their own environmental legacies, and wished to make a difference.

IV Conclusions

This article has discussed research which confirms the ways in which environmental law and associated decision making inform a great deal of central and local government activity in New Zealand. This research also shows the diversity of environmental law work streams, and the ways in which higher education can cater to these needs. Finally, a review of distance education in an environmental context strongly suggests that it holds promise as a means of enhancing environmental knowledge at a distance, benefitting as it does from existing pedagogies that in the past have favoured distance education as the preferred delivery platform for education for sustainability. The promotion of an expanded role for distance delivery of environmental law content in New Zealand and elsewhere is subject to a number of caveats. They include:

A *Finding Best Use*

Niche opportunities already exist for distance law education. In Australia, for example, it is being used increasingly for practical legal training, prior to admission to the legal profession.[36] In New Zealand, distance legal education is used regularly in real estate salesperson and legal executive training.[37] Is environmental law better suited to distance education than are other subject areas? The answer appears to be 'yes'. Factors favouring this conclusion include:

36 Kristoffer Greaves and Julianne Lynch, 'Is the lecturer in the room? A study of student satisfaction with online discussions in practical legal training' (2012) 22 *Legal Education Review* 1.

37 Open Polytechnic qualifications in these areas are recognized by the New Zealand Real Estate Agents Authority and Law Society, respectively, in the context of professional endorsement.

1. Its close relationship with education for sustainability, from which it can borrow established pedagogies;
2. Extremely active environmental reform, suggesting an ongoing role for professional development;[38]
3. Informality in most environmental proceedings, relaxing the requirement for face-to-face, moot court practice; and
4. The reach of distance education to isolated New Zealand communities and local champions who can become part of current pushes towards 'sub-council' or 'second-tier' governance models.[39]

Finding best use in New Zealand for distance environmental education is likely to require formal acknowledgement by organisations where it can be used for professional development and accreditation. Examples of agencies include: the New Zealand Planning Institute, the New Zealand Council of Legal Education, the Institute of Professional Legal Studies, the New Zealand Law Society, the College of Law, the Environment Institute of Australia and New Zealand, and Local Government New Zealand. Further development of distance education will likely require engagement with some or all of these providers.

B *Ensuring Technological Capacity.*

The movement towards legal distance education in its strict sense (ie no face-to-face contact between teachers and learners) typically involves a transitional stage of 'blended' or 'hybrid' delivery, where classroom time is reduced but not eliminated. [40] As noted elsewhere in this research, care is necessary to ensure that distance delivery stays 'in step' with technological capacity.[41]

C *Avoiding the MOOC trap.*

As noted elsewhere in this paper, MOOCs are a highly scaled variant of online education, which is very distinct from formal distance education. MOOCs are a concern for distance education because their weaknesses (lack of pedagogies, difficulties with assessment and recognition of prior learning, and abuse by diploma mills) perpetuate perceptions that distance learning is inferior to face-to-face teaching.[42] Distance education advocates are in a position to respond to adverse perceptions caused by reckless MOOC activities, simply by ensuring that students are happy with distance education, and that it serves their needs in ensuring better environmental futures.

Quality management in this area has been assisted by qualification reviews undertaken by the New Zealand Qualifications Authority, as they apply to higher education study at New Zealand polytechnics[43]. In a nutshell, the near-term future for the polytechnic sector will require stronger vocational linkages between what is being learned, why it is being learned, and how useful the learning has been in helping graduates find (and keep) employment. This could auger very well for the future of vocationally-based environmental education in this country, including an expanded role for distance delivery.

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38 Major revisions to the RMA occurred in 2003, 2005, 2009, 2013, and a 2015 Bill is presently before the New Zealand Parliament. LGA reform is no less active, with major amendments being made to it in 2009, 2012, and 2015.

39 Local Government New Zealand, '*Community level governance: what provision should be made in local government legislation?* (2014) <http://www.lgnz.co.nz/home/our-work/publications/community-level-governance/>

40 Robert J Beck, 'Teaching international law as a partially online course: the hybrid/blended approach to pedagogy' (2010) 11 *International Studies Perspectives* 273.

41 Huffman, above n 34.

42 Anthony A Pina, 'Online diploma mills: implications for legitimate distance education' (2010) 31 *Distance Education* 121.

43 New Zealand Qualifications Authority, '*Reviews of qualifications'* (2012) <http://www.nzqa.govt.nz/qualifications-standards/quals-development/>

LAW SCHOOLS: EVOLUTION AND LAW'S ROLE

*Cheryl Green**

I Introduction

What is required to produce a good lawyer capable of entering the realm of private or other types of law practice in today's world? Law is a profession and a business, and the community it serves expects high quality service within a fast-paced environment where rapid technology advances are the norm. Today's challenge is to incorporate into the law degree curriculum, the opportunity for law students to develop the requisite skills while teaching them to research, analyse and apply law.

II Legal Qualifications – Historical and Current

Traditionally, law degrees have focussed on teaching the theory of law and its application. The current legal admission requirements in New Zealand are: a four year law degree followed by a postgraduate requirement of completing the Professional Legal Studies Course ('Professionals Course') before admission to the bar. These legal admission requirements evolved from a report in 1987 to the New Zealand Law Society at the request of the Society and the Council of Legal Education (the 'Gold Report'), which was written by Professor Neil Gold who is a Canadian legal academic.[1]

As with some professional degrees, the distance between academic theory learning and its clinical practice application, is not always without tension in the institutions that teach theory and its application. The tension between adequate development of professional legal skills in law students (whether they be undergraduate or postgraduate law professionals) or on the job as a practising law clerk, has a long history. New Zealand has undertaken both paths with law clerking being the initial approach, and the Professionals Course being introduced after the Gold Report which said that 'the academic and practising branches of the profession have not been able to develop an agreement about the nature, structure and objectives for the effective preparation of lawyers.'[2] The Gold Report also clarified that the prior New Zealand legal admission training requirements were untenable, referring to it as:

> a poor sibling of both the academic and practising worlds. When the salutary decision to make law study a full-time activity was made, little was done to bridge the gap between academic grounding and the development of practical and professional skills, knowledge and the attitudes which are the requisites of competent practice…Reiterated, almost *ad nauseam,* is the need for client relation skills, fact marshalling and analysis skills, general problem solving capability and the arts of persuasion applicable to those who negotiate and advocate.[3]

The Gold Report resulted in the current requirement that all law graduates complete the professional practice course before seeking legal admission to the bar and obtaining a practising certificate. The course develops law problem solving skills listed in the New Zealand Council of Legal Education's *Professional Legal Studies Course and Assessment Standards Regulations* 2002 (NZ), and include:

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1 Neil Gold, 'Report on the Reform of Professional Legal Training in New Zealand' (Submission to the New Zealand Law Society, 1987) (the Gold Report).

2 Ibid 3.

3 Ibid 4-7.

1. Interviewing.
2. Advising.
3. Fact investigation and analysis.
4. Writing.
5. Drafting.
6. Negotiation.
7. Mediation.
8. Advocacy.
9. Problem solving.
10. Practical legal research and analysis.
11. Office and personal management.

This practical problem solving focus contrasts with the traditional law degree focus of teaching the theory of law and its theoretical application.

III On the Job Learning

In New Zealand we have the post-admission three year rule requirement during which time new lawyer professionals must not practice on their own account and must also receive practical training experience under the supervision of a senior practising 'mentor' whether they be a barrister and solicitor or a barrister sole. Those who wish to practice on their own must also pass the Stepping Up course set by the New Zealand Law Society. The Stepping Up course assists candidates to:

- Run the business of a law practice.
- Be responsible for the obligations of the practice.
- Understand and apply the relevant rules of conduct and client care.
- Understand the principles and rules of trust accounting noting that it is important for candidates to have an understanding whether or not they intend to operate a trust account.

The Right Honourable Sir Andrew Tipping reviewed the Professionals Course in 2013 and said unequivocally that it 'can never give trainees anything like that sort of experience and supervision that the three year rule is designed to provide post admission. That is where the primary focus of on the job experience and training should fall.'[4] Sir Tipping went on to say: '[t]he fact that in some cases the anticipated post admission supervision and training does not occur, or at least does not satisfactorily occur, should not skew the appropriate role of the Profs Course.'[5]

Clearly, most lawyers would consider the three year mentorship as the more preferred method of professional development for inexperienced lawyers, with which it is hard to disagree. But even Sir Tipping acknowledged that the system is far from perfect. The Gold Report similarly said that there 'was no evidence that law firms can be relied upon to provide all new lawyers with supervised, guided and directed opportunities for on-the-job learning through experience.'[6]

The events surrounding the ten year passage of the *Lawyers and Conveyancers Act 2006* (NZ) are an interesting case study of the struggle between traditional notions of professionalism and the new managerial practices that are now required in all law firms. Many law practices in the current environment clearly take their supervisory roles very seriously and commit, as part of their practice, to producing high quality well trained solicitors. What is also clear is that some practices struggle with this and there are others who, even worse, think the 'deep end' is the best place for a new lawyer to start. However to train and supervise newly admitted lawyers properly

4 Sir Andrew Tipping, *Review of the Professional Legal Studies Course: Report to the New Zealand Council of Legal Education* (PLSC Review, 2013) 3.

5 Ibid.

6 Neil Gold, above n 1 at 8.

requires time and cost. An inexperienced lawyer is an uneconomic unit and quite possibly a liability for the first one to two years.

In a 2016 report by New Zealand law graduate Josh Pemberton, called 'First Steps: The experiences and retention of New Zealand's Junior Lawyers'[7] ('First Steps'), some junior lawyers who were interviewed expressed the view that on-the-job learning required to become a useful lawyer in practice was such that the early stages of practice felt akin to 'an apprenticeship'.[8] Law is both a profession and a business – a very competitive business at that. It is easy to understand why in the current climate, advertised lawyer positions in law firms often require candidates with at least two or more years of experience. Few positions are available for newly admitted lawyers.

IV Experiences of Junior Lawyers

The First Steps report looks at how students cope with the transition from university to legal practice and provides both statistical data and commentary from interviews with junior lawyers about various aspects of their life in law. While the vast majority of the respondents surveyed agreed that law school had given them a good grounding in theory and analytical skills (92.7%), almost seven out of every eight respondents (86.7%) also agreed that their law school training should have been more practical.

Almost three quarters (74%) of respondents agreed that '[t]he professional legal studies course was a useful bridge between law school and legal practice'[9] but many of those who found their course useful overall, still expressed strong reservations about its timing and content. A number of respondents also felt that completing the Professionals Course after university while (often) working full-time in legal practice, meant the course was merely something that had to be endured, rather than something with which to properly engage. The phrase 'box-ticking' came up time and time again.

V What Does a Law Student Need to Learn?

Knowing what law students learn in law school and in the Professionals Course is simple. But the traits required for many lawyer positions are extensive, and feedback from the legal profession indicates that the following abilities are required for an employable law graduate:

- Intellectual horse-power sufficient to excel in his or her role as a lawyer.
- Quality of work output – the ability to produce high quality work with attention to detail.
- Achievement of targets in day-to-day work – the setting of realistic objectives and priorities and the initiation of prompt corrective action if required.
- Meeting deadlines – the ability to complete work and to manage time effectively.
- Cost effectiveness – making optimum use of financial and other resources.
- Decision-making – an ability to make sound decisions based on fact and to take initiative; to accept responsibility for decisions. It is also about the ability to follow through and avoid procrastination.
- Problem-solving – analytical skill and the ability to develop effective solutions.
- Job knowledge – knowing and understanding his or her brief.
- Innovation/creativity – an ability to think creatively within the context of his or her own specialisation and to find original solutions to problems.
- Leadership – effective management of, and planning with, team members, including the delegation of jobs at an appropriate level.

7 Josh Pemberton, *First Steps: The experiences and retention of New Zealand's junior lawyers* (The Law Foundation of New Zealand, 2016).
8 Ibid 14.
9 Ibid 13-14.

- Team building – an understanding of group processes and the coaching and development of all team members.
- Relationships – an ability to generate and sustain appropriate professional relationships.
- Communication skills – oral – an ability to communicate logically, clearly and with conviction.
- Communication skills – written – an ability to present documents in a clear, concise manner.
- Technological expertise; and
- Cultural awareness.

VI Bi-Culturalism in Legal Education

One of the Gold Report's recommendations in 1987 was that the Professionals Course should have a special section on Māori language and culture. Gold stated that as with all cultures, the knowledge of local customs and laws is fundamental.[10] In 1988, Justice Richardson J (as Chairman of the Council of Legal Education), included in his list of crucial issues for modern New Zealand education: 'valuing cultural diversity and recognising the unique character of New Zealand founded on the Treaty of Waitangi.'[11]

Chapter Four of the latest edition of *Burrows & Carter Statute Law in New Zealand*[12] looks at Māori concepts and language in legislation, stating that '[i]ncreasingly, legislation drafted and enacted in English also contains terms or provisions in Māori'[13]. One such example is the *Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 Te Ture mō Mokomoko (Hei Whakahoki I te Ihi, te Mana, me te Rangatiratanga) 2013* (NZ). Chapter Four also incorporates Tai Ahu Te Teo Māori as a language of New Zealand law, stating that 'the Interpretation Act 1999 should be amended to insert a provision to the effect that provisions incorporating the Māori language, if enacted, are presumed to be interpreted according to tikanga Māori.'[14]

Chapter Four also cites the dissenting judgment of F B Adams in *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) who said at page 444: '[l]egislation may well need to pin down the intended meaning of a Māori term, especially if the term has many different meanings, or there are tribal differences in usage.'[15] The evolving legislative developments regarding Māori concepts and language are so significant that law educators in New Zealand need to ensure that they are incorporated into the teaching of law undergraduates and postgraduates, just as Gold and Justice Richardson J recommended almost 30 years ago.

VII What Learning is Best for Professional Legal Practice?

The type of learning that law students undertake to prepare for professional life in legal practice is important because they need an engagement level that encourages 'accretion' by gradual accumulation of layers of practice experience. This type of learning is becoming more difficult to achieve due to the current focus on technology and instant communication.

10 Neil Gold, above n 1, 25.
11 Peter Spiller, 'The History of New Zealand Legal Education: A Study in Ambivalence' (1993) 4 (2) *Legal Education Review* 223, 125.
12 Ross Carter, *Burrows and Carter on Statute Law in New Zealand 5th Edition* (LexisNexis New Zealand, 2015).
13 Ibid 148.
14 Ibid 153.
15 Ibid 153.

Levy[16] has addressed educators' assumption that students' ability to 'multitask' is a new learning style resulting from their constant exposure to technology, as a study has showed that this assumption is wrong.

> We were absolutely shocked … multitaskers are terrible at every aspect of multitasking. They're terrible at ignoring irrelevant information; they're terrible at keeping information in their head nicely and neatly organised; and they're terrible at switching from one task to another.[17]

To dispel any notion that constant technology exposure confers multi-tasking superpowers, learning science suggests there are physiological and neurobiological constraints that make it impossible. Lecturing is a very useful technique for delivering information that is uncomplicated, straightforward and of a reasonably general nature. Lecturing is also a cost-effective way to convey information to a large number of students. But studies show that long periods of lecturing are ineffective for most learners whose attention spans rarely exceed (if we are lucky) 20 to 25 minutes. Putting information into practice is where we need to focus our attention if we wish to produce work ready law graduates; this is what all New Zealand university law schools are reviewing currently.

VIII 'Work Ready Graduates' – What Does This Mean?

On page 10 of a report titled Tertiary Education Strategy 2014-2019 produced in March 2014 by the Ministry of Business Innovation and Employment and the Ministry of Education in New Zealand, the stated priority is to ensure that tertiary education supports development of transferable skills including the ability to communicate well, process information effectively, think logically and critically, and to adapt to future changes. This priority is one of the most crucial outcomes of tertiary study, including for those degrees with vocation-specific qualifications. This report's reasoning is that a greater focus on attaining these transferable skills in tertiary education, will benefit graduates and employers, and improve graduates' employment outcomes.

IX What 'Work Ready Graduates' Does Not Mean

Section VII earlier in this article refers to learning by 'accretion' which must occur at the beginning of a degree to be successful. The Professionals Course provides an extremely useful and competent course, but given that students have approximately 11 assessments to undertake in 13 weeks, it can become a matter of 'ticking the boxes.' For example, no matter how high quality the teaching, a student who has never undertaken a negotiation or looked, even briefly, at negotiation theory, will usually struggle to understand what they are doing and focus inevitably, on what they need to do to pass their assessment, rather than on what they are doing and why. Although if a law student is lucky enough to land a job in a law firm with a high quality mentoring system, this may not be a problem at this stage (as discussed earlier above).

X The Way Forward?

Focusing on delivering a professional legal education that will qualify students for the practice of law should be undertaken from the first year of the law degree. This raises the obvious issues of cost and time in a structure that is already bursting at the seams with work commitments. Working more closely with the legal profession is an option, with the introduction of the *Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013*, and continuing professional development now being compulsory for all practising lawyers in New Zealand.

16 James B Levy, 'Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School' (2015) 19 *Chapman Law Review* 241, 21.

17 Ibid.

Eligible continuing professional development activities may include teaching and preparing for law courses at a tertiary level. One example would be where a law lecture includes references to clinical education taught by legal practitioners who bring their current practice insight with them. The law and the legal process can be examined, analysed and critiqued with client concerns and best interests in mind.

A more specific example is a Tort's course where, with support from the academic colleague teaching the course, a legal practitioner would teach a class on negligence using an anonymised current client matter with the client's written permission. This raises issues regarding client privacy and confidentiality but these are not insurmountable. The client's claim preparation could be explained to the class by referring to relevant legislation and case law. Law students may be subsequently briefed on the outcome of the client's claim where that occurs before the end of the course.

XI Conclusion

A barrier to change in complex organisations like law schools and professional societies, can be institutional inertia. Traditions can die hard even when they are clearly out of step with best practice. Law schools need to keep building a system of legal education that, while respecting appropriate traditions, embraces sound educational and cultural practices to ensure that law students have sufficient opportunities to acquire and develop the skills and values they need as future practising lawyers.

TELLING IT LIKE IT IS: ORAL PRESENTATIONS AND PEER ASSESSMENT FOR BUSINESS LAW STUDENTS

Rocco Loiacono[*]
and Anna Bunn[#]

Abstract

As academics, we are constantly encouraged to devise assessment tasks that engage students. Much research has been conducted into devising assessment that is *for* learning, rather than *of* learning. In three business law units over the past three years, one assessment task that has been utilised is that of an oral presentation which is assessed by the presenter's peers, and in some cases, by the tutor as well. One of the reasons this method of assessment was chosen was that having to assess your peers and be assessed by them is a realistic mode of assessment since in working environments, many of us have to present in a group and may be assessed, formally or informally, by our peers. Assessing someone else can also be one of the best ways of learning about ourselves. This paper reflects on the research with regard to peer assessment as both a formative and a summative assessment tool. It observes how the peer assessment tasks in Curtin Law School have been informed by research, and concludes that overall, peer assessment is positive for student learning, provided that it is utilised within certain well-defined parameters. It is hoped that this paper will lead to further investigation into developing a peer assessment approach that can be applied to engage students across many disciplines.

I Introduction

Assessment can perform two different functions. It can be a tool (for both teacher and student) to evaluate student performance in a particular subject (assessment of learning). It can also however, be a learning tool in itself (assessment for learning). As Brown states, 'assessment is probably the most important thing we can do to help our students learn.'[1] For many students, knowing that they will be assessed on a certain topic gives them the motivation to learn as much about the topic as they can. This is further supported by Weurlander et al, who state that 'assessment sends a strong message to students about what counts as knowledge in a particular learning environment.'[2]

Unfortunately, at times, assessment does not adequately focus on the process of learning, and particularly on how students will learn after the point of assessment.[3] This means that teachers may be missing an opportunity to better prepare students for their professional lives post-graduation.[4] This is significant given that there is new pressure on teaching academics to

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1 Sally Brown, 'Assessment for Learning' (2004) 1 *Learning and Teaching in Higher Education* 81, 81.

2 Maria Weurlander, Magnus Soderberg, Max Scheja, Hakan Hult and Annika Wernerson, et al, 'Exploring formative assessment as a tool for learning: students' experiences of different methods of formative assessment' (2012) 37(6) *Assessment & Evaluation in Higher Education* 747, 748.

3 David Boud and Nancy Falchikov (eds), *Rethinking Assessment in Higher Education: Learning for the Longer Term* (Routledge, 2007) 3.

4 Glyn Thomas, Dona Martin and Kathleen Pleasants, 'Using Self- and Peer-assessment to Enhance Students' Future-Learning in Higher Education' (2011) 8(1) *Journal of University Teaching & Learning Practice* 1, 1.

develop forms of assessment which promote efficient learning for more students for a longer time – assessment for life-long learning.[5]

Therefore, the challenge of devising assessment that is inclusive and engages students is imperative.[6] Further, the need to ensure that learning extends beyond the completion of a subject has led to the adoption of assessment approaches that emphasise the active engagement of students in their own learning. Peer assessment, as we explain below, can play an important role in this respect.[7] Furthermore, active participation by students in assessment design, choices, criteria and making judgments may be a more sustainable preparation for subsequent working life.[8]

Three business law units within the Bachelor of Commerce at Curtin University have utilised peer assessed oral presentations as a component of each unit's assessment. In terms of the decision to assess oral communication, it has been argued that the ability to offer analysis of a situation and to communicate that analysis effectively, are professionally valuable skills. Oral assessment in a law course is therefore well suited to assessing understanding and analysis, critical thinking and the ability to construct and defend an argument — attributes that are highly valued in a legal education. In this way, deep learning can be encouraged since oral assessment can test students' ability to discuss and defend their ideas and arguments in a way which static and one-way written communication does not.[9] This is primarily because of the questioning and dialogue that can form part of oral assessment.[10] Further, it has also been suggested that oral assessment is interpersonal in a way which written assessment often is not. The foregrounding of the personal relationship can also increase motivation on the part of the student. This may simply mean that students are able to perform to a higher standard or engage with the material they are studying, in a more in-depth manner.[11]

The decision to utilise peer assessment of oral presentations and the design of the various peer assessment tasks under discussion in this paper was informed by the literature. This paper reflects on some of the points noted above by the scholars cited, in particular with regard to peer assessment as both a means of assessment for learning, as well as assessment of learning, and as a means of actively engaging students. To study students' perceptions of this approach, we will review eVALUate (the Curtin University student teaching evaluation report) survey data relating to students' experience of assessment in three business law units from Semester 1, 2012 to Semester 2, 2015.[12] These surveys were completed voluntarily and anonymously by students who wished to comment and/or reflect on their teaching and learning experiences in particular units. Specifically, the qualitative data provided in these eVALUate surveys will be used to illustrate our respective experiences of using peer assessment to assess aspects of student learning (oral communication) in each of those three units. This analysis informs our conclusions on the advantages, disadvantages and unique challenges of this form of assessment, and will enable us to determine whether the use of peer assessment advocated by the literature

5 Steinar Kvale, 'Contradictions of Assessment for Learning in Institutions of Higher Learning', in Boud and Falchikov (eds), above n 3, 5.

6 Damian Cooper, *Talk About Assessment: Strategies and Tools to Improve Learning* (Thomas Nelson, 2006).

7 Dorothy Spiller, 'Assessment Matters: Self-Assessment and Peer Assessment' (Working Paper, Teaching Development, The University of Waikato, February 2012), <http://www.waikato.ac.nz/tdu/pdf/booklets/9_SelfPeerAssessment.pdf >.

8 David Boud and Nancy Falchikov, 'Aligning Assessment with Long-Term Learning' (2006) 31(4) *Assessment and Evaluation in Higher Education* 399.

9 See generally Chloe J Wallace, 'Using Oral Assessment in Law: Opportunities and Challenges' (2010) 44(3) *The Law Teacher* 365, 370.

10 Gordon Joughin, 'Student conceptions of oral presentations' (2007) *Studies in Higher Education* 323.

11 Wallace, above n 9, 370.

12 The authors obtained ethics approval to use the anonymous student comments: approval number RDBS-92-15.

as a means of promoting assessment for learning, active student engagement and enhanced communication and decision-making is in fact reflected by the students themselves.

II Peer Assessment as Formative and Summative Assessment

Whilst there are many variants of peer assessment, what they all have in common is that students provide grades and/or feedback to other students on the quality of their work. As Falchikov outlines:

> Peer assessment requires students to provide either feedback or grades (or both) to their peers on a product or a performance, based on the criteria of excellence for that product or event which students may have been involved in determining.[13]

Peer assessment is founded in philosophies of active learning[14] and andragogy[15] and may also be seen as a manifestation of social constructionism[16] since it often involves the joint construction of knowledge through discourse. A key component in peer assessment is, as noted above, the fact that students receive feedback on their performance from their peers (sometimes in addition to their tutor's feedback). Receiving feedback assists students to 'monitor the strengths and weaknesses of their performances, so that aspects associated with success or high quality can be recognised and reinforced, and unsatisfactory aspects modified or improved.'[17] In this sense, peer assessment can be viewed as a type of formative assessment, that is, assessment which is specifically intended to generate feedback on performance in order to improve and accelerate learning.[18] In other words, it is assessment *for* learning. As Brew observes:

> Assessment and learning must increasingly be viewed as one and the same activity; assessment must become an integral part of the learning process […] when teachers share with their students the process of assessment – giving up control, sharing power and leading students to take on the authority to assess themselves – the professional judgment of both is enhanced. Assessment becomes not something done to students. It becomes an activity done with students.[19]

In contrast to formative assessment, summative assessment refers to an assessment that is designed purely to contribute to an overall grade at the end of the study unit,[20] that is, it is assessment *of* learning by the teacher. Peer assessment takes the form of summative assessment where it is used towards students' grades in a particular study unit. However some academics may be cautious about using peer assessment as a form of summative assessment that actually

13 Nancy Falchikov, 'The Place of Peers in Learning and Assessment' in Boud and Falchikov (eds), above n 3, 132.

14 Nancy Falchikov and Judy Goldfinch, 'Student Peer Assessment in Higher Education: A Meta-Analysis Comparing Peer and Teacher Marks' (2000) 70(3) *Review of Educational Research* 287, 287. As to philosophies of active learning see, for example, Jean Piaget, *Science of Education and the Psychology of the Child* (Derek Coltman trans, Longman 1971) [trans of: *Psychologie et pédagogie* (first published 1969)].

15 See, for example, K Patricia Cross, *Adults as Learners: Increasing Participation and Facilitating Learning* (Jossey-Bass, 1981).

16 See, eg, Lev Vygotsky, *Thought and Language* (MIT Press, 1962).

17 D Royce Sadler, 'Formative Assessment and the Design of Instructional Systems' (1989) 18 *Instructional Science* 119, 120-21.

18 Ibid.

19 Angela Brew, 'Towards autonomous assessment: Using self-assessment and peer assessment' in S Brown and A Glasner (eds), *Assessment matters in higher education: Choosing and using diverse approaches* (Open University Press, 1999) 159, 169.

20 This distinction appears to have been first made by Benjamin Bloom, John Hastings and George Madaus in *Handbook on Formative and Summative Evaluation of Student Learning* (McGraw-Hill, 1971).

counts towards students' grades.[21] This is in part, due to concerns about the objectivity and reliability of peer assessment.[22] These concerns are considered later in this paper.

III Research Into the Benefits of and Concerns Around Peer Assessment

A number of benefits of peer assessment have been claimed. As noted above, one of the features of peer assessment is that students are active participants in the assessment process. Student involvement in assessment appears to have been increasing in recent years, and this increase appears across the spectrum of discipline areas including science and engineering, arts and humanities, mathematics, education, social sciences and business studies.[23] Active involvement of students in assessment can increase engagement in the learning process and improve both short and long-term outcomes by requiring students to 'make sophisticated judgements about their own learning, and that of their peers.'[24] Active involvement in assessment may mean that students are more motivated in the task at hand[25] or the learning process in general.[26] It has also been found that students are motivated by peer assessment due to the desire to impress their peers.[27]

In addition to allowing students to be active participants in the learning process, peer assessment also provides opportunities for students to become independent learners. This is because by being 'made aware of their own learning'[28] and learning to judge their own performance realistically, students are able to monitor their own learning, rather than having to rely on their teachers for feedback.[29] Topping found that peer assessment also provided opportunities for students to help each other,[30] and it has been observed that some students perceive peer feedback marking to be more beneficial than traditional marking.[31] This perception of the value of peer feedback could be due in part to the fact that feedback is available with more immediacy than teacher feedback.[32] Sun et al found that peer assessment actually resulted in a 'small but significant gain in student achievement',[33] and Falchikov found that peer assessment enhances student learning by providing the opportunity for reflection, analysis and diplomatic criticism.[34]

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21 Thomas, Martin and Pleasants, above n 4, 3.
22 Linda Leach, Guyon Neutze and Nick Zepke, 'Assessment and Empowerment: Some Critical Questions' (2001) 26(4) *Assessment and Evaluation in Higher Education* 293, 297.
23 Falchikov and Goldfinch, above n 14, 287.
24 Thomas, Martin and Pleasants, above n 4, 1.
25 Lorraine A J Stefani, 'Peer, Self and Tutor Assessment: Relative Reliabilities' (1994) 19(1) *Studies in Higher Education* 69, 73.
26 UNSW, *Assessment Toolkit: Student Peer Assessment*, 30 March 2015 < https://teaching.unsw.edu.au/peer-assessment>.
27 Stephanie A Hanrahan and Geoff Isaacs, 'Assessing Self- and Peer-assessment: The Students' Views' (2001) 20(1) *Higher Education Research and Development* 53, 63.
28 Weurlander et al, above n 2,757.
29 Geoffrey Crisp, *The E-Assessment Handbook* (Continuum, 2007); see also Keith A Oldfield and J Mark K Macalpine, 'Peer and Self-assessment at Tertiary Level – an Experiential Report' (1995) 20(1) *Assessment & Evaluation in Higher Education* 125, 129.
30 Keith J Topping, 'Peer Assessment' (2009) 28(1) *Theory into Practice* 20, 20.
31 Nancy Falchikov, 'Peer Feedback Marking: Developing Peer Assessment' (1995) 32(2) *Innovations in Education and Training International* 175, 181.
32 Topping, above n 30, 25.
33 Dennis L Sun, Naftali Harris, Guenther Walther and Michael Baiocchi, 'Peer Assessment Enhances Student Learning: The Results of a Matched Randomised Crossover Experiment in a Student Statistics Class' (2015) 10(12) *PLOS One* 1, 5.
34 Falchikov, above n 31.

Peer assessment can also assist students to gain professional and social skills. Biggs and Tang argue that the ability to make judgments about whether a performance or a product meets given criteria, is vital for effective professional action in any field,[35] a view echoed by Oldfield and MacAlpine.[36] Topping notes that learning how to both give and accept criticism is a useful and transferable social skill.[37]

It has been found that students may feel anxious about oral assessment tasks and that anxiety can affect the reliability of oral assessment.[38] It is submitted that one benefit of peer assessment, therefore, is that it can provide an opportunity to reduce that anxiety level. It is possible that one source of that anxiety is the power imbalance between a student and teacher. As noted by Leach, teachers have traditionally been 'all-powerful' in assessment processes.[39] Therefore, the involvement of students challenges these traditional power relations and can give students a sense of empowerment.[40]

In addition to benefitting students, peer assessment can benefit the teacher. Peer assessments may be an efficient and/or inexpensive way to provide personalised feedback.[41] Another benefit to teachers is that peer assessment can encourage a focus on developing clear assessment objectives and purposes, criteria and grading scales.[42]

In addition to the benefits claimed for peer assessment, a number of concerns have been raised. As already alluded to, academics may be reluctant to use peer assessment for grading students. It seems that this reluctance may be due to concerns about the validity of peer assessment, specifically the extent to which peer assessment is objective and reliable.[43] However, it has been observed that in almost all studies examining the reliability of peer assessments, indications of reliability were concerned with the extent to which there was agreement between those grades given by peers and those given by teachers in relation to the same product or performance.[44] These studies often involve implicit assumptions that teacher assessments are reliable, an assumption that may be open to challenge particularly in respect of assessments of oral presentations.[45] Indeed Topping found that a peer assessor with 'less skill at assessment but more time in which to do it could produce an equally reliable and valid assessment.'[46] Others have found that students can make rational judgments on the achievements of their peers.[47] It has also been suggested that reliability is increased where assessment criteria are jointly constructed, discussed and negotiated with learners,[48] and research has been conducted

35 John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the Student Does* (Open University Press, 3rd ed, 2007).

36 Oldfield and Macalpine, above n 29.

37 Topping, above n 30, 24.

38 Wallace, above n 9, 369, citing L Clouder and J Toms, 'Impact of Oral Assessment in Physiotherapy Students' Learning Practice' (2008) 24 *Physiotherapy Theory and Practice* 29, 42.

39 Leach, Neutze and Zepke, above n 22, 293.

40 Although it is important to bear in mind, as Leach et al point out, that 'empowerment is not the same for everyone. A process that is empowering for some may be disempowering for others and will be resisted by them': Ibid 294.

41 Sun et al, above n 33, 23.

42 Topping, above n 30, 24.

43 Douglas Magin and Phil Helmore, 'Peer and Teacher Assessments of Oral Presentation Skills: How Reliable Are They?' (2001) 26(3) *Studies in Higher Education* 287, 288, citing various studies that consider questions of objectivity and reliability.

44 Magin and Helmore, ibid 288, citing Topping, above n 30.

45 Magin and Helmore above n 43, 291, note a study by Van der Vluten et al that found that observational methods were less reliable than other forms of agreement (citing C Van Der Vlueten, G Norman and E De Graaff, 'Pitfalls in the Pursuit of Objectivity: Issues of: Reliability', *Medical Education* 25, 110-118).

46 Topping, above n 30, 25.

47 Stefani, above n 25, 69.

48 Topping, above n 30, 25.

to explore ways in which assessment criteria can be made more explicit and better understood by students.[49]

IV Peer Assessment in Curtin Law School Business Units: Background

A *The Peer Assessment Task and Assessment Structures of Units which contain a Peer Assessment Task*

The units in which peer assessment has been adopted in the Curtin Law School are offered to students enrolled in a Bachelor of Commerce Degree and (for the most part) pursuing a business law major. They are as follows:

1. BLAW 2008 Public Relations Law – This unit is offered to second and third year Bachelor of Commerce students. It is a core unit for students in the Public Relations Major and an elective unit for other students, including those studying Business Law as a single major. The unit aims to give students a broad understanding of laws and legal issues impacting upon the practice of public relations, and covers areas of law that include contract, intellectual property, defamation, confidential information and negligence, among other things. The unit is always offered at Curtin's Bentley campus in Perth and as a fully online unit. The unit is also offered in some semesters through Curtin partner institutions in Miri, Sarawak, Mauritius and Singapore. However the fully online students did not undertake a peer assessment task in the period covered by this paper. In this unit the relevant peer assessment task requires students to prepare a ten to fifteen minute presentation to a small group of their peers on a tutorial question assigned to them by the tutor. The assessment contributes towards 10% of a student's final mark. The tutor does not award a mark for this particular assessment. The other assessment tasks in this unit are a written summary, addressing the same question that students presented orally (and which is assessed by the tutor only and worth 20% of the unit marks); a written assignment (20%) and a final exam (50%). The average yearly enrolment in this unit since 2012 is approximately 200 students.

2. BLAW 2014 Tort Liability for Business – This unit is offered to second and third year Bachelor of Commerce students and is a core unit in the B.Com Business Law Major. The unit runs in semester one of each year only, and in semester one 2015 it had 98 enrolled students. The unit aims to provide students with knowledge of fundamental tort law principles in the areas of negligence, principles of damages, intentional infliction of economic loss, defamation and trespass. The unit is always offered at Curtin's Bentley campus in Perth and as a fully online unit. In some semesters the unit is also offered through Curtin's partner institution in Mauritius. However, the fully online students did not undertake a peer assessment task in the period covered by this paper. As with Public Relations Law, students are required to deliver a ten to fifteen minute presentation to a small group of their peers on a tutorial question assigned to them by the tutor. The assessment contributes towards 10% of a student's final mark. The tutor does not award a mark for this assessment task. In addition to this assignment, students prepare a written answer on the same question they presented on (worth 20% and marked by the tutor) and attempt another written assignment (20%) and a final exam (50%).

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49 Lin Norton, 'Using assessment criteria as learning criteria: A case study in psychology' (2004) 29(6) *Assessment and Evaluation in Higher Education* 687, 689. Norton also found that requiring students to use rubrics to assess the work of their peers also helped them to understand how those assessment criteria would be used to assess their own work.

3. TAXA 3002 Australian Tax Law Cases - This unit is offered to second year Bachelor of Commerce students. It looks at the statutory framework and case law that underpins some of the fundamental concepts in taxation, namely income and allowable deductions. The unit is always offered at Curtin's Bentley campus in Perth and as a fully online unit. As with the other units discussed, the fully online students did not undertake a peer assessment task in the period covered by this paper. In this unit, the relevant peer assessment requires students to prepare a five to ten minute presentation to three of their peers on a tutorial question assigned to them by the tutor. The assessment contributes towards 15% of a student's final mark. The other assessment tasks in this unit are a written assignment (worth 35% of a student's mark) and the final exam (worth 50% of a student's final mark). With regard to the peer assessment, the peers award the student a mark out of 15 on a series of marking criteria set out on the student's assessment sheet (these criteria are described below). The tutor also awards a mark out of 15 based on the same criteria. The two marks are then added together and the mean mark is awarded to the student for the assessment. The average enrolment since 2012 for this unit to date is 60 students.

B *Reasons for Introducing Peer Assessment into Units*

Peer assessment was introduced into the three units outlined above by the authors of this paper who were, at the time, unit coordinators for one or more of the units. There were several reasons for introducing peer assessment into these three units, with a major consideration being the desire to see students more actively engaged in the process of learning and assessment. Two of the three units (namely Public Relations Law and Tort Liability for Business) already had oral presentations as a component of the unit's assessment structure and the unit coordinator wished to retain oral presentation as a form of assessment, not least because the development of communication skills, including oral presentation skills, is an important graduate attribute and employability skill.[50]

Before the introduction of peer assessments, individual students in Tort Liability for Business had presented a case summary to the remainder of the class. These presentations took place during the one hour tutorial and typically, two or three presentations occurred during the same tutorial, taking approximately 40 minutes of the one hour of class time. The presentations were assessed only by the tutor. Similarly, before the introduction of peer assessed presentations in Public Relations Law, individual students would present their answer to a case study question to the class. Again, this was assessed by the tutor only. These presentations typically took approximately half of the class time or more. Having no role to play in delivery or assessment of the presentations, those students not presenting were passive rather than active members of the class. As such, peer assessed presentations were seen as a way of encouraging students to be active rather than passive participants in the learning and assessment process, as well as ensuring that sufficient class time remained after the presentations for feedback.

Before the introduction of peer assessed oral presentations, the unit 'Australian Tax Law Cases' did not previously have an oral presentation component within the assessment structure. One reason for introducing oral assessment into this unit was to provide students with further opportunities to develop their oral communication skills, given that at that time only five units across the Business Law and Taxation majors in the Curtin Law School assessed any form of oral presentation. Depending on their course structure, students would therefore typically be assessed on oral presentation only once or twice throughout their degree. A reason for selecting a peer assessed oral communication task, rather than a group presentation for example, was to provide students with the opportunity to develop informal presentation skills, such as may be used by professionals communicating ideas to colleagues and/or clients during meetings. As

50 Also a Curtin University Graduate attribute. Oral communication skills are a course learning objective for Curtin Business School courses.

with the units Tort Liability for Business and Public Relations Law, it was also hoped that peer assessed presentations would see students more actively engaged in the process of learning and assessment.

C *Assessment Criteria and Determining a mark*

After a student has presented to their peers, the student moves away from the group: usually the student who has presented will leave the classroom. This enables the group to openly and honestly discuss the presentation and the marks for each section and to reach a consensus on the marks to be awarded. One member of the group will act as the chair and complete one assessment form for the student who has presented – the mark for each of the criteria, and therefore the overall mark awarded by peers, is determined by consensus. Students are instructed that they may award half marks but no smaller fractions. Students are also encouraged to provide constructive feedback comments at the end of the form. While waiting to receive their marks and feedback, the student who has presented will reflect on and self-assess their own performance against the same criteria as they are assessed on by the group. This self-assessed mark is not used for grading but allows the tutor to address any large discrepancies between what a student expects they will be awarded, and what they are awarded. This is particularly important where a student self-assesses at a mark that is higher than the mark awarded by the group, although in the experience of the authors, this is rare. This also provides an opportunity for the student being assessed to seek further feedback and clarification from the group who assessed them, in order to help them understand why they received the mark they did.

The marking criteria against which students assess their peers' oral presentations places emphasis on the demonstration of good communication skills in addition to the relevance of substantive content. In each of the three units, students mark peers on preparation, confidence and presenting style, effective address to the group, and content. Confidence and presenting style is assessed against criteria such as sufficient eye-contact, enthusiasm, and not reading out a pre-prepared answer. Effective address to the group is assessed against criteria relating to clarity of speech and how easy the student's presentation was to follow. It is also assessed on pace (not rushing) and the extent to which the presenter identifies key points. Assessment for content requires students to assess the extent to which students explained the principles of law and relevant cases in sufficient detail, demonstrated (or appeared to demonstrate) an understanding of the law and applied the principles to the facts of the case study. The marking criteria used were the same for each of the three units. They were developed by the tutors, rather than jointly with the students. However, it is noted below that a possible option for future is to develop marking criteria in collaboration with students. Where the tutor also assesses students' oral presentations, the tutor utilises the same marking criteria.

Having explained the rationale for introducing peer assessed presentations and the criteria against which presentations are assessed, we turn now to reflect on whether the design and practice of these assessments, as informed by the literature, enabled the students to achieve the key goals, namely: the active engagement of students in their own learning, the development of communication skills which will help to prepare students for their working lives, and the development of students as independent learners.

V Reflections and Observations

The authors' reflections and observations on peer assessment are informed both by their personal experiences as tutors and unit coordinators, and by student comments about peer assessment in particular (or assessment in general). The comments that have been used for the purpose of these reflections are those made anonymously by students' in the university's unit evaluation surveys that are conducted for each unit at the end of every semester, and which are submitted through

Curtin University's eVALUate system.[51] By reviewing the responses provided in eVALUate surveys, it is possible to analyse whether peer assessment improves the student experience.

eVALUate data was gathered from the three units in which peer assessment has been adopted in Curtin Law School, as noted above. Student feedback in eVALUate is reported in relation to eleven items, one of which relates to assessment. The items are statements with which students either strongly agree, agree, disagree, somewhat disagree, or in respect of which students indicate that they are unable to judge. For example, the statement in relation to assessment is: 'The assessment tasks in this unit evaluate my achievement of the learning outcomes.' There are no specific questions about the form of assessment, and therefore no questions that specifically evaluate student perceptions of peer assessment. Students are also invited to provide anonymous comments on aspects of a unit being measured, that they found most helpful, and on how they think that unit might be improved. In the table set out in Appendix 1, information is provided as to the semesters from which data was gathered for the purpose of this paper, the locations and modes of study for each unit, the number of students enrolled in each unit, and the percentage response rate for each unit. As noted previously, all of the units reported on, run at Bentley campus and are available fully online. In some periods, a unit is also offered at one or more of Curtin's partner institutions. For the purpose of reporting the data in this table, the results across locations and modes were aggregated. The table also indicates the percentage of students who agreed with the statement on assessment (above), and the number of comments for each eVALUate survey that related to peer assessment.

The eVALUate survey data for each unit shows that student satisfaction with the assessment statement was high (ranging from 86% to 100%). In all cases this was above the university average agreement of 85% for each of the semesters reported on (except for semester 2 of 2014, when the university average was 84%). Although students were not asked specifically about peer assessment, the overall high level of agreement with the assessment item suggests that there was overall agreement with the fact that, as a task, peer assessment evaluated student achievement of learning outcomes.

The number of student comments specifically relating to peer assessment is generally quite low. Of the total of 43 comments made specifically about peer assessment, 20 were included in the section asking students about aspects of the unit they found most helpful, and 23 were included in the section about ways the unit could be improved. From a review of these qualitative comments, three themes emerged. The first theme is perceptions as to the value of peer assessment as an assessment tool; the second is perceptions as to the value of peer assessment as a tool for engaging students in the teaching and learning process; and the third is perceptions as to the methods, process and integrity of peer assessment. A selection of those comments, grouped according to these three themes, is set out in Appendix 2. In the following section, the authors offer some reflections on peer assessment, which reflections are also grouped according to the themes.

A *Perceptions as to the Value of Peer Assessment as an Assessment Tool*

Students have reported that they believe peer assessments do prepare them for their life post-graduation, giving 'a real world application'. Peer assessment helps to provide students with feedback on their presentation skills which is an important part of their role as future professionals, since they mirror client or internal meetings. This accords with the observations of Boud and Falchikov[52] and Biggs and Tang[53] above. Until 2011, students in Tort Liability and Public Relations Law recorded their experiences with peer assessment in a reflective

51 Beverley Oliver, Beatrice Tucker, Ritu Gupta and Shelley Yeo, 'Evaluate: An Evaluation Instrument for Measuring Students' Perceptions of Their Engagement and Learning Outcomes' (2008) 33(6) *Assessment and Evaluation in Higher Education* 619, 619.

52 Boud and Falchikov, above n 8.

53 Biggs and Tang, above n 35.

journal.[54] A large number of these comments show that students genuinely saw the value of peer assessment in developing the types of communication skills they will need in the workplace. This is reflected in a number of eVALUate comments set out in Appendix 2. It appears that most students actually enjoy both delivering and assessing presentations, particularly because they rarely engage in this form of assessment task in other units – it is something different and they appreciate being more actively involved in the class and assessment process.

There appears to be a general view among students that peer assessed oral presentations help them develop their confidence in speaking in front of others, as well as developing their research skills and allowing them to gain a better understanding of a particular topic, which leads to a better quality of assessment.[55] Peer assessment also provides opportunities for constructive feedback. Students also appeared receptive to being given feedback from their peers in identifying areas for improvement and further study. These formative learning aspects identified by students as positive reasons for peer assessment reflect the arguments developed in favour of this method by scholars, such as Biggs and Tang[56] and Norton[57], as discussed above. It also seemed to us that getting students to 'present' to their peers means they really have to think about the audience. They have to think about how to communicate their message (in law, obviously, legal principles and application of the law to relevant facts). This is essentially a form of teaching and, as such, often involves the students in deep learning because they have to have a real understanding first before they can explain to others. This would seem to reflect other findings in the literature.[58]

B *Perceptions as to the Value of Peer Assessment as a Tool for Engaging Students in the Teaching and Learning Process*

It appears that peer assessed oral presentations allow students to be more engaged in their learning, whether they are presenting or assessing their peers. The topics and questions students present on are case studies, which require a student not only to understand the principle of law or taxation they have learned, but to apply those principles to the facts of the case-study. The presentations encourage students who are presenting to think more about the subject matter of the unit and the topic of their presentation, and encourage those students to apply their knowledge in a way they may not have done had the case study question simply formed the basis of class discussion, rather than assessment. This, in turn, can facilitate participation and discussion in the tutorial class in a way that is learner-centred rather than teacher-centred. Very often groups will ask the presenter questions after a presentation that they may not have asked in a whole class setting. Generally, presentations can benefit the listener by communicating information about the subject and others' opinions on how to solve problems. However, in a formal whole class setting, the listeners are passive and may not be engaged. This is in contrast to small group peer presentations where the members of the group are more engaged because they are involved in assessment, and because there is a closer relationship with the presenter. One student reflected in their journal that: 'I really like this form of assessment because the presenter and the audience are exposed to an in depth analysis of the topic. Because the groups are smaller, you are more likely to listen and retain information.' The oral presentation setting was definitely far more interactive and as a result appeared to enhance student learning. In this

54 Reflective journals provide a very valuable source of data about student perceptions of peer assessments. However, requiring students to complete a reflective journal is only possible if the journal counts towards a student's grade. The unit coordinator of the units where reflective journals were used discontinued the use of reflective journals primarily in order to assess other learning outcomes.

55 It will be recalled that Wallace suggests that oral assessments in law can produce anxiety and may therefore be less reliable: Wallace above n 9.

56 Biggs and Tang, above n 35.

57 Norton, above n 49.

58 See, eg, Crisp, above n 29 and Wallace, above n 9.

way, the goals of formative and summative assessment, as identified by scholars such as Nicol and Macfarlane-Dick[59] and Weurlander et al,[60] seem to have been fulfilled.

C *Perceptions as to the Methods, Process and Integrity of Peer Assessment*

It can also be observed that students have reservations with regard to peer assessment and believe that there are potential inconsistencies in marking related to a perceived lack of appropriate knowledge of the subject matter on the part of the assessors, and perceptions of bias or favouritism. The majority of student comments on peer assessment included in the 'how the unit can be improved' section of the eVALUate surveys, related to this theme. There appeared to be a view among students that a mark awarded by a peer should not be weighted greater than or even as much as, a mark given by a tutor, given the subjective nature of such assessments. These perceptions give rise to at least two further questions. Firstly, are students sufficiently 'qualified' to assess their peers' oral presentations? Secondly, is there really bias and/or inconsistency in the assessment process, or only perceived bias and/or inconsistency?

In terms of the first question, it is the authors' view that students are properly qualified to assess their peers, provided that what is being assessed is primarily oral communication skills, rather than content.[61] As noted above, the marking criteria used for peer assessment specifically distinguish between criteria related to the preparation, delivery, and organisation of the presentation, on the one hand, and the content of the presentation, on the other. Although students do award a mark for content, this accounts for less than 50% of the marks awarded for the presentation. Moreover, even the marks related to content are such that, in the authors' view, peers are qualified to pass judgment. The criteria related to content instruct student assessors to consider the structure of the presentation, how well the principles of law were explained and applied to the facts, and how well the student *appeared* to understand the principles they were explaining. These criteria, then, allow assessors to focus on the way the material was presented rather than on the content per se, and arguably overcome a concern that students are not qualified to assess their peers. Although the authors have yet to undertake a quantitative analysis of grades as between peer presentation marks and written summary marks, anecdotally it appears that students who do not meet expectations for their written summaries (usually achieving a pass or below) also tend to do poorly in their presentations.[62] This probably reflects the fact that presentation skills and content are inextricably linked, so that students who have not understood a topic will generally not be able to present well on it. This is an area which would lend itself well to further research.

In terms of managing student perceptions, it is important that students are clearly informed of the design, objectives and benefit of peer assessment. In particular, students should be reminded of the fact that in a workplace, colleagues will be judging others' on the way subject matter is presented, even when those passing judgement do not necessarily understand the subject matter. Hopefully, a clear explanation as to the purposes and design of the peer assessment task will help students to see it as a valid form of assessment and understand why it is being used in the unit. It is possible that even greater student 'buy-in' can be achieved by involving students in developing the assessment criteria themselves. In any event, as cautioned by Thomas et al,

59 David Nicol and Debra Macfarlane-Dick, 'Formative assessment and self-regulated learning: A model and seven principles of good feedback practice' (2006) 31(2) *Studies in Higher Education* 199.

60 Weurlander et al, above n 2,748.

61 Topping found that peer assessors with 'less skill at assessment but more time in which to do it could produce an equally reliable and valid assessment': Topping above n 30. Stefani found that students are able to make rational judgments on the achievements of their peers: Stefani, above n 25, 69.

62 However, it is also true that a large number of students seem to achieve a high distinction for their oral presentation but do less well in their written answer. This discrepancy can probably be explained by the fact that students are primarily assessing presentation skills, rather than content.

teachers planning to use peer (or self) assessment should 'be prepared to spend sufficient time discussing the rationale for doing so, as recommended in the literature.'[63]

In relation to the second question as to whether students are biased and/or inconsistent in terms of marking, this is much more difficult to answer. Although presenters and groups are randomly assigned each week, and tutors generally ensure that a presenter is not presenting to someone whom the tutor knows to be friend (perhaps a person they usually sit next to in class), it is all but impossible to rule out bias. On the other hand, provided the group assessing a presenter is large enough, the effect of any actual bias on the part of one or even two individuals in the group may be mitigated. Even where the presenter and some or all of the assessors are not well known to each other, there may be a tendency for assessors to be over-generous — and this seems particularly likely when the group is small so that individual members may feel personally responsible about a harsh mark. It seems, conversely, that groups are less likely to mark harshly due to bias or subjectivity, which is reflected in the fact that it is rare that a student self-assesses their presentation at a mark which is lower than the mark awarded by the group. On the other hand, it may be that it is wrong to assume that teachers themselves can ever be truly objective.[64]

Given the subjective nature of any assessment, inconsistency in marking is, again, difficult to rule out. However ensuring students have – so far as possible – a common understanding of the marking criteria, can be achieved early in semester before presentations commence. One way in which this can be achieved for example, is by way of a 'mock' presentation that students assess in groups, followed by a comparison of marks for the same presentation and a discussion as to why marks were allocated as they were. Commencing in semester 1 2015, the units Public Relations Law and Tort Liability for Business adopted this approach. In the first tutorial of the semester, the purpose of peer assessment was explained to the class and some students were given the opportunity to assess others on a 'mock' presentation. Four student presenters volunteered and were assigned a pre-prepared news article. Away from the rest of the class, two of the student presenters were instructed simply to read the article provided word for word to their group. The other two were given an opportunity to distil key points and were asked not to read from the article, and to engage the group as best they could in their presentation of the news story. The presenters were then allocated to a group of assessors, who assessed them using the same criteria used for peer assessment during semester (with the exception of the final criteria – assessment for content). This exercise provides an opportunity for students to become familiar with the marking criteria before using them for assessment. It provides the opportunity for whole class discussion as to what makes a good presentation (for example, eye-contact, enthusiasm, presenting key-points) and what is not good (for example, word for word reading from notes). An alternative pre-assessment exercise would involve all student groups assessing the same artefacts (perhaps pre-recorded student presentations made for demonstration purposes) and comparing and discussing marks. This has not yet been trialled in any of the units discussed in this paper, but is being considered in one of those units.

As noted above, it has been found that the reliability of peer assessment can be improved when teachers are also involved in assessing. Therefore, one way of dealing with potential bias and inconsistency, or just even perceived bias and inconsistency, is for the presentations to be assessed by the tutor, as occurs in Australian Tax Law Cases. The disadvantage of this approach however, is that it makes it difficult for presentations to run simultaneously which in turn, risks valuable class time. One way to overcome this could be through the use of recording technology which would allow tutors to assess presentations after the event. Recording presentations is likely to have its own challenges and influences on the assessment process but may be worth trialling in the future. Another way of countering bias is to ensure that assessor groups are sufficiently large. Albeit in the context of peer assessment of written work, Falchikov reports

63 Thomas, Martin and Pleasants, above n 4, 14.

64 See, eg, Leach, Neutze and Zepke, above n 22, 296, questioning 'the assumption that assessment can even aim to minimise subjectivity.'

that some students felt embarrassed judging their peers, and that others felt an obligation to friends.[65] At least one of the student comments from eVALUate, set out in Appendix 2, suggested that smaller groups were more likely to be biased. Another student commented that presenters would get a good mark if their fellows liked them, and another that marking peers could be a little uncomfortable. The effects of any actual bias and inconsistency can also be mitigated to an extent by ensuring that peer assessment is relatively low-stakes and does not count for more than 10% or possibly 15% of unit marks. In the units in which it has been adopted in the Curtin Law School, that weighting is never more than 15%, that is, a low-stakes assessment. The value of regular, low-stakes assessment has been analysed by several scholars such as Yorke[66] and Nicol and Macfarlane-Dick, who conclude that:

> In order to produce feedback that is relevant and informative and meets students' needs, teachers themselves need good data about how students are progressing. They also need to be involved in reviewing and reflecting on this data, and in taking action to help support the development of self-regulation of their students.[67]

Ideally, peer assessment should then be simply one method amongst a wide range of assessments adopted. Such an approach might assist in addressing the concerns raised by both students in this study with respect to peer assessment.

VI Conclusion and Recommendations for Further Research

The challenge of devising assessment that is inclusive and engages students[68] is imperative. Peer assessment is considered an important part of developing a formative assessment approach which is inclusive and engaging. In the Curtin Law School, attempts have been made to put this theory into the practice of teaching law to business students by assigning students oral presentations that are assessed by their peers, or alternatively, by both peers and the tutor. Marks are awarded for such assessments which count towards a student's final mark. In reflecting on the value of peer assessment as described in the literature, it appears that students are quite receptive to this form of assessment, with the overall level of agreement with the assessment item, as demonstrated in the responses provided in eVALUate surveys, being high. Generally, peer assessment is seen by students as a valuable learning tool. The eVALUate surveys however, did identify some important reservations with regard to this form of assessment, relating principally to the methods, process and integrity of peer assessment. It is suggested that such reservations be addressed by ensuring that:

1. Students are made fully aware of the marking criteria applicable to an assessment (e.g. via the provision of rubrics). This may also involve training students to ensure a common understanding of the assessment criteria ('pre-marking moderation'). Consideration should also be given to involving students in the development of the marking criteria;
2. Peer assessment is a low-stakes assessment, and, ideally, one of several additional low-stakes assessment tasks as part of an overall formative assessment approach;
3. The purposes and design of the peer assessment task are clearly and explicitly communicated to students from the very beginning of the unit;
4. Assessor group members are randomly allocated to groups each week and that so far as possible, the presenter is not allocated to a group known to contain one or more friends;
5. Assessor groups are sufficiently large. This is to counter perceptions of bias and to ensure that students feel more comfortable assessing their peers; and

65 Falchikov, above n 31, 181.
66 Mantz Yorke, 'Formative assessment in higher education: Moves towards theory and the enhancement of pedagogic practice' (2003) 45(4) *Higher Education* 477.
67 Nicol and Macfarlane-Dick, above n 59, 214.
68 Cooper, above n 6.

6. The tutor is involved in marking alongside a students' peers. This is another way of countering some of the actual and perceived drawbacks of peer assessment but, as discussed above, presents its own challenges. In addition, some of the negative perceptions towards peer assessment on the part of students can be overcome through clear communication of the purposes and design of the peer assessment task from the very beginning of the unit.

Such measures should overcome some of the concerns raised with regard to peer assessment, namely with respect to potential inconsistencies in marking, a lack of appropriate knowledge of the subject matter of an assessment by the assessors, and perceptions of bias or favouritism. It should also ensure the feedback received by the student is more regular and targeted to assist the student in identifying areas for improvement.

This paper has demonstrated that students believe, overall, that peer assessment is valuable to them for many reasons. Thus, it is apparent that there is a place for peer assessment, as long as it is utilised within certain well-defined parameters. It is suggested that, ideally, peer assessment should be simply one method amongst a wide range of assessments adopted as part of an overall approach of regular, low-stakes assessment tasks. It is hoped that by highlighting these issues, an approach can be developed with regard to peer assessment that takes note of the concerns identified in this study so as to more fully engage students in their learning.

In order to investigate in a more detailed way, student and staff perceptions of peer assessment with a view to encouraging best practice, it is suggested that a detailed qualitative study be undertaken. The study would involve both students and staff and would seek their views on the positive and negative aspects of peer assessment, as identified in the literature and in the eVALUate responses detailed in this paper. More specifically, it is hoped that this paper will encourage further development of peer assessment as a tool for authentic assessment of student learning, developing real-world skills and engaging students.

Other areas for further research would be a study of the extent to which students' self-assessment scores correlated with the scores awarded by peers and (where applicable) with those awarded by the tutors. Likewise, where tutors are involved in assessing oral presentations, a study of the extent to which the peer marks correspond with those of the tutors, would provide valuable insights as to the reliability of peer assessment as a form of summative assessment. A study of the extent to which high presentation marks correspond to high written marks, and vice versa, could provide information about the extent to which a good presentation is influenced by the level of the presenter's conceptual understanding. Finally, although the eVALUate data reported here has been aggregated across all locations in which the units are run, it would be interesting to consider whether there are significant differences evident in the qualitative comments between the different locations which might suggest that students in different countries have different experiences and perceptions of peer assessment.

APPENDIX 1: NUMBER OF STUDENTS ENROLLED IN UNITS DISCUSSED, AND KEY EVALUATE DATA

Unit & Semester to which eVALUate report relates, and locations/modes offered	Number of students enrolled	Percentage response rate	Percentage agreement (ie those choosing 'strongly agree' or agree) with assessment item	Number of comments specifically relating to peer assessment
BLAW 2014 Tort Liability for Business				
2013, Sem 1 (Perth, Fully Online)	94	35%	94%	5
2014, Sem 1 (Perth, Mauritius, Fully Online)	125	36%	88%	4
2015, Sem 1 (Perth, Fully Online)	97	26%	96%	5
BLAW2008 Public Relations Law				
2012, Semester 2 (Perth, Mauritius, Fully Online)	113	41.5%	100%	3
2013, Semester 1 (Perth, Miri Sarawak, Singapore, Fully Online)	97	39%	86%	6
2014, Semester 1 (Perth, Miri Sarawak, Singapore, Fully Online)	109	34%	90%	2
2014, Semester 2 (Perth, Fully Online)	57	33%	89%	3
2015, Semester 1 (Perth, Miri Sarawak, Fully Online)	96	30%	89.5%	4
Unit & Semester to which eVALUate report relates, and locations/modes offered	**Number of students enrolled**	**Percentage response rate**	**Percentage agreement (ie those choosing 'strongly agree' or agree) with assessment item**	**Number of comments specifically relating to peer assessment**
2015, Semester 2 (Perth, Fully Online)	100	33%	93%	1
TAXA 3002 Australian Tax Law Cases				
2011, Semester 2 (Perth, Fully Online)	53	34%	100%	2
2012, Semester 2 (Perth, Fully Online)	66	32%	91%	4
2013, Semester 2 (Perth, Fully Online)	60	33%	90%	4
Totals/averages	**1067 students**	**34% (average)**	**92% (average)**	**43 comments**

APPENDIX 2: SELECTED STUDENT COMMENTS ON PEER ASSESSMENT FROM EVALUATE SURVEYS

Perceptions as to the value of peer assessment as an assessment tool:

'Being assessed by your peers is exactly what happens in the workforce and sometimes it is the best feedback you can get.'

'I thought the use of peers to assess was a great way for students to get confidence speaking to others in preparation for the workforce.'

'I enjoyed the presentation assessment task which allowed us to present to a small group in our class. It allowed us to focus more on the content of the assessment as opposed to worrying about presenting to a large group of people, which I think gave us the opportunity to get better results.'

'I thought it was great that we only had to present to a small group based on a topic we had a chance to familiarize ourselves with.'

'I also found the format of presenting to small groups as opposed to the whole class for the second assignment to be very effective and I encourage that it continue.'

'I definitely think that doing the student presentations on the tutorial questions also helped me to learn the material.'

'The weekly presentations from students helped give a better understanding of the topic as this condensed the important fundamental aspects of the area of law.'

'…the weekly individual presentations in the tutorial assisted in reinforcing the information learnt from the lectures.'

'…the weekly presentations from students helped give a better understanding of the topic as this condensed the important fundamental aspects of the area of law.'

Perceptions as to the value of peer assessment as a tool for engaging students in the teaching and learning process:

'…. the speech we all had to do was very informal was helpful as it was a lot less intimidating for everyone!'

'Another interesting part is the oral presentation which is interactive and also allows the student (even if he/she has not done the tutorial question) to be exposed to the topic.'

'The Tutorial question presentations were a refreshingly different way to go through example questions and enjoyable. The tutorial presentations were an interactive way to get the students involved in the tutorial questions. Most other units have the tutor go through the questions which can sometimes be a bit boring.'

'It was almost as though I was trying to teach my peers the topic, rather than just delivering a speech to an entire, often unreceptive class.'

'I also really enjoyed the small group presentations and thought I learnt more and listened more in those than I would in a whole class presentation, which overall makes the presenter feel like their hard work is actually going to be of benefit to others.'

'I really like the presentations in tutorial but I feel that they take away from valuable learning time. After the presentations we always seem rushed to cover what needs to be done in the remaining time'.

'Peer evaluation was very interesting putting us in the shoes of assessors'.

'The assessment's I feel are great in helping students understand the content throughout the unit, and above all make it relatively enjoyable to learn'.

Perceptions as to the methods, process and integrity of peer assessment:

'I found the peer assessment not as satisfactory. There were students who presented better knowledge of the topic and principles during the peer presentation and were not given as good marks. If it had been marked by the teacher, the judgement and marks would have been more appropriate'.

'I think the in class presentations were marked too easily by students. I think it would be better if each student gave the presenter a mark and then those marks were averaged'.

'Maybe speeches could be altered just for a partner exercise as tutorial turn ups were low so ended up presenting in front of two or 3 students at max'.

'I feel that if the speech was worth more marks the students would take it more seriously and be more attentive in the way they relayed the information to the students that marked them'.

'The group presentation could develop a bias mark when only presented to a small group. Despite being more daunting for the student presenting, it would be fairer to present to the whole class and give a gauge on student performance'.

'The oral presentation - you got a good mark if the markers (your fellow students) liked you. It's a lot of pressure on each other... and it's a little uncomfortable to mark each other. I think the teacher needs to be the marker'.

'…it sometimes was hard to present our topics and only receiving feedback from only 2 people'.

'The only thing I would maybe look at is asking the students who are grading the student who has done the tutorial question to also prepare answers so that they are in a position to judge'.