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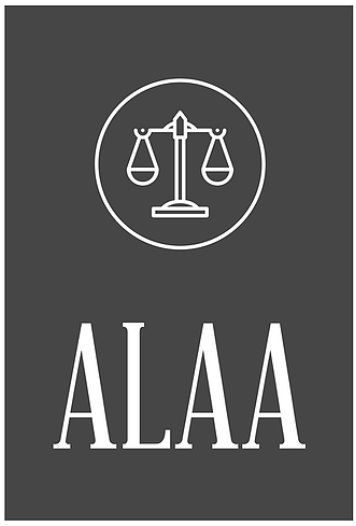


# JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

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# FOREWORD

*Dr Jonathan Barrett*

The articles published in this volume of the *Journal of the Australasian Law Academics Association* ('*JALAA*') were first presented as papers at the 2022 Australasian Law Academics Association Conference, hosted by Monash University at its Law Chambers, in the heart of Victoria's legal quarter. First, therefore, we acknowledge the people of the Kulin Nations on whose land Monash University's buildings are situated. For visitors to Australia's cultural capital, the vibrancy of Melbourne, where people and ideas from around the world come to mix and create, was a reminder of how Covid-19 had in some ways put humanity on hold. And yet, the articles published in this volume of *JALAA* indicate how the business of teaching law has not just muddled through the pandemic but has developed and been strengthened through innovation and reflective practice.

In what is becoming a *JALAA* tradition, this volume starts with a reflection from Emeritus Professor David Barker on his long and fascinating career in the law and in legal education. While the early years of David's teaching practice may appear distant from the rigorously peer-reviewed articles that discuss the application of the latest pedagogical technology in the classroom (or students' bedrooms) or how First Nations' practices of 'yarning' can be brought into the teaching of law outside the big cities, a golden thread abides in continuous investigation into the best ways to teach the law.

Editors are experiencing increasing difficulty in recruiting reviewers because management metrics may not sufficiently recognise this essential academic function. I would therefore like to express my particular gratitude to the reviewers, and to members of the ALAA Executive who either reviewed or recommended reviewers. As always, it was a pleasure to work with authors, who submitted articles of a high standard but were also open to the benefit of the constructive review of their peers. I would also like to thank Leylani Taylor for coordination and administrative support, and Barbara Graham, copy-editor and typesetter of this volume.

*Dr Jonathan Barrett*
*Editor in Chief*
*JALAA*

# DISTANT VOICES, TOLL ROADS/NIGHT WATCHMEN AND *LAW MADE SIMPLE*: REFLECTIONS ON MENTORING, NETWORKING AND A VARIED SELECTION OF RESEARCH AND PUBLISHING TOPICS

*Emeritus Professor David Barker AM*

ABSTRACT

This paper is an outcome of a successful symposium conducted by ALAA in December 2021, which caused me, as the presenter of this paper, to reflect on how my own experience of research and publishing might serve as a guide to others embarking on their academic legal careers.

In the sharing of these experiences, allowance must be made for the age barrier between myself and those towards whom this advice is aimed. However, it shows that research can arise from the most unusual circumstances, illustrated in how my military experience was used to advantage 40 years later in a submission to a parliamentary Standing Committee, and my work for local government gave rise to research into local Bill procedure. The section on access to legal education illustrates how the selection of a writer of the foreword for a research monograph gave rise to welcome publicity. Legal publishing is also well covered, with the importance of recognising advantages as they are offered. Hopefully the early career academic will be encouraged by the random research and publication opportunities I experienced to pursue similar opportunities as and when they might arise.

# I IMPLICATIONS OF THE CHOICE OF A CAREER

In December 2021, a presentation was organised by ALAA regarding early researchers and their choice of mentors and research topics.[1] This was a highly successful symposium, obviously of great help to early researchers, and for my part it generated a great deal of reflection as to how I had developed some of my research projects and entered legal publishing, both as an author and an editor. Of course, everyone has had a different experience in this respect, but I considered how my own experiences might serve as a guide to others who are just embarking on their legal academic careers.

Thinking back to my first interaction with the law in 1953 gave me cause to consider how matters have changed regarding the law, career choices and their outcomes. In this respect I have recorded how my various research ideas arose from my own personal experience and were subsequently developed into research projects. The second part of the paper relates to the possibilities of legal publishing and how chance encounters can open up into major publishing opportunities.

When I started working in the law in the UK, in some ways it was much easier because there were no real legal career choices other than entering articles to train as a solicitor or study for the bar exams. Even then, the concept of articles in most firms of solicitors still involved a payment to the law firm for the privilege of entering articles. The idea of studying for a university law degree was, for most, a distant choice, dependent on whether you could win a scholarship to pay for your tertiary studies or whether your parents could financially support you, although the latter was an opportunity open only to the very few.

# II RESEARCH INTO MILITARY LAW

## A *Early Origins*

Looking back on my career in the law, I realise that it was not the clever selection of the right path towards academia or finding a position in the legal profession, but more the result of serendipity. When I left school in 1953, like everyone else in the UK the only choice was serving for two years in National Service, with most being recruited into the army. I was selected for the Royal Army Service Corps, not a fashionable army regiment — whilst it was not a cavalry regiment, it was at least responsible for the operation of mule trains! These never formed part of my army life, which was much more prosaic in that I learned to touch-type, a skill that has remained with me long after my abilities in shooting and the use of the bayonet have disappeared.

The two worst places to be posted in the British army were Aldershot and Catterick Camp in Yorkshire — unfortunately, I experienced both. I started my training at Aldershot, which has been described as ‘a terrifying place … the town was bristling with military, generals bore

[1] Liam Elphick, ‘Early Career Journeys in Legal Academia’ (Zoom Panel, ALAA, Monash University Law School, 2 December 2021).

down on you from all directions, the continuous snap of salutes sounded like cricket balls on a fast wicket, sergeant-majors roared like lions, and there was an overwhelming air of disciplined doom'.[2] What a relief when, after my basic training, I was posted away to Catterick, in the north of England, where the winters were so cold that the sheep tried to get into the army billets for warmth; that is if they could get past the snow piled up against the billet doors. There were no chairs to sit on, as they had been chopped up for firewood many years before I arrived.

Nevertheless, it was where my legal career began — in 'A' Staff Branch of the military administration, which dealt with court martials, the exercise of justice for all military personnel based on the English *Manual of Military Law*. My work involved the preparation for, the conduct of and the conclusion of court martial proceedings with the confirmation of sentence, if the accused was found guilty, by the General Officer Commanding Northumbrian Military District. Little did I know that this time was to be the most enjoyable part of my military life, as very soon I was plucked from my cosy time in the office and sent on a long drill and battle course at Golden Hill Fort on the Isle of Wight — but that is another episode of my military life outside the scope of this paper. Nevertheless, my subsequent military career, which included a further 17 years with the British Army Reserves, did impact on my subsequent legal research output.

So it was that this early experience of the law gave rise to a major research project nearly 40 years later, when I was part of the University of Technology Sydney ('UTS') Faculty of Law from 1989 onwards.

### B *Inquiry into Military Justice Procedures in the Australian Defence Force*[3]

The UTS Faculty of Law in 1997 was just beginning to develop a research ethos, and it just so happened that a mutual interest into research was shared by myself as the new Dean of the Faculty, Penny Croft, a comparatively newly appointed law lecturer, and Danielle Manion, a recent law graduate. Prompted by a press notice in February 1998 by the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade of the Commonwealth Parliament inviting submissions relating to an inquiry into military justice procedures in the Australian Defence Force, it was decided to develop and submit a report for consideration by the committee. This was not a random choice by the three of us, but a joint realisation that military justice procedures impacted on:

1. Australia's possible breach of art 14(1) of the International Covenant on Civil and Political Rights ('ICCPR') by failing to guarantee military personnel an independent and impartial tribunal under the *Defence Force Discipline Act 1982* ('DFDA');

[2] Anthony Carson, *A Rose by Any Other Name* (Penguin, 1962) 92.
[3] Joint Standing Committee on Foreign Affairs, Defence and Trade, Defence Sub-Committee, Parliament of Australia, *Military Justice Procedures in the Australian Defence Force* (21 June 1999).

2. The 'service connection test' in relation to the jurisdiction of military tribunals consistent with ch III of the Constitution; and

3. The constitutionality of the appointment of the Judge Advocate General ('JAG') under the DFDA given the JAG's reporting function under s 196A.[4]

It is not the intention of this paper to go into the intricacies of the submission made by the UTS research team, but to describe the implications and consequences of such a submission.

### C *The Submission*

It will be appreciated that any submission to a parliamentary committee, whether it involves the Commonwealth or a State Parliament, requires a well-prepared brief. The UTS brief incorporated two submissions. The first, Submission No 20,[5] consisted of seven pages, recorded in Hansard, providing recommendations on:

1. Art 14(1) of the ICCPR: 'Since the UK has recently amended its legislation to comply with the Commission's [European Commission on Human Rights, Convention on Human Rights and Fundamental Freedoms] finding in *Findlay v United Kingdom*, Australia should similarly amend the DFDA to ensure that an accused person before a court martial is guaranteed a fair trial by an impartial and independent tribunal in accordance with Article 14 (1) of the ICCPR.'

2. The 'service connection test': 'Given the increased recognition of human rights in our society, particularly the right to a fair trial by an independent and impartial tribunal, it seems incongruous that military personnel should not be afforded basic guarantees in the trial of service offences in times of peace. Such guarantees could be ensured by constituting a separate Ch III military court to deal with services offences that extend beyond merely disciplinary offences. Alternatively, military tribunals should be restricted to the purely disciplinary aspects of service offences, as advocated by Justice Deane in *Re Tracey.*'

3. The JAG under the DFDA: 'Under the DFDA, the JAG fulfils both a reporting and a judicial function. Pursuant to s 196A of the DFDA, the JAG is required to furnish an annual report to the Minister on the operation of the DFDA, its Regulations and Rules, and the operation of any other Law of the Commonwealth or of the ACT, which relates to the discipline of the defence force. Given the finding of the Court in *Re Wilson*, the constitutionality of this function is now in question. Accordingly, this function should be removed from the role of the JAG, or the JAG should not be a Ch III judge.'

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[4] Ibid 32.

[5] David Barker, Penny Croft and Danielle Manion, 'Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Defence Sub-Committee, Inquiry into Military Justice Procedures in the Australian Defence Force' (Submission, 1998).

With the Oral Hearing of the Defence Sub-Committee set to be held on 19 June 1998, the UTS research team was granted the opportunity to submit further explanation of our previously submitted written evidence, as Supplementary Submission 20.1, on:

1. Art 14(1) of the ICCPR, which culminated in the statement that '[i]t is therefore our view that there is a strong possibility of an individual relying upon the first Optional Protocol of the ICCPR and arguing that Australia is in breach of s 14(1) of the ICCPR'.

2. The 'service connection test', which incorporated the final paragraph:

> The majority of problems within the 'service connection' test are that it:
>
> - is too vague and wide.
> - ousts Chapter III judges and thus fails to guarantee judicial independence.
> - makes no distinction between peace and wartime disciplinary situations.
>
> We would thus recommend the creation of a Chapter III military court as already stated in our original submission at page 295.

No further comments were added to '3. The JAG under the DFDA'.[6]

## D *The Oral Hearing of the Submission*

The oral hearing occupied approximately an hour and a half of submissions made by the UTS team, which were subjected to considerable and vigorous cross examination by the Sub-Committee. One reason for this might have been that most of the submissions dealt with instances relating to military justice, which the submissions attempted to question or were in answer to such submissions. The UTS submission was unique in that it was made by a university law school and was the only submission by a person or organisation outside of the military. It was obvious to an onlooker that the Sub-Committee relished the opportunity to be involved with an entirely different cross-section of participants who both questioned the current process of Australian military law and made proposals for its reform.

## E *Outcome of the Inquiry*

There were two basic outcomes from the UTS submission. The first was that the press was caught up in the unique nature of the UTS arguments. A full-page spread in the *Sydney Morning Herald* was titled 'UTS Law Dean Questions the Legitimacy of the Australian Government's System of Military Law'.[7]

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[6] David Barker, Penny Croft and Danielle Manion, 'Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Defence Sub-Committee, Inquiry into Military Justice Procedures in the Australian Defence Force — Supplement' (1998) 289.

[7] 'UTS Law Dean Questions the Legitimacy of the Australia Government's System of Military Law', *The Sydney Morning Herald* (Sydney, 1988).

The second was that, in October 2007, in what was claimed to be 'a significant milestone for military justice',[8] the Australian Military Court ('AMC') was established and the inaugural military judges sworn in. The new court provided members of the Australian Defence Force with an even more transparent and impartial military justice system, reflecting the world's best practice. An examination of the establishment of this new AMC would reveal that it replaced the system of individual trials by court martial or Defence Force magistrates, a move advocated in the UTS submissions to the inquiry. Of course, it would be inappropriate to claim that this was solely the effect of the UTS submission, but it would have had some effect in the application of these reforms.

However, for those who are fully aware of the implications of military law, there was a sequel to this decision. In *Lane v Morrison* (2009) the High Court held that the creation of the AMC, and the conferral of military jurisdiction on it, were invalid.[9] There was subsequent legislation to restore the military justice system to its pre-amendment form, and these changes were upheld in *Haskins v Commonwealth* (2011).[10] It could be argued that these decisions brought the work of the UTS military law research team full circle. The conclusion to be drawn from this history is that quite a significant section of research can arise from an original or early interest if coupled with an enthusiastic team of researchers.

## III PRIVATE LOCAL BILL PROCEDURE: TOLL ROADS AND NIGHT WATCHMEN

It is the focus of this paper to encourage potential researchers to consider developing research projects arising from the most unlikely circumstances or in the most unusual situations. My research into private local Bill procedure would be the most esoteric example of such a situation. My National Service was followed by 16 years in local government. For most, this would not be the most fulfilling of employment experiences. However, for me it gave rise to my MPhil project, 'Local Legislation in Guildford: Its Nature and Impact Described in the Context of a Commentary on the Part Played in the Development of Local Government in England',[11] which serves as an unusual outcome from my time as a local government employee. This most unlikely and idiosyncratic research project arose because of my employment from 1965 to 1972 as a Senior Legal Officer at Guildford Council in Surrey in the UK, during the time when the council promoted the *Guildford Corporation Act 1967*. A subsequent period of full-time study at the University of Kent in 1970–71 and the writing of the research thesis culminated in the award of the MPhil in 1983.

Private Bills are an interesting part of many Commonwealth countries' legislation. In the UK, public Bills provide for matters that affect the country, such as adequate facilities for travel by land or water, as compared to private Acts that provide for such local services as lighting,

[8] Cristy Symington, 'A New Military Court' (14 December 2007) *Lawyers Weekly* 20.
[9] *Lane v Morrison* (2009) CLR 230.
[10] *Haskins v Commonwealth of Australia* [2011] HCA 29.
[11] David Barker, 'Local Legislation in Guildford: Its Nature and Impact Described in the Context of a Commentary on the Part Played by Local Acts in the Development of Local Government in England' (MPhil Thesis, The University of Kent, 1983).

watching, street paving and cleansing. Outside private local government Bill legislation, private Bills have been used for the promotion of insurance companies, canals, railways and major toll roads. As a matter of general interest, you will still find local Acts being promoted within Australian State legislatures.

However, this paper is concerned with the effect of the local Acts of Guildford and how they became part of an MPhil thesis. To any newcomer to local Acts of Parliament, it is most probably helpful to place the particular *Guildford* Corporation *Act 1967* into context by a brief reference to the early history of Guildford and the effect of local legislation on its development, particularly as it is regarded as one of those towns that have made substantial use of such private legislation to meet the ever-changing needs of the community.

The principal reasons for the promotion of the *Guildford Corporation Act 1967* can be summarised as follows. First, the owners of the Godalming Navigation canal, the Stevens family, wished to transfer it to the National Trust. The problem was that many of the original commissioners of the Navigation had been appointed under the powers of a previous Guildford local Act, which meant that the council would still have some liability for the canal even after it had been transferred. Second, the council had the right to collect the sum of a penny in respect of each sheep that passed over the major bridge crossing the Navigation in Guildford. This was known as the 'Guildford Pence'. To resolve this problem, it was suggested that the Navigation be transferred to the Guildford Corporation, with a subsequent re-transfer to the National Trust. The advice that the council received was that the most appropriate process to achieve this was by the promotion of a local government Bill, which if approved would become a local Act of Parliament.[12]

The outcome was not only the *Guildford Corporation Act 1967*, but a further attempt by the successor local authority to the Guildford Borough Council — the Guildford District Council — to promote a Bill for the siting of a new Surrey County Hall in Guildford on a local open space, Stoke Park, which resulted in the local Bill being entitled The Stoke Park Guildford Bill. The promotion of this Bill had all the usual issues — pressure groups, amenity societies and influential lobbyists pitting those who viewed the proposal as the culmination of the Guildford historic claim to be recognised as the County Town of Surrey against others who considered it to be the desecration of a respected open space for the satisfaction of misplaced civic aggrandisement, with a complete disregard for the wishes of the majority of Guildford ratepayers. It is not surprising, when viewed in retrospect, that a great deal of passion was created on both sides, not only within Guildford itself, but in the national media and in the House of Lords. The proceedings of the Bill, which eventually ended in failure, included correspondence in *The Times* and an ill-tempered debate in the House of Lords, where the depth of ill-feeling over the failure led one of the members to remark: 'My Lords, I suspect that there is something strange in the atmosphere of your Lordships' house this afternoon.'[13]

[12] Ibid 81.
[13] Ibid 165.

Re-reading my completed thesis now removes any doubt that my former employment at Guildford Council and my involvement in the preparations for the *Guildford Corporation Act 1967* assisted me in researching and writing the thesis, and the experience helped me in the networking and interviewing of those involved in that particular Act and subsequent local legislation when I was completing my research on the topic.

## IV ACCESS TO LEGAL EDUCATION

As someone who became a lawyer from a family that, other than my brother, had never produced any lawyers, I always had an interest as to the social profile of present-day young lawyers and whether this indicated a problem of access if the Australian legal profession did not reflect the socio-economic class, ethnicity or gender composition of society at large.

This led me, when Dean of the Polytechnic of Central London Law School, to initiate an access course for disadvantaged students into the law degree programme at the Polytechnic. Subsequently at UTS, prior to and when I became Deputy Head of the Law School, I was again involved as a member of the Student Equity and Access Committee in programmes introducing disadvantaged students to the possibility of studying for a law degree.

However, I realised that there was an opportunity for further research, based on an earlier research project in 1978 by Don Anderson, John Western and Paul Boreham entitled 'Law and the Making of Legal Practitioners'.[14] As early as 1991, I took the opportunity to develop some tentative research into the possibilities of expanding access to the legal profession. The impetus for this research arose from a report on recent statistical trends in Australian legal education by then Associate Professor David Weisbrot (subsequently Dean of the University of Sydney Law School) to the Law Council of Australia's Legal Education Conference held at Bond University on 14 February 1991.[15] In his paper, Professor Weisbrot stated that 'the Australian legal profession does not reflect the socio-economic class, ethnicity or gender composition of the society at large …. the social background of young lawyers is, if anything, more elite than in previous generations'.[16]

However, due to the pressures of teaching and administration, the research, whilst continuing in an unstructured way, did not gather momentum until the opportunity arose in 1994 to engage University of Sydney law graduate Anna Maloney, who was undertaking part-time teaching but seeking a research opportunity. This coincided with Chris Roper, in his capacity as Director of the Centre for Legal Education, established in 1992, initiating several reviews and

[14] Don Anderson, John Western and Paul Boreham, 'Law and the Making of Legal Practitioners' in Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales and George Allen & Unwin, 1978) 181, 185–6.
[15] David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (Conference Paper, Law Council, Legal Education Conference, 14 February 1991).
[16] David Weisbrot, 'Access to Legal Education in Australia' in William Twining, Neil Kibble and Rajeev Dhavan (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989) 84, 88.

subsequent publications, together with research monographs published by the Centre. It was because of this research initiative that a grant of AUD4,000 enabled my research to go forward.

Again, it is not the intention of this paper to become involved in the minutiae of the research project. However, it did give rise to a contemporary literature review on access courses and the more pressing problem of creating a system that could adequately rank disadvantage, the difficulties of which gave rise to greater concern. A major outcome of the research was the creation of a model access course that could be adopted by university law schools in cooperation with TAFE colleges. With the completion and publication of the 1996 monograph *Access to Legal Education*,[17] the research programme would most probably not have made any further progress but for one final stroke of good advice. This was to invite the Hon Justice Michael Kirby of the High Court of Australia to write a foreword. With his usual generosity, Justice Kirby did write a foreword of four pages, which was a chapter. There was the added advantage that access into legal education is a particular concern, if not a passion of Kirby. There was also one additional advantage of his involvement that we had not envisaged. The publication of the monograph coincided with him being the principal speaker at the 1996 UTS Law Graduation Ceremony and, to the surprise of everyone, he made the major feature of his graduation speech 'Access to Legal Education' and the publication of the Centre for Legal Education monograph. This meant that there was major publicity at a gathering of lawyers and potential lawyers in the UTS Great Hall, and of course, the additional publicity for any speech given by Michael Kirby.

## V PHD THESIS: 'A HISTORY OF AUSTRALIAN LEGAL EDUCATION'

It is not my intention to devote too much time to my PhD thesis, which I completed in 2016, as it could only be used as an illustration of how conventional research should be conducted.[18]

Nevertheless, I had retired, gained a great deal of experience in the topic and retained a wealth of material over the years regarding the thesis — the topic was legal education. I gained financial support through an Australian Postgraduate Award, for which I had to compete against keen competition but for which I had ample time to prepare, and it was the only research that I was able to complete without the external demands of teaching or administration. I would add that I had an excellent supervisor in Professor Brian Opeskin. Except for a minor medical episode I was able to complete my thesis within the timetabled programme. Its completion would only serve as an illustration that research can be enjoyable and fulfilling if you have unlimited time to undertake it, which is not the normal opportunity offered to the early researcher struggling to juggle the demands of excessive teaching and administration.

[17] David Barker and Anna Maloney, *Access to Legal Education* (Centre for Legal Education, 1996).
[18] David Barker, 'A History of Australian Legal Education' (PhD Thesis, Macquarie University, 2016).

## VI WRITING TEXTBOOKS AND BEING A LEGAL AUTHOR

I have not been a prolific author but learned early on in my academic career that it was helpful to devote at least some time to legal writing, whether it was the preparation of lecture notes, conference papers or papers for faculty or university meetings. I have always strongly encouraged the presentation of papers at ALTA/ALAA conferences. Often this process of unlimited papers being presented at the conference has been criticised, but I have been of the view that it provides an opportunity for early researchers to gain experience before presenting on more esoteric topics to more demanding audiences. This comment recognises that many of the papers presented at ALAA conferences are of a high standard but there is also the opportunity for the presentation of papers of varying quality, affording the novice academic to gain experience in what will prove to be a lifetime journey of academic presentations. I would mention that I have consistently presented at least one paper at ALTA/ALAA conferences since 1989 and have most probably presented in excess of 100 papers at national and international conferences over the past 30 years.

When I first commenced teaching law in 1972 at a college of technology (now Solent Southampton University in the UK), I remember the advice of the head of the Department of Building Construction at the college, himself a successful author, who said: 'The best way to commence in academic authorship is to write a subsequent edition of a book already in print.'

### A Law Made Simple

Although my first opportunity to undertake any legal authorship did not arise until I had been teaching for a decade, it was exactly this opportunity that was offered to me. A book with the unpretentious title of *Law Made Simple* had first been written by Colin Padfield in 1970.[19] It originally had terrible reviews but had somehow struck a chord with law students who discovered that it covered all their needs as a basic legal textbook and was attractive to the general reader. Padfield unfortunately died in 1980 and a group of academics including myself was asked to prepare a revised copy of his most recent edition. Although this was an interim arrangement, I realised that the publisher (at that time Heinemann) would require something more permanent, so offered to become the author of any subsequent editions, which they accepted. Since then, the book has gone through numerous editions and publishers, and the latest — the 14th edition, celebrating 50 years of publication — was published by Routledge in 2020,[20] by which time the number of copies published had exceeded 150,000.

### B *Australian* Essential Series

In 1994, when I made a chance call into the temporary offices of the UTS Law Faculty in Harris Street, a representative of Cavendish Publishing said she was seeking someone interested in initiating an Australian series of law books based on the UK's *Essential Law* series. I was

[19] Colin F Padfield, *Law Made Simple* (WH Allen, 1970).
[20] David Barker, *Law Made Simple* (Routledge, 14th ed, 2020).

aware that Cavendish Publishing, a new UK publishing company under the management of Sonny Leong, had made a significant impact on law publishing in the UK, and thought that it was an opportunity for UTS law academics to become involved as authors of Australian legal texts. I was not disappointed, as UTS members of the Law Faculty responded to the challenge with enthusiasm. I had been appointed as the next Dean of the Law Faculty in 1997, which coincided with the ALTA Conference taking place at the Law School that same year. By this time, the first five editions of the Australian *Essential Series* had been published — including texts on administrative law (by Ian Ellis-Jones), contract law (by Geoff Monahan), law of evidence (by Colin Ying), management law (by Michael Adams) and tort law (by Anita Stuhmcke) — and so the launch of the series was able to take place at the conference.[21]

This was followed by a succession of further titles, culminating in a total of 17, including *Essential Australian Law*, which I authored. There were two spin-offs from this publishing venture. The first was that for a few years Cavendish became a major publishing sponsor at the ALTA conferences, climaxing at the 2003 Conference at the Murdoch Law School in Fremantle, which, because of the joint interests of Professor Ralph Simmonds, the Dean of Murdoch at the time, and Sonny Leong, was devoted to the Blues Brothers, with every conference delegate being issued with a pair of dark glasses![22] The other was the regular publication of the free *Australian Law Student Reporter*,[23] which incorporated a page devoted to legal updates of all Priestley law subjects. Subsequently it was a great disappointment when Cavendish sold out their publishing interests to Routledge, who decided to discontinue all the Cavendish Australian publications, bringing the *Essential Series* to an end.

## C Law in Principle *series*

Although Sonny Leong had given up his personal publishing interests, he still retained his interest in legal publishing, so it was no surprise when on his initiative I was approached by Palgrave Macmillan, who wished to enter legal publishing in Australia. I was asked if I would like to become the Commissioning Editor for a legal textbook series, *Law in Principle*, and as I had just relinquished my role as Dean at UTS it seemed an ideal opportunity to renew my interest in legal publishing. However, I did discover that, compared to the earlier *Essential Series*, it was now more difficult to attract academics to undertake authorship of legal textbooks, despite the reputation of a publisher like Palgrave Macmillan. Part of this has been the increasing reluctance of research accreditation agencies to recognise law textbooks as research projects.

Nevertheless, the *Law in Principle* series reached six volumes before the publishers decided to relinquish legal publishing in Australia.[24]

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[21] George Marsh (ed), *The First Twenty Years: Faculty of Law, UTS, 1977–1997* (UTS Faculty of Law, 1997) 87.
[22] *2003 ALTA Conference: Changing Law* (Web Page) <http://alta.austlii.edu.au/2003_conference.html>.
[23] David Barker (ed), *Australian Law Student Reporter* (Cavendish Publishing, 2003).
[24] John Pyke, *Constitutional Law* (*Law Principles and Practice* series, Palgrave Macmillan Australia, 2013).

## VII REFLECTIONS ON LEGAL RESEARCH AND LEGAL PUBLISHING

I understand for those just entering as a career academic that the time constraints are quite daunting, particularly with the current emphasis on more online teaching in these Covid-19 times placing even more pressure on law teachers. However, I trust that the description of my early experiences regarding the possibilities of research and publishing will encourage the early career law academic to seek out or accept such opportunities when offered. I would mention that my first year's teaching programme had an outline covering three sections a day (morning, afternoon and evening, five days a week with one section free a week), so that teaching/contact hours could fluctuate between 20 and 27 hours a week with a free session each week of 3 hours. In addition, I was responsible for administering a hall of residence where I collected the rent of each resident (27 of them) once a week.

However, even producing course materials for each teaching session — printed hand-outs, when I was teaching — is creating academic resource material that could come in useful later. Furthermore, while the more senior members of the school or faculty will already have a monopoly over the more traditional subjects, such as contract, torts or criminal law, in today's society even the most niche subjects can be developed into research topics or publishing ventures for the future.

In my PhD thesis and book *A History of Australian Legal Education*, I comment on one of the principal themes of legal education, which is the transition of law schools from having a teaching-only function to one that incorporates a teaching-research nexus. It was the Pearce Report of 1987 that marked the first acknowledgement that law schools should regard research as a major component of their role within the university environment.[25] It was also the Pearce Report that created the impetus for the development of legal research in its modern form in Australia. In setting out my own experience in endeavouring to capitalise on the varied opportunities for research that have arisen in my career, I hope that I will have encouraged early career academics to take similar advantage of such opportunities that might arise within their own law schools and universities. Law teaching has been described as 'a great and noble occupation'[26] and for every law academic it is important to realise that this perception of a fulfilling legal career must incorporate the concept of accepting such random research and publication opportunities as and when they arise.

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[25] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) 306 [9.1].

[26] Fiona Cownie and Ray Cocks, '*A Great and Noble Occupation!': The History of the Society of Legal Scholars* (Hart Publishing, 2009).

# DEVELOPING THE EVALUATIVE JUDGMENT OF LAW STUDENTS THROUGH ASSESSMENT RUBRICS*

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## ABSTRACT

Evaluation, or evaluative judgment, is a mandated thinking skill for law students. Students should learn that there is basic logic of evaluation that applies across three evaluative domains relevant to the study and practice of law: evaluation as a critical thinking skill, evaluative judgment as the ability to determine the quality of assessment work, and evaluative reasoning as a method for attributing a property or quality to a legal subject matter. Evaluative reasoning is a discrete model of legal reasoning, called for when the law uses a broad standard or criterion. Law educators can use analytic assessment rubrics, coupled with other pedagogical practices, to teach the 'logic' of evaluation and develop the evaluative expertise of students across the three domains.

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# I INTRODUCTION

In its simplest form, an analytic assessment rubric provides a framework for 'evaluation of student performance' against a set of prescribed criteria.[1] Although assessment rubrics were first used primarily as a tool to assess student learning within higher education,[2] recently educators have also begun using assessment rubrics to improve student performance and develop students' metacognitive skills.[3]

This paper explores how assessment rubrics can be used to develop students' skills in evaluation, or 'evaluative judgment'[4] as the process of evaluation is commonly referred to in educational and professional contexts. There are varying forms and methods of exercising evaluative judgment in higher education. Within the discipline of law, it is contended that evaluative skills can be learned and exercised across three domains, namely:

1. the application of a general evaluative 'critical thinking' skill that is common across all disciplines, including law[5]
2. the ability of students to judge the quality of their assessment work against compliance with discipline-specific standards of performance[6]

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[1] Ivo de Boer et al, *Rubrics — A Tool for Feedback and Assessment Viewed from Different Perspectives* (Springer, 2021) 2.

[2] See, eg, Barbara Moskal and Jon Leydens, 'Scoring Rubric Development: Validity and Reliability' (2000) 7 *Practical Assessment, Research and Evaluation* 10:1–6.

[3] See, eg, Elizabeth Baker and Mary Rozendal, 'Cognitive-Based Rubrics: Examining the Development of Reflection among Preservice Teachers' (2019) 46(2) *Teacher Education Quarterly* 58; Heidi Andrade et al, 'Rubric-Referenced Self-Assessment and Self-Efficacy for Writing' (2009) 102(4) *The Journal of Educational Research* 287.

[4] We use the spellings 'evaluative judgment' and 'value judgment'. In our observation, contemporary practice in Australian courts and tribunals is to use the spelling 'judgment' within the phrases 'evaluative judgment' and 'value judgment'. For example, the High Court exclusively used the spellings 'evaluative judgment' and 'value judgment' in their 2022 (as at 28 November 2022) and 2021 judgments; relevantly, 'evaluative judgment' appeared in nine High Court cases in 2021 and 2022 (*Garlett v Western Australia* (2022) 96 ALJR 888 ('*Garlett*'); *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 ('*Nathanson*'); *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604; *Google LLC v Defteros* (2022) 403 ALR 434; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; *DVO16 v Minister for Immigration and Border Protection* (2021) 388 ALR 389; *Palmer v Western Australia* (2021) 246 CLR 182 ('*Palmer*'); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68), and 'value judgment' appeared in two (*Alexander v Minister for Home Affairs* (2022) 401 ALR 438; *Palmer*). However, we note that the spelling 'evaluative judgement' is commonly used in 'scholarship of learning and teaching', eg, in Joanna Tai et al, 'Developing Evaluative Judgement: Enabling Students to Make Decisions about the Quality of Work' (2018) 76(3) *Higher Education* 467.

[5] Australian Qualifications Framework Council, *Australian Qualifications Framework* (Report, 2nd ed, January 2013) 13 <https://www.aqf.edu.au/publication/aqf-second-edition> ('AQF'); Jonathan Heard et al, *Critical Thinking: Skill Development Framework* (Final Report, Australian Council for Educational Research, June 2020) <https://research.acer.edu.au/ar_misc/41>.

[6] Tai et al (n 4) 468.

3. the application of discipline-specific evaluative practices, such as 'evaluative reasoning' in the discipline of law.[7]

As teachers, it is helpful to see these evaluative domains as relating to distinct aspects of a student's learning (ie, critical thinking, assessment work and discipline-specific practices). However, there is also unity across the three domains as all involve the same basic 'logic' of evaluation.

The ability to evaluate is an expected learning outcome for higher education graduates, regardless of discipline,[8] and is a particularly significant skill in law,[9] and thus opportunities for law students to develop and practice this skill are critical. Importantly, students' work in one of the evaluative domains can support development of their skill in another evaluative domain if teachers help students to see the underlying process of evaluation. For example, training in how to evaluate a legal text, claim or argument as a critical thinking skill[10] develops the ability of law students to identify relevant criteria for evaluations and to use those criteria to construct and apply discipline-specific standards, skills that are equally useful for developing student expertise in evaluative judgment of their assessment work. This paper explores how analytic assessment rubrics with descriptive criteria, coupled with pedagogical practices aligned with rubrics (eg, assessment exemplars, self-reflection exercises, guided peer-review activities, group discussions, targeted assessment feedback), can support law students to develop their evaluative expertise across the three domains and, in particular, to develop their skill in evaluative reasoning as a law-specific discipline practice.

Section II of the paper describes the key features of evaluation as a critical thinking skill common across disciplines. Section III discusses evaluation as a critical thinking skill in a law-specific context. Section IV discusses evaluative reasoning as a discipline-specific form of evaluation. Finally, Section V examines how analytic rubrics with descriptive criteria can be

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[7] In distinguishing law from other professional practices, Schwandt states: 'In law, for example, legal thinking involves following, applying, interpreting, and arguing within a framework of rules; a capacity to categorize objects and acts (eg, is a skateboard a toy or a vehicle); reasoning with precedent through analogy; and fact-finding': Thomas Schwandt, 'Evaluative Thinking as a Collaborative Social Practice: The Case of Boundary Judgment Making' (2018) Summer(158) *New Directions for Evaluation* 125, 126. Writing extra-curially, Justice Gordon distinguishes between law and science, observing that 'in identifying a rule or legal principle, the process of legal method and judicial decision-making requires evaluative reasoning rather than simply direct acceptance of observable outcomes that may appear to determine the question from a scientific perspective': Justice Michelle Gordon, 'The Interaction between Science and Law — Legal Science or a Science of Law' (Speech, French CJ Colloquium, University of Western Australia, 24 November 2016) <https://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-gordon>.

[8] See AQF (n 5) 13–17. The AQF was reviewed in 2019: Australian Qualifications Framework, *Review of the Australian Qualifications Framework* (Final Report, 24 October 2019) <https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/review-australian-qualifications-framework-final-report-2019>.

[9] Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) 10 <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.

[10] Nick James, *Good Practice Guide (Bachelor of Laws): Thinking Skills (Threshold Learning Outcome 3)* (Report, Australian Learning and Teaching Council, 2011) 12 <http://www.lawteachnetwork.org/resources/gpg-thinking.pdf>.

applied to develop student evaluative skills when combined with supporting practices that require students to engage with the evaluative architecture inherent to the rubric.

## II EVALUATION ACROSS THREE DOMAINS: CRITICAL THINKING, EVALUATIVE JUDGMENT AND EVALUATIVE REASONING

### A *Evaluation as a Critical Thinking Skill*

Evaluation has been variously described as, inter alia: the making of a judgment about the amount, number or value of something;[11] an 'applied inquiry process for collecting and synthesizing evidence that culminates in conclusions about the state of affairs, value, merit, worth, significance, or quality of a program, product, person, policy, proposal, or plan';[12] and the attribution of a property to something.[13]

Evaluation is fundamentally about the attribution of 'value' to a subject matter. This attribution of value is often described as a 'judgment' — hence use of the terms 'value judgment' and 'evaluative judgment'. The process of evaluation generally involves the attribution of a property, quality, merit, amount, worth or other form of 'value' to a subject matter, typically with reference to criteria and standards. The revised version of 'Bloom's Taxonomy', a framework for learning and assessment commonly adopted in universities in Australia, United Kingdom and United States,[14] defines 'evaluate' as 'making judgments based on criteria and standards', and proposes that a distinctive feature of evaluating as a cognitive process is the 'use of standards of performance with clearly defined criteria'.[15] Based on the work of the Australian philosopher Michael Scriven, Fournier describes the basic logic of evaluation in this way:

> *1. Establish criteria of merit*. On what dimensions must the evaluand (ie the object of the evaluation) do well?
>
> *2. Constructing standards*. How well should the evaluand perform?
>
> *3. Measuring performance and comparing with standards*. How well did the evaluand perform?
>
> *4. Synthesising and integrating data into a judgment of merit or worth.* What is the merit or worth of the evaluand?[16]

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[11] 'Evaluation', *Oxford Learner's Dictionaries* (Web Page, 2022) <https://www.oxfordlearnersdictionaries.com/definition/english/evaluation>.
[12] Deborah Fournier, 'Evaluation' in Sandra Mathison (ed), *Encyclopedia of Evaluation* (Sage, 2005) 139.
[13] William FitzPatrick, 'Representing Ethical Reality: A Guide for Worldly Non-Naturalists' (2018) 48(3–4) *Canadian Journal of Philosophy* 548, 550.
[14] Philip Newton, Ana Da Silva and Lee George Peters, 'A Pragmatic Master List of Action Verbs for Bloom's Taxonomy' (2020) 5 *Frontiers in Education* 107 <https://doi.org/10.3389/feduc.2020.00107>.
[15] Lorin Anderson et al (eds), *A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom's Taxonomy of Educational Objectives* (Longman, abridged ed, 2001) 83.
[16] Deborah Fournier, 'Establishing Evaluative Conclusions: A Distinction between General and Working Logic' (1995) Winter (68) *New Directions in Evaluation Research* 15, 16.

The value attributed to a subject matter in an evaluation may be a qualitative property or quality, or a quantitative amount or allocation that equates to a particular property or quality. Thus, an evaluation is typically a statement or claim that (a) a subject matter has (or does not have) a particular property or quality or (b) a certain amount or allocation of a subject matter would have a particular property or quality. An evaluative statement or claim will generally identify relevant features of the subject matter; indicate the criteria that guide or inform the attribution of value; and describe the property or quality that is being attributed. Generally, the property or quality is the 'standard' for the evaluation, or structures the attribution of value in a way that is standard-like. To improve defensibility, an evaluative statement or claim may also describe the underlying reasoning process, for example, the weighting or consideration given to specific criteria or where the evaluator thinks the threshold for the standard sits in the circumstances.

### B *Evaluative Judgment — the Ability to Judge the Quality of Assessment Work*

Tai et al (2018) use the term 'evaluative judgement' to describe a student's 'capability to make decisions about the quality of work of self and others'.[17] They propose that developing the evaluative judgment of students should be a goal of higher education, and expressly link the evaluative skills that students acquire in relation to assessment work — including understanding how to identify and apply relevant criteria and standards — to the evaluative skills they will need to adopt in their respective disciplines. They argue that when students produce work and receive a mark they gain some insight into the quality of their work and may form implicit evaluative criteria. However, an explicit focus on practices to develop evaluative judgment in relation to standards and criteria leads to better calibrated decisions about the quality of their work, and the curriculum can then better induct and socialise students into their discipline. Where students are able to discuss standards and criteria, and evaluative processes, they gain agency in their learning and integration into the discipline.[18]

### C *Tying Evaluation Together*

As will be discussed further in Section IV of the paper, 'evaluative reasoning' in the discipline of law is a discrete mode of legal reasoning in which a value (ie, a property, quality, amount or allocation) is attributed to a legal subject matter. Conceptually, a student's ability to judge the quality of their own or others' assessable work is the same as their ability to attribute a value to a subject matter in legal problem-solving (ie, evaluative reasoning).

Thus, assessment practices that develop a law student's skill in determining the quality of assessment work, with reference to criteria and standards, will also develop the skills they use in evaluative reasoning. A law student who is able to determine the quality of their own or others' assessable work — and to explain the basis for attributing that quality to the work by

[17] Tai et al (n 4) 468.
[18] Ibid 473.

reference to criteria and standards — has the basic logical and argumentative tools to engage in evaluative reasoning for legal problems.

Academic integrity offers a practical example of how evaluative thinking works across the three domains and the shared logical basis for evaluative judgment for assessment work and evaluative reasoning within the discipline of law. For example, at Curtin University, a lack of academic integrity refers to conduct by a student that is dishonest or unfair in connection with any academic work.[19] Thus, for Curtin University students to properly understand what academic integrity requires of them, they must be able to instantiate the concept of 'unfairness' to the particular circumstances of an assessment task and possible 'unfair' behaviours they might engage in while completing that task. Put another way, students must be able to construct a standard of 'fairness' for student conduct relating to the assessment work, which means the students must (inter alia) identify relevant criteria for evaluating student conduct in relation to a particular assessment task, think about how those criteria apply to the conduct in question, and make a reasoned conclusion as to whether the conduct in question conforms to the standard of 'fairness' (or does not, and is therefore 'unfair'). In this context, Professor George Williams recently emphasised the importance of expressly training students in academic integrity, stating that 'talking to students, eyeballing students, talking about plagiarism, right and wrong — that's effective. A lot of teaching is about setting down basic values of integrity, ethical standards and the like'.[20] Viewed from across the three evaluative domains, training in academic integrity should develop the ability of students to: evaluate information available to them about academic integrity (eg, from discussions with teachers or from university materials); make a decision about the quality of an assessment work (eg, does the work comply with a compulsory standard of performance [ie, the student completing the assessment task with academic integrity]); and attribute a property to a subject matter (eg, is the conduct of the student 'fair', in the circumstances).

## III EVALUATION AS A CRITICAL THINKING SKILL IN LAW

The Australian Qualifications Framework ('AQF') is the national policy regulating education and training qualifications in Australia.[21] The AQF specifies generic criteria for each qualification level.[22] The AQF learning outcomes for qualification types are constructed as a taxonomy of what graduates are expected to know, understand and be able to do as a result of

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[19] Section 4 of Curtin University's *Statute No. 10 — Student Discipline* defines 'academic misconduct' as:

> conduct by a Student, other than conduct constituting Academic Record Fraud or General Misconduct, that is dishonest or unfair in connection with any academic work, such as —
>
> (a) during any exam, test or other supervised assessment activity;
> (b) in relation to the preparation or presentation of any assessed item of work; or
> (c) in relation to the conduct of research or any other similar academic activity.

[20] Celina Ribeiro, 'The Push and Pull of Cheating at University: "No One Knows What Cheating Is Any More"' *The Guardian* (online, 27 November 2022) <https://www.theguardian.com/australia-news/2022/nov/27/the-push-and-pull-of-cheating-at-university-no-one-knows-what-cheating-is-any-more?>.

[21] AQF (n 5). For a broad explanation of the national framework regulating higher education in Australia, see Christina Do and Leigh Smith, 'The Integration of Learning Outcomes and Graduate Attributes in the Australian Higher Education Sector (Part 1)' (2021) 47(1) *Monash University Law Review* 88, 94–7.

[22] AQF (n 5) 9.

learning. By way of example, the bachelor degree is classified as an AQF Level 7 qualification, with all 'graduates at this level having broad and coherent knowledge and skills for professional work and/or further learning'.[23]

The AQF specifies that graduates at Level 7 criteria are also expected to 'have well-developed cognitive, technical and communication skills to select and apply methods and technologies to: analyse and *evaluate* information to complete a range of activities …'.[24] Therefore, a graduate who has acquired a bachelor degree from an Australian university is expected to have been taught, been assessed on, and adequately demonstrated evaluation skills.

Specifically within the discipline of law, the ability to evaluate is a recognised fundamental legal skill. As prescribed in the Australian Learning and Teaching Council's *Bachelor of Laws, Learning and Teaching Academic Standards Statement*,[25] six Threshold Learning Outcomes ('TLOs') were identified for the Bachelor of Laws qualification.[26] In the context of the AQF, the TLOs represent what a Bachelor of Laws graduate is expected to know, understand and be able to do as a result of learning.

The six TLOs that were identified for the Bachelor of Laws qualification are:

- TLO 1: Knowledge
- TLO 2: Ethics and professional responsibility
- TLO 3: Thinking skills
- TLO 4: Research skills
- TLO 5: Communication and collaboration
- TLO 6: Self-management.[27]

With respect to TLO 3, Bachelor of Laws graduates are expected to be able to:

> a) identify and articulate legal issues,
> b) apply legal reasoning and research to generate appropriate responses to legal issues,
> c) engage in critical analysis and make a reasoned choice amongst alternatives, and
> d) think creatively in approaching legal issues and generating appropriate responses.[28]

Specifically, TLO 3(c) is the ability to critically analyse a legal text, claim or argument in order to understand it more thoroughly, and to evaluate the text, claim or argument in order to determine its truth value or correctness, its consistency with an ideological standard (the rule

[23] Ibid 13.
[24] Ibid (emphasis added).
[25] Kift and Israel (n 9).
[26] Ibid 10.
[27] Ibid.
[28] Ibid.

of law, gender equality, social justice, etc), or if it is the best option from among a range of choices.

## IV TEACHING EVALUATIVE REASONING AS A DISTINCT MODE OF LEGAL REASONING

Evaluative reasoning has received limited attention in legal education scholarship in Australia. Recent examples include: Allcock and Yin discussing evaluation as an aspect of judicial consideration of whether to impose a duty of care in negligence;[29] Townsley describing the emotional basis for evaluative judgments in legal ethics education;[30] and Galloway et al considering evaluative skills as part of teaching students to think and problem-solve like lawyers.[31] Johnstone's discussion of evaluative skills in legal analysis is an older, but still relevant, example. The work of Julius Stone remains a key starting point, as noted by former High Court Chief Justice Robert French.[32] In the field of legal education, Orr's analysis of how the Tertiary Education Quality and Standards Agency's 'fit and proper person' test applies to higher education providers is a helpful illustration of evaluative reasoning, as the test requires an 'evaluative assessment of fitness and propriety'.[33]

Part IV contributes to the scholarship in this area. Specifically, this Part draws on the learning and teaching experience and research of Finn, one of the authors of this paper, who teaches evaluative reasoning in an undergraduate unit (Bachelor of Laws, AQF Level 7) 'Constitutional Law', and a postgraduate unit (Bachelor of Laws (Honours), AQF Level 8) 'Advanced Legal Research and Writing for Honours'. In these units, instruction in evaluative reasoning is based on five key points, which are outlined below.[34]

### A *Evaluation Is a Critical Thinking Skill and a Mode of Legal Reasoning*

Evaluative reasoning is taught as both a critical thinking skill and a discrete mode of legal reasoning. Evaluative reasoning can be contextualised to TLO 3(b): 'apply legal reasoning and research to generate appropriate responses to legal issues'. In the *Good Practice Guide* for TLO

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[29] Martin Allcock and Ken Yin, 'The Application of Syllogism as a Pedagogical Tool in Teaching Duty of Care' (2020/21) 13/14 *Journal of the Australasian Law Academics Association* 12, 25.
[30] Lesley Townsley, 'Thinking Like a Lawyer Ethically: Narrative Intelligence and Emotion' (2014) 24(1) *Legal Education Review* 5:69–93.
[31] Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 5:95–114.
[32] Chief Justice Robert French, 'Judicial Activism: The Boundaries of the Judicial Role' (Speech, Law Asia Conference, 10 November 2009) 1, 3–4 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>.
[33] John Orr, 'The Fit and Proper Persons Concept in Higher Education Law' (2019) 22 *International Journal of Law & Education* 64, 76.
[34] These principles are derived from Hugh Finn, 'Law of Value: Concepts of Value & Evaluation in Judicial Decision-Making' (Honours Thesis, Murdoch University, 2013) <https://researchrepository.murdoch.edu.au/id/eprint/21955> and Hugh Finn, 'Law of Value: Training Law Students in Evaluative Reasoning' (Conference Paper, Global Legal Skills Conference, 10 December 2018) <https://espace.curtin.edu.au/handle/20.500.11937/76205?show=full>.

3, Professor Nick James describes three forms of reasoning that law students are commonly taught:

> When judges and legal theorists synthesise numerous legal decisions into a general legal principle they engage in *inductive reasoning*. When lawyers and judges apply a general legal principle to a particular legal problem they engage in *deductive reasoning*. When lawyers argue about whether or not a particular precedent should be followed they engage in *reasoning by analogy*.[35]

We frame evaluative reasoning as a fourth mode of reasoning that law students should be trained in, by extending Professor James' framework to include: when judges attribute a value (ie, a property, quality, amount or allocation) to a subject matter they engage in *evaluative reasoning*.

Evaluative reasoning can also be contextualised to law students by giving examples of evaluative tasks in which courts commonly engage, for example:

1. *Establish whether the subject matter conforms with a legal standard or falls within the ambit of a statutory or common law criterion.*

   Example: The defendants' conduct was not unconscionable within the meaning of ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth).

2. *Determine an amount or allocation of time, money, responsibility or other numerical measure that conforms with a standard or satisfies the threshold for a criterion.*

   Example: The provision was inadequate for the applicant's 'proper maintenance, education and advancement in life'.

3. *Weigh or balance particular values or evaluative outcomes that cannot be reduced to a common measure of value.*

   Example: The criterion 'adequate in its balance' requires the court to balance two incommensurables — the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[36]

[35] James (n 10) 12 (emphasis added).
[36] *Brown v Tasmania* (2017) 261 CLR 328, 377 [160] (Gageler J).

## B *Evaluative Reasoning Is Called for When the Law Uses a Broad Standard or Criterion Rather than Precise Rules*

Value judgments and evaluative judgments are a component of judicial decision-making across many practice areas of law, such as: misleading and deceptive conduct;[37] succession law;[38] constitutional law;[39] statutory unconscionable conduct;[40] administrative law;[41] sentencing;[42] and equity.[43] The need for value and evaluative judgments — and evaluative reasoning — arises when statutes, common law rules and equitable principles express a legal standard or criterion in broad or vague terms,[44] whether in common evaluative expressions like 'reasonable' or 'proper' or in particular statutory terms or phrases — for example, the phrase 'high risk serious offender', which the High Court recently considered in *Garlett v Western Australia* (2022) 96 ALJR 888.

The Australian Law Reform Commission report *Financial Services Legislation: Interim Report A*, published in November 2021, provides a practical example of how evaluative reasoning works within the context of a statutory scheme.[45] Chapter 2 of the report sets out a 'taxonomy' of concepts, principles, norms, rules and standards as a framework for understanding how the disclosure requirements in the *Corporations Act 2001* (Cth) ch 7 are intended to operate. For example, discussion of the framework distinguishes between the more indeterminate character of 'standards' and the more concrete content of 'rules'.[46] As examples of 'standards', the report cites a list from Roscoe Pound, namely the requirements to act in 'good faith', or 'reasonably', or 'prudently', or 'diligently' or 'fairly'.

Figure 1 below provides a starting point to encourage students to think about the content of legal norms and whether a particular law is more 'rule-like' or 'standard-like', and then about the practical operation of 'rule-like' laws and 'standard-like' laws as a means of regulating conduct.[47] In line with TLO 3(b), students are then asked to consider how they can use the four

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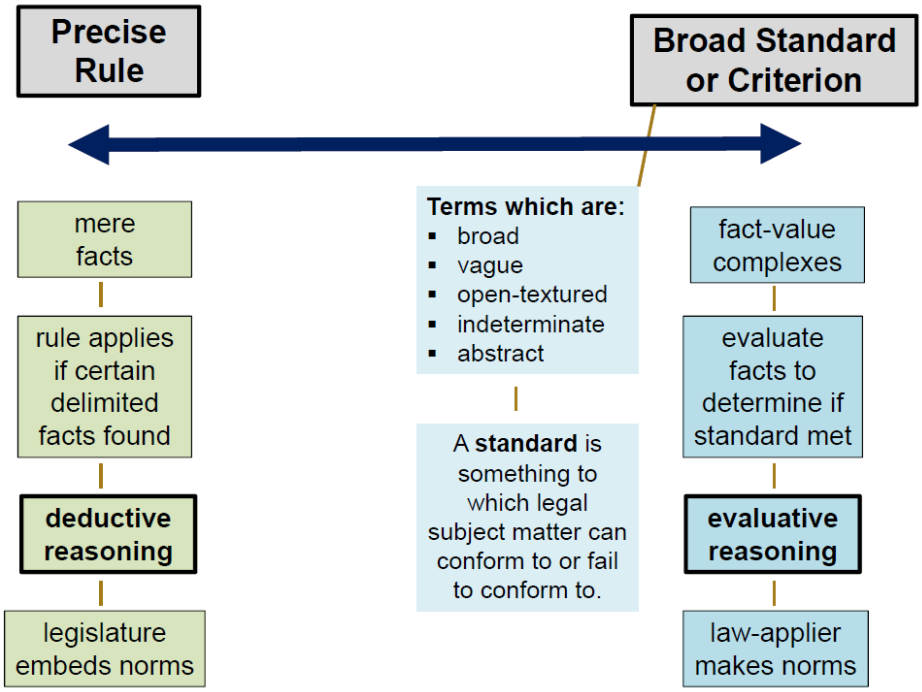
[37] French (n 32).
[38] Justice Geoff Lindsay, 'Challenges in the Conduct of a "Succession" Case across Jurisdictional Boundaries' (Speech, Law Society of NSW Specialist Accreditation Conference (Wills & Estates), 5 August 2021) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2021%20Speeches/Lindsay_20210805.pdf>.
[39] See, recently, *Garlett* (n 4) 912–13, [107] (Kiefel CJ, Keane and Steward JJ).
[40] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.
[41] See, recently, *Nathanson* (n 4).
[42] *Markarian v R* (2006) 228 CLR 357, 378 [51].
[43] *Thorne v Kennedy* (2017) 263 CLR 85, 105 [43].
[44] See, eg, *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261, [119]–[121]; *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91].
[45] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021).
[46] Ibid 57–63. See also Peter Toy, 'An Examination of Legal Values in Statutory Unconscionable Conduct' (2020) 48(5) *Australian Business Law Review* 406.
[47] See, eg, John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 267-268 [266]–[271] (Allsop CJ) ('*Paciocco*').

modes of legal reasoning to support legal arguments and solve legal problems. For example, students might use:

- *evaluative reasoning* when considering the application of 'standards' and *deductive reasoning* when considering the application of 'rules'
- *analogical reasoning* to argue for a particular outcome based on how courts have instantiated an abstract standard or applied a precise rule in previous cases with similar factual circumstances
- *inductive reasoning* to build a new legal norm (whether a precise rule or an abstract standard) based on how courts have dealt with a particular circumstance in a series of previous cases.

Figure 1: A continuum for legal norms between 'rule-like' and 'standard-like'




### C *Two Senses of 'Value': Value as a Property or Quality Attributed to Things and Value as a Criterion to Guide Decision-Making*

Law students are taught to distinguish between two senses of value. First, value may refer to an abstract property, quality or amount that can be attributed to a subject matter, usually as a form of merit, worth or significance (eg, 'the conduct of X was unconscionable' or 'the provision for Y was inadequate'). Value in this sense can also refer to the amount (or degree) of a property or quality that a subject matter possesses (eg, 'the probative value of the evidence exceeds its prejudicial value'). Further, value in this sense may be notional or numerical (eg, a percentage or monetary allocation). If the value is numerical, a range of outcomes may be acceptable; in contrast, if the value is notional then generally either a yes or a no answer will

be correct, unless the decision is a 'discretionary value judgment' on which reasonable minds may differ as to the outcome.[48]

Second, value may be a conception of an idealised or desirable state of affairs or behaviour. A value, in this second sense, often operates as a guide or criterion for proper conduct (eg, how the parties to a legal relationship are to act) or for judicial or administrative decision-making. As Allsop CJ has observed, values 'inform and underpin a rational and fair expectation of how power should be organised, exercised and controlled at a private and public level'.[49] For example, some well-known legal values are that the operation of criminal law should be as certain as possible,[50] and that a party to a contract must act in good faith and thus must not undermine the bargain entered into.[51] To the cause of great confusion, use of the term 'value judgment' may involve either or both of these senses of value — for example, a value judgment may refer to a decision that attributes a property to a subject matter or to a decision that is guided by, or has regard to, a set of values. The complexity is that a single decision may involve *both* senses of value. For example, as put by Allsop CJ:

> Decisions about questions such as unconscionable, unfair, good faith and similar expressions are not reached by applying definitions but by understanding and applying the principle with its attendant value to the facts and circumstances and drawing a conclusion by the process of characterisation, which involves the making of a value-based judgment by reference to ascribed meaning (construction), found facts (of all relevant circumstances) and expressed principle or rule (containing relevant public or private values).[52]

## D *There Is a Logic of Evaluation That Provides a Framework for Evaluative Reasoning*

Like other forms of legal reasoning, evaluative reasoning has an underlying logical framework. This framework involves the attribution of a particular *legal standard or criterion* (eg, a property, quality, merit, amount or worth) to a legal *subject matter* (eg, conduct, allocations of assets, evidence). This attribution of value to the subject matter is generally guided by *criteria*, and the overall aim of the evaluation is typically to determine whether the subject matter meets or satisfies a legal standard or criterion (*evaluative outcome*). The criteria guiding the evaluation may be expressly stated or implicitly contained in the relevant law (eg, a statutory provision, common law or equitable principle) — in either case, courts may need to do work to 'fill out the content of the norm'.[53] Where criteria guiding the evaluation include values,

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[48] *A v Corruption and Crime Commissioner* (2013) 306 ALR 491, 543 [246] (McLure P).
[49] Chief Justice Allsop, 'Values in Law: How They Influence and Shape Rules and the Application of Law' (Hochelaga Lecture, 20 October 2016) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>.
[50] Ibid.
[51] *Paciocco* (n 47) 273 [288] (Allsop CJ).
[52] Chief Justice Allsop, 'The Changing Manifestation of Risk: Comments on Innovation, Unconscionability and the Duty of Utmost Good Faith' (Geoff Masel Lecture, 10 June 2020) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20200610> (citations omitted).
[53] Ibid.

reasonable minds may differ about, for example, whether particular values are relevant to the evaluation, how the abstract or idealised content of a value is, or ought to be, instantiated in the circumstances, and what weighting the value should receive in the decision.

### E *Evaluative Reasoning Is a Normative Exercise*

Finally, evaluative judgments are normative because, inter alia, they: make judgments about what ought to be the case (eg, 'in these circumstances, this conduct is unreasonable'); attribute (or do not attribute) a property with a positive or negative character to a subject matter; and indicate whether a subject matter conforms or fails to conform to a legal standard. Like other legal decisions, legal consequences (eg, an award of damages) may follow from the outcome of the evaluation.

And understanding of the normative character of evaluative judgments helps students to see the purpose of reasoning — that is, to justify the evaluative outcome reached. Judges and experienced legal practitioners may rely on their experience, and developed intuition, to guide how they reason and make evaluative judgments. In contrast, law students have little or no insight or experience as to how broad legal standards are to be instantiated. Thus, as with the evaluative judgment of assessment work, law students must learn the content of discipline-specific standards, the criteria that underlie the application of those standards, and a methodology to justify evaluative conclusions. In the next section, we discuss how assessment rubrics, in conjunction with supporting pedagogical practices, can help students to develop this evaluative expertise.

## V USING ANALYTIC RUBRICS WITH DESCRIPTIVE CRITERIA TO DEVELOP EVALUATIVE SKILLS

### A *Assessment Rubrics*

Scholarship on assessment rubric development has grown exponentially over the past decade,[54] as educators have continued to innovate in rubric design and to explore the breadth of learning outcomes that rubrics can support. Initially, assessment rubrics were used as a tool for educators to assess student learning more effectively.[55] Thus early research on rubrics focused on measuring and enhancing validity and reliability in assessment marking.[56] However, there has been a shift towards using rubrics as a way to improve student performance and to promote

[54] Phillip Dawson, 'Assessment Rubrics: Towards Clearer and More Replicable Design, Research and Practice' (2017) 42(3) *Assessment and Evaluation Higher Education* 347, 348.
[55] See, eg, Moskal and Leydens (n 2).
[56] For a review of the early academic literature on rubrics and their validity, see Anders Jonsson and Gunilla Svingby, 'The Use of Scoring Rubrics: Reliability, Validity and Educational Consequences' (2007) 2(2) *Educational Research Review* 130. See also Moskal and Leydens (n 2).

student development of metacognitive skills through peer and self-reflection,[57] and more recent research has explored how assessment rubrics can be used to support student learning and reflection through formative assessment.[58]

Brookhart and Chen describe a rubric as a 'coherent set of criteria for students' work that includes descriptions of levels of performance quality on the criteria'.[59] Those criteria and those descriptions can work together to provide a scoring guide or strategy.[60] For the purposes of this paper, we understand assessment rubrics to have four principal features:

1. a task description that relates to the overall learning outcome(s) being assessed
2. the criteria being assessed (eg, a particular skill, knowledge or behaviour)
3. the levels of achievement for the criteria being assessed
4. descriptions for each level of achievement for each criterion being assessed.

Beyond these core features, the design of assessment rubrics varies widely. For example, rubrics may use evaluative criteria or descriptive criteria, and may apply a holistic or analytic approach.[61]

This paper focuses on analytic rubrics with descriptive criteria because their evaluative architecture (ie, criteria with performance-level descriptions) aligns with the logic for evaluation as described above. As explained further below, by engaging with rubrics students learn what skill, knowledge or behaviour they must demonstrate for the assessment task, the criteria that will be used to assess their proficiency in that skill, knowledge or behaviour, and the standard to which they must perform that skill, knowledge or behaviour. In this way, analytic rubrics with descriptive criteria allow students to develop their evaluative skills and improve their 'assessment literacy', which is their 'understanding of the purposes of assessment and the processes surrounding assessment'.[62]

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[57] For a description of the shift in approaches to higher education, see Peter Grainger and Katie Weir (eds), *Facilitating Student Learning and Engagement in Higher Education through Assessment Rubrics* (Cambridge Scholars Publishing, 2020); Cary Bennett, 'Assessment Rubrics: Thinking Inside the Boxes' (2016) 9(1) *Learning and Teaching: The International Journal of Higher Education in the Social Sciences* 50; Baker and Rozendal (n 3); Andrade et al (n 3).

[58] See, eg, Ernesto Panadero and Anders Jonsson, 'The Use of Scoring Rubrics for Formative Assessment Purposes Revisited: A Review' (2013) 9(1) *Educational Research Review* 129; Lene Nordrum, Katherine Evans and Magnus Gustafsson, 'Comparing Student Learning Experiences of In-Text Commentary and Rubric-Articulated Feedback: Strategies for Formative Assessment' (2013) 38(8) *Assessment & Evaluation in Higher Education* 919.

[59] Susan Brookhart and Fei Chen, 'The Quality and Effectiveness of Descriptive Rubrics' (2015) 67(3) *Educational Review* 343, 343.

[60] Dawson (n 54).

[61] Ernesto Panadero and Anders Jonsson, 'A Critical Review of the Arguments against the Use of Rubrics' (2020) 30 *Educational Research Review* 100329; Susan Brookhart, 'Appropriate Criteria: Key to Effective Rubrics' (2018) 3 *Frontiers in Education* 22:1–12.

[62] Calvin Smith et al, 'Assessment Literacy and Student Learning: The Case for Explicitly Developing Students "Assessment Literacy"' (2013) 38(1) *Assessment & Evaluation in Higher Education* 44, 44–6.

Generally, in an analytic rubric the criteria being assessed are evaluated separately,[63] with the criteria set out in rows and the descriptions for the levels of performance for each criterion set out in columns. The marker then evaluates the assessment work for each criterion independently.[64] In contrast to evaluative criteria, which use adjectival expressions to differentiate levels of performance (eg, satisfactory, good, excellent), descriptive criteria indicate particular aspects or features of performance. In an analytic rubric, the descriptive criteria are differentiated across the levels of performance for a particular criterion. Figure 2 below provides an example of an analytic rubric with descriptive criteria.

Figure 2: Example of an analytic assessment rubric with descriptive criteria, showing assessable criteria (three criteria for the broader criterion of 'argument') and descriptions for the levels of performance

| Category & Weighting | Criteria | Below Expectations (Fail) | Meets Expectations (Pass) | Meets Expectations (Credit) | Exceeds Expectations (Distinction) | Exceeds Expectations (High Distinction) |
|---|---|---|---|---|---|---|
| **1 Argument** (x marks) | **Logical structure** (1) | The assessment did not follow a logical sequence based on: (1) a clear statement of the overall argument; (2) the presentation of a series of claims to support the overall argument; and (3) the presentation of information to support the claims. | The assessment generally presented an argument in a logical manner that stated the overall argument, presented claims to support that overall argument, and also presented information to support the claims. The assessment could be improved by stating the claims and supporting information with greater clarity and by imposing a clearer structure to the argument. The assessment may not have sufficiently addressed all aspects of the assessment question. | The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. The assessment could be improved by stating the claims and supporting information with greater clarity and by imposing a clearer structure to the argument. The assessment may not have sufficiently addressed all aspects of the assessment question. | The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. Most claims and supporting information were presented with sufficient clarity and there was a clear structure to the argument. The assessment sufficiently addressed all aspects of the assessment question. | The assessment presented an argument in a logical manner that stated the overall argument, presented a series of distinct claims to support that overall argument, and also presented information to support the claims. Claims and supporting information were stated with sufficient clarity and the overall argument was clear. The assessment addressed all aspects of the assessment question in a creative, original and highly persuasive manner. |
| | **Quality of reasoning** (2) | The assessment did not use legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were supported by suitable evidence, examples, analogies, or other supporting information. | The assessment generally used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were generally supported by suitable evidence, examples, analogies, or other supporting information. However, many of the claims were weak or were inadequately explained and some or much of the supporting information was irrelevant, unpersuasive or otherwise unsuitable. | The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate claims that were supported by suitable evidence, examples, analogies, or other supporting information. However, some claims were weak or poorly explained and some of the supporting information was irrelevant, unpersuasive or otherwise unsuitable. | The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate and sometimes complex or sophisticated claims that were supported by suitable evidence, examples, analogies, or other supporting information. However, a few of the claims were weak or poorly explained and a small amount of the supporting information was irrelevant, unpersuasive or otherwise unsuitable. | The assessment used legal and non-legal concepts and other information extracted from relevant and authoritative primary and secondary sources to make appropriate and complex or sophisticated claims that were supported by suitable evidence, examples, analogies, or other supporting information showing considerable insight. |
| | **Understanding of law and legal theory** (3) | The assessment did not accurately describe legal concepts, correctly apply legal concepts to particular circumstances, and/or critically evaluate the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments. | In general, the assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances. However, some legal concepts were described or applied incorrectly. The assessment did not critically evaluate the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments. | The assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances but there were a few notable errors. The assessment included little critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments. | The assessment accurately described legal concepts and correctly applied legal concepts to particular circumstances except for a few minor errors. The assessment included some critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments. | The assessment accurately described legal concepts and correctly and insightfully applied legal concepts to particular circumstances. The assessment consistently engaged in critical evaluation of the strengths, weaknesses or other relevant characteristics of legal concepts and legal arguments. |

Analytic rubrics with descriptive criteria can support either holistic or analytic marking. In holistic marking, the marker forms an overall judgment on the quality of an assessment work through the simultaneous consideration of the assessable criteria, whereas in analytic marking the mark for an assessment is derived in a systematic way from judgments on individual criteria (eg, marks are allocated to individual criteria and these marks are then added together to obtain the overall assessment mark).[65] In either case, the rubric can be used as a reference point for feedback on how students performed for particular criteria (eg, shading in the cells that

[63] de Boer et al (n 1) 2.
[64] Brookhart (n 61).
[65] Carmen Tomas et al, 'Modeling Holistic Marks with Analytic Rubrics' (2019) 4 *Frontiers in Education* 89:1–19.

correspond to the level of performance for the criterion or structuring feedback comments in relation to the criteria descriptors).

### B *Using Analytic Rubrics with Descriptive Criteria to Develop Evaluative Skills*

We propose that there are three key stages to how analytic rubrics with descriptive criteria can support the development of student evaluative skills.

First, students engage with the content of the rubric itself to learn its underlying logic of evaluation and to familiarise themselves with the basic components of its evaluative architecture — namely the criteria and the descriptors for each level of performance for a criterion. Critically, engagement with the criteria and the criteria descriptors builds student understanding of evaluation as a logical and structured process, by which the evaluator reasons towards a justified conclusion — or, often, to a series of evaluative conclusions (eg, for each assessable criteria), from which an overall evaluative conclusion for the assessment work (or other subject matter) is synthesised or calculated. This insight into the logical foundation of evaluation prepares students for the practice of evaluation, in which students will apply the logical process they have learned to an assessment work. This 'logical' expertise underpins evaluation as a critical thinking skill, as an ability to judge the quality of assessment work, and as discipline-specific practice for attributing properties or qualities to subject matter (ie, evaluative reasoning).

Second, students apply that evaluative architecture to evaluate assessment work, which may include their work or the work of others. At a granular level, this stage requires students to examine the assessment work and use the criteria descriptors to determine an appropriate level of performance for each criterion. This stage builds on the earlier rubric engagement by encouraging students to analyse and apply the criteria and the performance descriptors against an assessment work. In doing so, students will consider what the threshold is for each level of performance and use the descriptors to evaluate the assessment work against the 'standard' they have intuited.

Third, students must use the completed evaluative process to improve performance. In this stage, students integrate information they have received during the assessment process — for example, any activities undertaken in the first two stages with feedback from the marker (including marks awarded) — to consider the standards of performance for particular criteria and how they can achieve a higher level of performance for a similar task in the future.

### C *Pedagogical Practices to Support Student Engagement with Rubrics*

Pedagogical practices may be used alongside analytic rubrics with descriptive criteria to actively engage students and develop their evaluative skills. Examples are:

- **Rubric guidance** — students receive guidance about the rubric content, eg, to explain why criteria were selected, how criteria reflect discipline-specific tasks, norms or standards, and how levels of performance differ for particular criteria.
- **Rubric dialogue** — students have opportunities to question the teacher about the rubric content, either in real time or via online forums (eg, discussion boards).
- **Students as partners** — teachers and students work together to develop the rubric or to refine its content.
- **Assessment exemplars** — students are given examples of assessment work with guidance as to the levels of performance for particular criteria (eg, an example of an assessment work that is annotated with feedback referenced to the rubric).[66]
- **Self-reflection exercises** — students review and reflect on their own capability and performance for an assessment, prior to submission (eg, answering a series of reflective questions or preparing a reflective journal).[67]
- **Peer-review activities** — students review and assess the performance of their peers for an assessment (eg, engaging in peer-assessment grading or peer-group rating for group assessments).[68]
- **Peer discussions** — students collectively discuss the assessment rubric, contributing their perspective, understanding and knowledge (eg, in facilitated in-class discussions).[69]
- **Group assessments** — students work collaboratively on a group assessment, with requirements or suggestions that students discuss the rubric and/or collectively reflect on their own capability and performance for an assessment work, prior to submission.
- **Rubric-referenced feedback** — markers provide feedback that is referenced to the criteria in the rubric and that explains the level of performance achieved (eg, written or oral feedback provided in conjunction with the assessment rubric).[70]
- **Post-assessment reflection** — students review the assessment feedback and reflect on their own capability and performance (eg, answering a series of reflective questions or preparing a reflective journal).
- **Post-assessment revision** — students revise the assessment to address the assessment feedback and improve their performance.

## VI CONCLUSION

Evaluation is a fundamental 'thinking skill' that law students must learn and demonstrate throughout their law degree[71] and, in the longer term, must also demonstrate in legal practice

[66] See generally Bruce Cooper and Anne Gargan, 'Rubrics in Education: Old Term, New Meanings' (2009) 91(1) *Phi Delta Kappan* 54; Dawson (n 54); Jonsson and Svingby (n 56).
[67] See generally Baker and Rozendal (n 3).
[68] See generally Panadero and Jonsson, 'The Use of Scoring Rubrics for Formative Assessment' (n 58).
[69] See generally Jordan Rogers et al, 'Validation of a Reflection Rubric for Higher Education' (2019) 20(6) *Reflective Practice* 761.
[70] See generally de Boer et al (n 1) 31.
[71] Ibid.

and within the profession. Evaluative reasoning has traditionally been taught in law schools through the use of scenario problem questions — requiring students to examine statutes and/or equity and the common law to apply the identified relevant legal principles to the factual situation in order to ascertain a likely outcome. However, to assist law students in developing their evaluative expertise, it is critical for legal educators to provide numerous and varying opportunities for law students to practice the particular skills underpinning evaluative reasoning.

Additional opportunities for law students to engage in and exercise evaluative reasoning can be facilitated through the explicit use of analytic assessment rubrics, in conjunction with other pedagogical practices. Further, a requirement for students to actively engage with analytic assessment rubrics, by examining the criterion descriptors and measuring each criterion against their work to assess its quality, will not only assist students to develop their evaluative judgment for assessment work, but will also better equip students to assess standards more broadly and assist them to become independent, self-regulated learners and legal scholars.

# READY FOR A REBOOT: LAW SCHOOLS NEED TO REBOOT AND UPGRADE THE LAW CURRICULUM NOW TO BETTER MEET THE IMPACTS OF TECHNOLOGY

*Caroline Hart and Aaron Timoshanko*[*]

## ABSTRACT

This paper investigates Australian legal education's capacity to acknowledge and respond to the impacts of the increasing use of technologies aiding legal service delivery. While law academics are debating the extent of this impact, there are already new jobs with new titles requiring new skillsets, and these employment opportunities will go to the best-prepared graduates. Even within the current framework, law academics have the capacity to better equip graduates to succeed in this changing environment through leadership and engagement with the key players. The responsibility to lead this adapted legal education is best held by law schools carrying it out as a fiduciary role towards graduates rather than as a broker for broader tech-interests.

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# I INTRODUCTION

This paper investigates the capacity of Australian law schools to acknowledge and respond to the impacts on legal education of existing and emerging technologies being used in the delivery of legal services, known as 'LawTech'.[1] LawTech encompasses all technologies that can be applied to the delivery of legal services,[2] including automated decision-making,[3] analytics of decision-making,[4] and predictive analytics of judicial decisions.[5] The impact of these technologies is that '[a]nalysis that might have taken years of experience and hours of human work to produce [is] now generated by software programs', and is 'now undertaken by programs that replace the trust or validation of a lawyer'.[6]

Where does the responsibility lie for the increasing use of technologies, when lawyers 'do not possess the analytical tools required to assess [their] adequacy?'[7] The duties under Australian practising certificates provide for a duty of competence,[8] which does not expressly reference 'technology competence'. It is worth noting that the American Bar Association has 'amended the ABA [American Bar Association] Model Rules of Professional Conduct to include a Duty of Technology Competence'.[9] Although it is not within the scope of this paper to explore the duties of legal practitioners, it is valuable to have this practitioner context in mind when considering Australian legal education's response to the impacts of technology on law graduates entering a job market that includes global opportunities and influences.

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[1] Lisa Webley et al, 'The Profession(s)' Engagement with LawTech: Narratives and Archetypes of Future Law' (2019) 1 *Law, Technology and Humans* 6, 6 citing Marcelo Corrales et al, 'Digital Technologies, Legal Design and the Future of the Legal Profession' in Marcelo Corrales, Mark Fenwick and Helena Haapio (eds), *Legal Tech, Smart Contracts and Blockchain* (Springer, 2019).

[2] See generally Kevin D Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press, 2017). See also John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Services' (2014) 82(6) *Fordham Law Review* 3041, 3046, where McGinnis and Pearce identify that machine learning will impact legal practice most in the areas of discovery, legal search, document generation, brief generation and case prediction.

[3] Eg, Neota Logic, Rainbird and Oracle Policy Automation.

[4] Eg, Elexirr, GovPredict and LexPredict.

[5] Eg, Pre/Dicta and Premonition.

[6] Sari Graben, 'Law and Technology in Legal Education: A Systematic Approach at Ryerson' (2021) 58(1) *Osgoode Hall Law Journal* 139, 143.

[7] Ibid 144.

[8] *Legal Profession Act 2007* (Qld) ss 23, 25; *Legal Profession Uniform Law* (NSW) ss 10, 11; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (Legal Professional Uniform Law), ss 10, 11; *Legal Profession Act 2006* (ACT) ss 16, 17; *Legal Profession Act 2006* (NT) ss 18, 19; *Legal Profession Act 2007* (Tas) ss 13, 14; *Legal Practitioners Act 1981* (SA) ss 21, 23; *Legal Profession Act 2008* (WA) ss 12, 13.

[9] Jamie J Baker, 'Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society' (2018) 69(3) *South Carolina Law Review* 557. See also generally Katherine Medianik, 'Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era' (2018) 39 *Cardozo Law Review* 1497; Anthony E Davis, 'The Ethical Obligation to Be Technologically Competent' (2016) 3 *New York Law Journal*.

Lawyers have already put in place paperless offices and cloud-based practice management systems.[10] One of Covid-19's impacts has been to accelerate the legal profession's use of, and confidence in, technology, which may include simple systems they already use such as Zoom and MS Teams.[11]

While law academics have been debating the extent of the impact of technology on the legal profession — whether it is accurate[12] or over-dramatised[13] — the market into which graduates are seeking employment is already responding to rapidly evolving technologies by offering new jobs with new titles, requiring new skillsets with proficiency in a new language.[14] Employment opportunities are going to those graduates who are best prepared.

There is a growing body of literature, spanning common law countries, on the need for law schools to better prepare students for using technologies in legal practice, often criticising schools for not keeping pace with the current developments.[15] There is also growing recognition that law schools have been late to respond to the need to educate students for the technological demands of legal practice.[16] A recent desktop survey carried out between November 2019 and March 2020 of all Australian law schools indicated an 'uncertainty in the types of technology that may disrupt the legal profession and uncertainty regarding the impact technology will have on graduate employment'.[17] The results point to the need for a more cohesive and coordinated approach by the law academy.[18]

This paper proposes that a more responsive law curriculum set in train by law schools is not difficult to achieve. The legal education framework in Australia currently provides sufficient

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[10] Simon Canick, 'Infusing Technology in Law School Curriculum' (2014) 42 *Capital University Law Review* 663, 663–4.
[11] Caroline Hart, 'Future Ready Law Firms: Not Changing Is Not an Option! Interview with Terri Mottershead', *Proctor* (Web Page, 28 June 2022) <https://www.qlsproctor.com.au/2022/06/future-ready-law-firms-not-changing-is-not-an-option>.
[12] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017); Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019).
[13] Dana Remus and Frank Levy, 'Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law' (2017) 30(3) *Georgetown Journal of Legal Ethics* 501.
[14] Ibid; Susskind, *Tomorrow's Lawyers* (n 12).
[15] Kenneth J Hirsh and Wayne Miller, 'Law School Education in the 21st Century: Adding Information Technology Instruction to the Curriculum' (2004) 12(3) *William & Mary Bill of Rights Journal* 873; Luke R Nottage and Makoto Ibusuki, 'IT and Transformations in Legal Practice and Education in Japan and Australia' (2002) 4 *University of Technology Sydney Law Review* 31; William BT Mock, 'Informing Law Curricula: Modifying First-Year Courses to Reflect the Information Revolution' (2001) 51(4) *Journal of Legal Education* 554; Stephanie Dangel, Margaret Hagan and James Bryan Williams, 'Reimagining Today's Legal Education for Tomorrow's Lawyers: The Role of Legal Design, Technology and Innovation' in A Masson and G Robinson (eds), *Mapping Legal Innovation* (Springer, 2021) 383, 387; McGinnis and Pearce (n 2); Graben (n 6); Karina Palkova and Olena Agapova, 'Legal Tech in Legal Education: Global Perspectives and Challenges from the Latvian-Ukrainian Experience' (2021) 5 *Society, Integration, Education: Proceedings of the International Scientific Conference* 414.
[16] Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *University of New South Wales Law Journal* 1199. See also Canick (n 10).
[17] Aaron Timoshanko and Caroline L Hart, 'Teaching Technology into the Law Curriculum' (2021) 13/14 *Journal of the Australasian Law Academics Association* 146, 152.
[18] Ibid 160.

flexibility and autonomy within individual law schools to proactively incorporate relevant content that will better prepare graduates for the changing marketplace. The determination of that content can be achieved through greater engagement with the full range of employers and technology developers to ensure law academics are better informed about the careers market into which graduates will enter.

The research methodology for this article included a desktop investigation, accessing Google, Google Scholar, university library resources and job sites. Searches focused on the topics of law, technology, and emerging career opportunities for law graduates. It also included a literature review of the role of legal education, the skills and knowledge required of law students and law graduates, and an overview of the current framework within which law academics operate.

In this article, Part II reviews the experience of legal education in accommodating broad interests, including employer interests. Part III then overviews the regulatory framework of legal education, while Part IV focuses on attributes and skills required of the 'new lawyer'. Finally, Part V provides an analysis of the findings and concludes with recommendations for law academics.

## II WHOSE INTERESTS SHOULD LEGAL EDUCATION SERVE?

The literature reveals that, over the past 50 years, Australian legal education has a record of serving a diverse range of interests, including that of employers.

### A *Law School as a Trade School*

Law school has been seen as a trade school, directly serving the specific needs of the legal profession. The first major state intervention into legal education was the Australian federal government's 1964 Martin Report, which found that an over-self-regulated profession was not producing the volume and form of lawyers necessary for national economic growth. It did not adequately deal with the needs of corporate practice and the rapidly expanding welfare state.[19] The Martin Report recommended that the state ought to culturally re-engineer the profession through a publicly funded expansion of places and subjects studied in law schools.[20] Prior to this intervention, employability had not been considered a priority or the responsibility of a university legal education. However, with increasing pressure on lawyers to bill for their time, there was no opportunity to provide this ongoing legal education within the workplace. Law

[19] This was in the context when the legal profession was the legal educator.

[20] Christine Parker and Andrew Goldsmith, '"Failed Sociologists" in the Market Place: Law Schools in Australia' (1998) 25(1) *Journal of Law & Society* 33; Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia (Martin Report)* (Final Report, Australian Universities Commission, August 1964) <http://hdl.voced.edu.au/10707/228215>; Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993).

school as a trade school reflects the growing demand among employers on universities taking a role in teaching skills in addition to discipline knowledge.[21]

There is also external pressure being applied on universities to make graduates more job-ready.[22] The authors acknowledge that government funding is increasingly tied to employability outcomes to produce work-ready graduates. Government policy may also be a driving force behind the desire for greater skills development in law schools.[23] Employers had traditionally taken on that role through the relatively lengthy articles of clerkship. With the shortened practical legal training, employers' expectations of skills development have increasingly been pushed back onto universities. The importance of skills for law graduates are analysed separately in Part IV below.

The literature on law school as a trade school remains relevant, yet is only one approach to legal education. Other approaches, discussed below, include descriptors of a law school as being a liberalist greenhouse, preparation for potential entrepreneurs and as a sandbox for experimentation and creation.

### B *Law School as a Liberalist Greenhouse*

Should legal education be seen as a liberalist greenhouse? This view is in tension with history, where a law school was seen as a trade school in which the academy is subservient to the profession. This consequently 'has the effect of uncritically endorsing and perpetuating the status quo'.[24] Legal education driven by a need to satisfy only the legal profession fails to address broader 'producers and consumers of legal discourse'.[25]

A law school as a liberalist greenhouse rejects the constraints upon learning and teaching placed upon it by the legal profession. It views legal education as independent of the legal profession and supports law academics learning, teaching and even researching with the more fundamental outcome of producing critical thinking graduates.[26] Keyes and Johnstone have advanced the need for a broader purpose of legal education beyond preparation for private legal practice.[27] For law schools this requires rethinking their relationship with the legal profession

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[21] Kate Galloway et al, 'The Legal Academy's Engagements with LawTech: Technology Narratives and Archetypes as Drivers of Change' (2019) 1(1) *Law, Technology and Humans* 27.
[22] *Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Act* (Cth) 2020 took effect to increase student contributions enrolling in law programs after January 2021 compared to students' contributions prior to that date.
[23] The extent to which that desire for skills is resourced is another matter, dependent upon an individual university's allocation of budgets and resources to their law school. The *Job-Ready Graduates* legislation (n 22) has also taken effect to increase student contributions enrolling in law programs after January 2021.
[24] Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537, 542, 543.
[25] Ibid 542; David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 26.
[26] Discussions on academics' independence made news headlines in Australia during 2022: Bianca Nogrady, 'Australian Researchers Push to End Politicians' Power to Veto Grants', *Nature* (Web Page, 10 March 2022) <https://www.nature.com/articles/d41586-022-00682-7>.
[27] Keyes and Johnstone (n 24).

and ensuring that they assert their autonomy in matters of curriculum, teaching and research. Their aims should encompass more than just preparing students for work in private legal practice.[28]

In this role, the purpose of law schools in society is to produce graduates capable of critically evaluating the role of law beyond that of the legal profession and to consider the ethical, social, economic and political implications. This approach is not merely about countering constraints, but one in which a growth mindset is inviting the student to become central to learning and teaching. The benefits include developing broader thinking skills that potentially make such a law degree better futureproofed.

### C *Law School as Entrepreneurial*

Within this approach to legal education, law schools play a role in engaging students with entrepreneurial influences, shaping course content, delivery and assessment. This role played by legal education has been met with the rise of commercial interests outside of the legal profession seeking to influence legal education. This is evident in the sponsorship and interaction of technology companies with law schools.[29] In particular, the commentary from the United States acknowledges a growth of entrepreneurial interests permeating law schools, which exposes law graduates to other opportunities outside the legal profession.[30] The extent of engagement of entrepreneurial interests as part of the curriculum raises several issues (and challenges). For example, how do we determine ownership of intellectual property created as part of assessment and access to licensed software products? Such challenges may be resolved by identifying them before any engagement in the curriculum so they can be addressed early.[31]

### D *Law School as a Sandbox*

Legal education can also be viewed as a 'sandbox' or laboratory in which the law is subject to experimentation based on new ideas and views unimpeded by either the legal profession or other regulatory bodies.[32] The outcome is to produce graduates as experimenters and initiators within society.

Under this view, law academics need to build the capacity to engage in curriculum design that challenges the classificatory orthodoxy entrenched within the Priestley 11 (see Part III below).[33] In this alternative curriculum, the text of the law might become a sandbox: a place

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[28] Ibid.
[29] Stephanie Francis Ward, 'Tech Entrepreneurship Features a Shift in Thinking at Some Law Schools', *ABA Journal* (Web Page, 9 March 2018) <https://www.abajournal.com/news/article/tech_entrepreneurship_features_a_shift_in_thinking_at_some_law_schools>.
[30] Ibid.
[31] Ibid.
[32] Keyes and Johnstone (n 24); Michael Legg, 'New Skills for New Lawyers: Responding to Technology and Practice Developments' in KE Lindgren, Françoís Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2018) 373; Galloway et al (n 21).
[33] Galloway et al (n 21).

for experimentation with diverse applications and a critical outlook that weighs up the future of law against the purpose of a diversified legal profession as an arm of the justice system.[34]

The value of legal education incorporating knowledge on LawTech into the curriculum as experimenters (rather than waiting for confirmation of its presence or impact) provides law students with opportunities to evaluate and absorb the impacts of LawTech generally.[35] Practical and forward-thinking legal education needs to better prepare students to evaluate the extent to which the claims by technology providers or industries are hype or not.[36]

Although one of the core roles of legal education is to prepare graduates for practice, the precise nature of this role and the extent to which it should be directed by the legal profession or entrepreneurial interests would benefit from reference to informed scholarship, independent evaluation, and review of courses with ultimate responsibility being held by law academics. The brief literature review above reveals that the role of legal education has travelled a path of both accommodating the needs of the legal profession and asserting its own independence. This paper affirms that, although legal education needs to remain independent, it must also engage with and become more informed by innovators and technologies that have entered the field of legal service delivery.

The regulatory environment in which Australian legal education resides has sufficient flexibility to adapt the law curriculum to reflect these developments.

## III THE REGULATORY FOUNDATIONS OF LEGAL EDUCATION

Law programs are shaped at the national level and accredited at the state (and territory) level.[37] This has benefits for national uniformity, lawyer mobility, a degree of consumer confidence and managing disciplinary actions.[38] It is noted that the process for establishing the current national regulatory foundations began in the early 1990s and was not completed until the mid-2000s; any future large-scale change or reform at a national level is likely also to take time.

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[34] Ibid.
[35] Kasey Panetta, '5 Trends Drive the Gartner Hype Cycle for Emerging Technologies, 2020', *Gartner* (Web Page, 8 March 2021) <www.gartner.com/smarterwithgartner/5-trends-drive-the-gartner-hype-cycle-for-emerging-technologies-2020>.
[36] Ibid.
[37] *Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA); *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic).
[38] James W Jones et al, 'Reforming Lawyer Mobility — Protecting Turf or Serving Clients?' (2017) 30(1) *The Georgetown Journal of Legal Ethics* 125.

This part of the paper suggests that the current foundations are, for the moment, sufficiently flexible to accommodate inclusion of LawTech into the curriculum. The framework within which legal education is offered[39] includes:

1. a national framework to ensure specified content is uniformly covered, responding to national policies and accredited at state (and territory) levels
2. Threshold Learning Outcomes ('TLOs') endorsed by the Council of Australian Law Deans ('CALD')
3. graduate attributes ('GAs') implemented at the university level.

Each will now be discussed in turn.

### A *Regulatory Requirements at the National Level: The Priestley 11*

There have been several reviews into the role of legal education and the extent to which legal education providers should be responsive to the interests of others. Perhaps the most enduring review of the law curricula was made in 1992 when the Law Admissions Consultative Committee ('LACC') determined that students must complete 11 areas of knowledge — the Priestley 11 — to qualify to practice.[40] The Priestley 11 does not have to be taught within the law curriculum as separate courses. Rather it is the substance of each area that must be covered. This provides flexibility for individual law schools determining their own curriculum.

The Priestley 11 has remained the same, with no additions or deletions, for almost 30 years, other than CALD's recognition of the importance of statutory interpretation.[41] The Priestley 11 merely identifies areas of knowledge. It is

> focused entirely on areas of law that students should know. The reality is that tools such as Google search and IBM Watson are already better at knowing basic information and that future tools will come to 'know' more complex or advanced knowledge.[42]

In 2019, the LACC, an important committee in informing legal education, sought feedback on 'Redrafting the Academic Requirements for Admission' to revise descriptions for the Priestley

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[39] Law graduates who seek to practise law as an employed solicitor must also complete practical legal training, and employed solicitors who want to own and manage a law firm are required to complete an accredited practice management course. This is beyond the scope of this paper. It is enough to note here that becoming a 'law graduate' is likely to be just the beginning for a life in the legal profession.

[40] The Priestley 11 refers to the 11 subjects that every Australian law school must cover: administrative law, civil procedure, company law, contracts, criminal law and procedure, equity (including trusts), ethics and professional responsibility, evidence, constitutional law (both federal and state), property law and torts.

[41] Jeffrey Barnes et al, *The Council of Australian Law Deans: 2015 Good Practice Guide to Teaching Statutory Interpretation* (Report, prepared for CALD, June 2015) <https://cald.asn.au/wp-content/uploads/2017/11/Council-of-Australian-Law-Deans-Good-Practice-Guide-to-Teaching-Statutory-Interpretation.pdf>.

[42] Lyria Bennett Moses, 'The Need for Lawyers' in KE Lindgren, Françoís Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2018) 355, 366.

11, including specific recognition of the impact of emerging technologies.[43] However, at the time of this publication no formal changes have been made to the Priestley 11.

### B *Threshold Learning Outcomes*

TLOs are a 'different attempt to articulate what needs to be learnt within a law degree'.[44] TLOs are 'the set of knowledge, skills and the application of the knowledge and skills a person has acquired and is able to demonstrate as a result of learning'.[45] TLOs were developed as part of the Higher Education Quality and Regulatory Framework.[46] The Australian Learning and Teaching Council was commissioned to manage components of the Learning and Teaching Academic Standards that incorporated 'eight broad discipline groups', including law.[47] CALD were part of the consultation process to develop a set of standards for Australian law schools.[48]

TLOs go further than the requirement that a law student simply acquires knowledge. There is a reference to skills. The TLOs for the Bachelor of Laws include: fundamental areas of legal knowledge; ethics and professional responsibility; thinking skills that relate to legal issues and legal reasoning; research skills on legal and policy issues; communication and collaboration skills; and self-management on learning, working independently and personal and professional development.[49] There is no express statement about 'technology skills'.

### C *Graduate Attributes*

Most universities in Australia have developed GA principles, and these are embedded into the course objectives, materials, and assessment of coursework programs. The objective of incorporating these principles into coursework is to ensure that all students demonstrate these attributes when they complete their coursework program.[50] The GAs include: well-informed individuals with discipline-specific expertise; critical, creative thinkers; effective communicators and collaborators; ethical, engaged professionals and citizens; employable, enterprising professionals; and culturally capable individuals.[51] GAs relate to

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[43] This consultation was carried out by the LACC and disseminated through the networks of CALD and the Legal Education Associate Deans Network during 2019. At this stage, it remains for law schools to determine their curricula. Bond University has been proactive through its Centre for Professional Legal Education and its project on the impact of emerging technology on each of the Priestley 11 subject areas.
[44] Moses (n 42) 366.
[45] Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.
[46] Ibid. TLOs were also developed for the Juris Doctor (postgraduate-level law program) that apply the same outcomes, but to a standard reflecting the postgraduate status of the Juris Doctor.
[47] Ibid 3.
[48] Ibid.
[49] Ibid.
[50] 'Graduate Attributes Policy', *University of Southern Queensland* (Web Page, 2022) <https://policy.usq.edu.au/documents/18747PL>.
[51] Ibid.

> the qualities, skills and understandings a university community agrees its students should develop during their time with the institution. These attributes include but go beyond the disciplinary expertise or technical knowledge that has traditionally formed the core of most university courses. They are qualities that also prepare graduates as agents of social good in an unknown future.[52]

They 'encapsulate transferable, non-discipline specific skills that a graduate may achieve through learning that have application in study, work and life contexts'.[53] Attributes include, but are not limited to, both skills and knowledge.

This definition indicates that GAs bring an enduring quality that will provide a graduate with some 'insurance' (or foundation) that the skills and knowledge they have acquired at university will have value beyond university. They will support employment, entrepreneurship, and career futureproofing.[54]

The literature has questioned whether GAs are fit-for-purpose in a rapidly changing world, in particular when considering the disruption[55] flowing from new technology.[56]

The Priestley 11 is not prescriptive, merely requiring that a law school must cover the 11 areas of knowledge. The TLOs push legal education forward in requiring not just knowledge, but also skills and application. Finally, GAs are governed at the university level and give recognition to the need for graduates to be prepared for at least the foreseeable future.

The framework described above reveals that there remains a high degree of autonomy within individual law schools to chart and navigate their own course on developing a responsive and dynamic law curriculum. Perhaps such individuality will result in even further differentiation between schools and more distinct options for students seeking differing career paths. By doing so they can futureproof students for their employability and potential to contribute more broadly to a changing social and economic world. It is also a reminder that the framework was established in 1992 and most recently updated over a decade ago in 2010. Perhaps if enough law schools take the lead within this environment by responding through evolution and

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[52] Simon C Barrie, 'A Research-based Approach to Generic Graduate Attributes Policy' (2004) 23(3) *Higher Education Research & Development* 261, citing J Bowden et al, *Generic Capabilities of ATN University Graduates* (Report, Department of Education, Training and Youth Affairs, Commonwealth Government, 2000). See also Beverley Oliver and Trina Jorre de St Jorre, 'Graduate Attributes for 2020 and Beyond: Recommendations for Australian Higher Education Providers' (2018) 37(4) *Higher Education Research & Development* 821, 822.

[53] Sara Hammer, Peter Ayriss and Amanda McCubbin, 'Style or Substance: How Australian Universities Contextualise Their Graduate Attributes for the Curriculum Quality Space' (2021) 40(3) *Higher Education Research & Development* 508.

[54] However, there is an opposing view that an emphasis upon GAs linked too closely to employability may diminish the purpose of university as being an opportunity for students to develop socially and personally: Cassandra Star and Sara Hammer, 'Teaching Generic Skills: Eroding the Higher Purpose of Universities, or an Opportunity for Renewal?' (2008) 34(2) *Oxford Review of Education* 237.

[55] Clayton M Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business School Press, illustrated ed, 2015).

[56] Oliver and Jorre (n 52). But see 'Graduate Attributes and Skills Development', *Melbourne Law School* (Web Page, 4 December 2019) <https://law.unimelb.edu.au/students/jd/studies/grad-attributes-and-skills>.

adaptation to our changing world, they could trigger broader formalised national change. This article asserts that such change is possible within the current regulatory framework.

The desktop review into the job market for law graduates (discussed below) reveals a shifting and transitioning environment from which legal education is in danger of becoming disconnected.

## IV LAWTECH AND EMPLOYABILITY

The place of LawTech within the legal profession has been described as occurring in a series of waves. Australia is currently in a third wave, which commenced in 2012, in which legal analytics and technology-assisted review are increasingly being used in the delivery of legal services.[57] The use of these technologies at this developmental stage is gaining momentum, especially in other countries.[58]

The impact on law graduates of technologies being used to deliver legal services will be varied. It may include the loss of jobs for junior lawyers involved in the traditional 'time-consuming, repetitive tasks requiring relatively low levels of skills and experience'[59] — for example, those previously reviewing huge boxes of documents for discovery and litigation requirements. This is now being replaced by e-discovery and e-litigation technologies, making the process much more efficient.

The desktop review conducted by the authors into the existing job market for law graduates revealed the following insights. First, employers of law graduates, including government, top law firms and the 'Big Four' banks in Australia, are already exploring and embracing technologies, including blockchain technologies to complete commercial contracts.[60]

Second, the government has been one of the most significant users of technologies to assist in carrying out statutory powers and functions, most recently (and most notably) for automated administrative decision-making systems, as in the case of debt recovery.[61]

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[57] Julian Webb, 'Legal Technology: The Great Disruption?' in Richard L Abel et al (eds), *Lawyers in 21st Century Societies: Vol 2 — Comparisons and Theories* (Hart Publishing, 2022) 515, 519–20. Webb describes the first wave occurring from 1970 to 1990, focusing on the automation of legal research and information retrieval: at 516–17. The second wave of digital transformation, occurring from 1991 to 2012, was enabled by increased use of personal computers, cheaper software, the internet and increased mobile devices.

[58] Ibid 520–1. Countries taking leadership, across varied platforms of technology, include Singapore, China, Canada and the US.

[59] Moses (n 42) 365.

[60] Corporate and Institutional Banking, 'Blockchain: The Next Big Thing', *NAB Business Research and Insights* (Blog Post, 16 January 2019) <https://business.nab.com.au/blockchain-the-next-big-thing-32894>; Westpac Banking Corporation, 'ANZ, Commonwealth Bank, IBM, SCentre Group and Westpac Commence Live Pilot for Lygon, a Blockchain-Based Platform to Transform the Bank Guarantee Process' (Media Release, 4 July 2019) <https://www.westpac.com.au/about-westpac/media/media-releases/2019/4-july>; 'CBA's Blockchain Centre of Excellence Puts the Pedal to the Metal', *Commbank* (Web Page, 21 January 2019) <https://www.commbank.com.au/guidance/newsroom/commodities-blockchain-trade-finance-201901.html>.

[61] Dominique Hogan-Doran, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13(3) *Judicial Review* 345.

Third, job descriptions are shifting from the familiar and long-held titles of 'law clerk' and 'law graduate', to titles such as 'e-discovery consultant', 'legal document reviewer', 'legal searching support assistant', 'paralegal technologist', and 'associate document reviewer'. Recruiters and employers categorise these positions as 'legal positions'. Law academics need to look for avenues to engage with this environment to ensure that law curricula become more responsive to a changing market for the benefit of graduates' employability.[62]

Fourth, legal education needs to acknowledge that law graduates are the emerging policy developers and law reformers in this changing job market. The need for emerging lawyers to have an understanding of the implications of technologies — legal, economic, social and technical literacy — will only increase as these technologies are promoted as sources of commercial success or social benefit.[63] The law has a history of being criticised for not keeping up with technology, with the resulting lag having implications where 'new technologies can also create new hazards'.[64] Law plays an important role in providing mechanisms to manage these risks,[65] but such risk management is only effective where lawyers are appropriately educated to identify and investigate the issues and critically contribute to the appropriate resolution of how they are to be managed. As put by Denton and Reynolds:

> Every new development presents similar concerns about the speed at which it can be regulated. This includes technologies that currently lack adequate frameworks such as commercial use of drones, self-driving cars, space exploration and computing. The need for regulation of these technologies is perhaps more apparent due to their novelty, but this novelty highlights the need for whole new frameworks.[66]

Employment opportunities favour graduates with the knowledge, skills and mindset that show at least some competency in this environment. Legal education must adapt, through engagement (including research) with employers and the job market to sharpen the understanding of the impacts of technology on the delivery of legal services, as well as the broader legal, social and economic impacts. Having identified the changing employment opportunities afforded by technologies in law, we turn to consider changing attributes expected of law graduates.

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[62] Hunter (n 16); 'Employer Satisfaction Survey', *Quality Indicators for Learning and Teaching* (Web Page, 2020) <https://www.qilt.edu.au/qilt-surveys/employer-satisfaction>. The Quality Indicators for Learning and Teaching data does not specifically address 'legal profession' employer satisfaction.

[63] Farran Powell, 'FTX Declares Bankruptcy', *Forbes Advisor* (Web Page, 14 November 2022) <https://www.forbes.com/advisor/investing/cryptocurrency/ftx-declares-bankruptcy>; Luke Henriques-Gomes, 'Robodebt Went Ahead, Despite Legal Doubts, after Earning Scott Morrison's Backing Inquiry Hears', *The Guardian* (online, 2 November 2022) <https://www.theguardian.com/australia-news/2022/nov/02/robodebt-royal-commission-legal-doubts-centrelink-welfare-debt-recovery-scott-morrison-backing-inquiry-hears>.

[64] Jai A Denton and Christopher S Reynolds, 'Limping Along and Lagging Behind: The Law and Emerging Gene Technologies' (2018) 24 *James Cook University Law Review* 61, 61.

[65] Ibid.

[66] Ibid 61–2.

## A *What Attributes Do 'New Lawyers' Need?*

The attributes of the traditional lawyer have been identified as including a lack of empathy, focus on detail and an unwillingness to delegate.[67] Paradoxically, the 'new lawyer' is emerging almost in opposition. Richard Susskind, in 1996, first articulated the idea of the 'new lawyer',[68] emerging from the increasing use of technologies to deliver legal services. More recently, a summary of the skills needed for the new lawyer was provided by Professor Michael Legg.[69] This summary was part of a commission of inquiry, carried out by the Law Society of New South Wales, in which seven skills or areas of knowledge were identified as essential for the successful future practice of law: the ability to understand and employ technology; interpersonal skills; professional skills; business skills; project management skills; inter-disciplinary experience; and resilience.[70]

The evolution from traditional lawyer to new lawyer invites the question as to where the law academic might sit as an educator of those who will fit on this continuum?

### 1 *Technology Literacy*

Law students need to be able to identify the best technology to employ in a given situation, finding the most efficient and cost-effective way to meet the client's objective.[71] Some law schools 'have already begun to assist students to acquire proficiency in these skills through "law apps" courses and "hackathons"'.[72]

While many law students may enter law school with some technology skills,[73] these 'need to be directed to, and honed for, the practice of law'.[74] For example, the use of document review and e-discovery is rising sharply; students need to be aware of how it works, its applications and its shortcomings.[75]

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[67] Caroline Hart, *The Seven Elements of Successful Country Law Firms* (Federation Press, 2018) 26. Research indicates that there is a 'surprising correlation between pessimism and success in law school', discussed by Martin EP Seligman, Paul R Verkuil and Terry H Kang, 'Why Lawyers Are Unhappy' (2001) 33 *Cardozo Law Review* 33, 40.

[68] Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon Press, 1996); Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (Oxford University Press, 2008); Susskind, *Tomorrow's Lawyers* (n 12); Richard E Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015).

[69] Legg (n 32).

[70] Ibid.

[71] Ibid 375.

[72] Ibid 376. A law app is where students use software packages to build an application to assist in access to justice. A hackathon is a short, intense collaboration between people with a variety of skills (eg, computer programmer) to solve a problem.

[73] Lorelle J Burton et al, 'Digital Literacy in Higher Education: The Rhetoric and the Reality' in Marcus K Harmes, Henk Huijser and Patrick Alan Danaher (eds), *Myths in Education, Learning and Teaching: Policies, Practices and Principles* (Palgrave Macmillan, 2015) 151 <https://doi.org/10.1057/9781137476982_9>.

[74] Legg (n 32) 385.

[75] PA Ryan, 'Exploring the Use of Artificial Intelligence to Improve Law Students' Self-Assessments' in KE Lindgren, François Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2018) 421, 420.

As described in Part I, these technologies are already being deployed in legal practice. It would not be too onerous for a law school to map such technologies against their substantive law courses and suitably embed them. At the very least, acknowledgement of them is essential.

While law students may not need to know how to code, they do need to know the output of the technology and how to evaluate different technologies that are already being used in practice.[76] However in all discussions around the developing technologies affecting legal practice we should not lose sight of the core fundamental legal principles that must underpin these new tools. Students should not be encouraged to think that the application of any technology is an end in itself and a goal that signifies good legal practice. Their use for efficiency purposes will no doubt become crucial. But future practitioners must have an understanding of how the technologies work to have the confidence that they will aid in the provision of sound legal services. Fundamental legal knowledge should drive the choice and manner of use of the tools, not the other way around.

### 2 *Interpersonal Skills, Including Emotional Intelligence, Teamwork and Collaboration*

There are a set of skills required of the new lawyer that are described as human characteristics, particularly emotional intelligence, teamwork and collaboration.[77] These attributes are essential for client care and management, as well as in the new ways of delivering legal services that require 'lawyers to collaborate not only with other lawyers but also with technologists, project managers and other professionals'.[78] Many law schools already incorporate opportunities to develop teamwork and collaboration skills as part of assessment.

### 3 *Business Skills, Including Accounting and Finance*

Law is both a profession and an endeavour where law firm owners are operating and managing a business.[79] '[S]uccess in the law is not achieved by simply being an outstanding legal technician. Knowledge of business and the key accounting and finance tools is a necessity to operate in the legal market'.[80] Law graduates will need to adopt an entrepreneurial mindset to take advantage of opportunities in a more casualised workplace. This includes the ability to network and navigate a more flexible, entrepreneurially based market.[81]

### 4 *Legal Project Management Skills*

Law graduates will need both knowledge and skills relating to legal project management, which involves the scoping, scheduling and costing of legal work, as well as knowing how it is resourced, managed and monitored.[82]

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[76] Legg (n 32) 376.
[77] Ibid.
[78] Ibid 378.
[79] Hart (n 67).
[80] Legg (n 32) 379–80.
[81] Hunter (n 16).
[82] Legg (n 32).

### 5 *Inter-disciplinary Experience*

The literature recognises the advantages held by students who have had customer experience in any capacity. This could include, for example, retail or food services. Such work can give them important skills necessary for dealing with clients.[83] One of the key elements identified as part of this experience is the structured training and reflection that heightens opportunities for student learning.[84] In addition, expectations are that the new lawyer will work not only with clients but also with a range of other professions and occupations, including software developers and accountants.[85]

### 6 *Cross-disciplinary Knowledge and Skills*

Emerging from the literature is that graduates need to acquire certain attributes to become the new lawyer,[86] including cross-disciplinary knowledge.[87] Law schools need to expose students to cross-disciplinary contexts to produce graduates who are more immediately useful to their employers while still teaching the doctrinal content that continues to be mandatory. If law graduates are to remain employable while meeting new challenges,

> then legal education needs to change. … [T]he demands for students with legal and technical expertise, for Susskind's legal knowledge engineers, legal technologists, legal hybrids and legal data scientists, is likely to increase.[88]

This cross-disciplinary trend is not to suggest that law students will learn, acquire and develop 'expertise' in all these skills. Expertise takes time to develop. Instead, law students should acquire the knowledge and skills at university, which are then refined through further study (eg, practical legal training) and continued legal and professional education. Introducing students to the attributes required to succeed with LawTech is seen as a way to maximise students' prospects of success in practice, 'because the right tools optimised to a lawyer's needs and individual practice ultimately make the job far more enjoyable, and far more effective and efficient'.[89]

What is common to this list of attributes for the new lawyer is the focus on experience and skills, rather than knowledge. Yet substantive law and knowledge 'still dominates law school

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[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Richard S Granat and Stephanie L Kimbro, 'The Teaching of Law Practice Management and Technology in Law Schools: A New Paradigm' (2013) 88(3) *Chicago-Kent Law Review* 757; Oliver R Goodenough, 'Developing an E-Curriculum: Reflections on the Future of Legal Education and on the Importance of Digital Expertise' (2013) 88(3) *Chicago-Kent Law Review* 845.
[87] Moses (n 42).
[88] Ibid 366.
[89] Law Society of New South Wales, *The Future of Law and Innovation in the Profession: The FLIP Report 2017* (Report, 2017) 31 <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf>.

teaching and curriculum in Australia with insufficient adaptation to the changing environment or reflection about the implications of all of this for legal education'.[90]

Possibly one of the barriers to providing appropriate skills development within law schools is that delivering learning and teaching focused on the acquisition of skills is more resource intensive when compared with providing a law student with a login and password to a database. The economic constraints of offering law programs have been raised by the law academy, including concerns that '[l]aw schools and their faculty are being asked to train students to practice in ways that produce a faster return on investment for law firms and the legal market'.[91] This has been described by Margaret Thornton as universities imposing corporatist and commodifying approaches upon law academics.[92]

## V ANALYSIS AND RECOMMENDATIONS

'There's no turning back: technology is now a ubiquitous reality in the everyday practice of law.'[93] It is therefore part of the world and job market into which law graduates are entering. Law schools must respond to this new world and better prepare and equip their graduates. They have the flexibility to do so within the existing regulatory framework.

### A *Legal Education Has the Ability to Adapt and Respond*

The first finding from this exploratory research is that one of the core roles of legal education has been to prepare graduates for employment, including contributing more broadly within the legal system to include legal, social and economic aspects. Ultimately, the responsibility for adaptation and evolution is best held by law academics, and this role should be carried out as a fiduciary role towards graduates, rather than as a broker acting in the interests of either the legal profession or entrepreneurial tech-interests.

In carrying out this role, law academics must engage to a greater extent with technology innovators and developers, as well as the expanding and changing range of employers. Engagement needs to be proactive rather than reactive and motivated by attempts to bridge the widening gap between law schools and the job market. That gap is fast becoming the dinosaur (rather than the elephant) in the rooms of both law academics and practitioners.

This engagement can be done by law academics drawing upon their existing skillsets, including independent critical analysis and research design expertise.[94] The question must be asked: what

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[90] David Weisbrot, 'Taking Skills Seriously: Reforming Australian Legal Education' (2004) 29(6) *Alternative Law Journal* 266, 269.
[91] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2009) 10(6–7) *German Law Journal* 641, cited in Graben (n 6) 150.
[92] Graben (n 6) 150 citing Margaret Thornton, 'Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same' (1998) 36(2) *Osgood Hall Law Journal* 369.
[93] Baker (n 9) 557.
[94] Complex adaptive systems theory gives insights into the approaches that legal education can leverage. Kevin J Dooley, 'A Complex Adaptive Systems Model of Organization Change' (1997) 1 *Nonlinear Dynamics, Psychology, and Life Sciences* 69 <https://doi.org/10.1023/A:1022375910940>.

is the point of universities, if not to be the laboratory for research and development in response to curiosity, which then flows into the classroom as learning and teaching? Law academics have a window of opportunity to draw upon their abilities to research and engage, with the outcome of bringing about renewal of the curriculum to better prepare their graduates.

The market into which law graduates are seeking employment is a rapidly changing one, as described throughout this paper, yet such graduates have gained their law qualifications through traditional approaches, taught by law academics who have also progressed through traditional pathways. Should there be a fear that both are possibly siloed from outside engagement?

### B *Adaptation within the Current Regulatory Framework*

The second finding of this paper is that review and reform of the law curricula at the national level may be time-consuming and require consensus among the legal profession and law deans. However, this does not mean that a law school cannot undertake its own review of its own curriculum within the parameters of the Priestley 11, TLOs and GAs.[95] Law academics need to question whether, and to what extent, they are prepared to take on a greater leadership role at the law school level of those activities that are within their control. Such activities include investigating, researching, mapping and adapting curricula to ensure their graduates can compete in a changing legal profession impacted by technologies that demand new skills and new attributes.

There is nothing to stop law academics from harnessing the very technologies under discussion — for example, applying modelling and predictive analysis — to explore the impacts of adapted legal education to better meet the needs of law graduates,[96] while at the same time staying true to the fundamentals of core legal knowledge.

While the legal profession and judiciary may direct elements of legal education (in part to ensure consumer protection and ethical standards), there remains sufficient autonomy and flexibility within the national and state regulatory framework for law academics to respond and adapt to a changing world that is presenting challenges, pressures and opportunities.

The TLOs and GAs have, so far, provided some futureproofing and employability opportunities for graduates because they have focused on skills rather than technical expertise that could ground a graduate in a time capsule and therefore limit their ability to maximise opportunities. The knowledge and skills acquired by graduates should have some capability of application into the future rather than having a short use-by-date. For example, the skill of critical analysis is likely to futureproof a graduate more than a detailed knowledge of a particular technology. The role of a law school should include investigating its curriculum to determine where and how students can be engaged, challenged and prepared for the impacts of technologies. This is

[95] Moses (n 42).
[96] Dooley (n 94).

generally not yet occurring.[97] Further, law schools must make informed decisions about curriculum design and be willing to seek evaluation and review, not only by the Tertiary Education Quality and Standards Agency, admitting authorities and the institution itself, but also from graduates and employers. Anecdotally, feedback from recent graduates about their transition into practice can be very sobering.[98]

## C *Recommendations*

This paper makes three recommendations for legal education to better prepare law graduates for a changing world.

First, law schools should reflect upon the proven dynamic nature of legal education and take a more proactive approach to reviewing and redesigning their curricula, rather than waiting for others to act. Leadership within law schools is needed to ensure law graduates are taught and assessed on skills and knowledge appropriate to the changing employment environment.

Second, law schools should move in closer and engage with employers (who seem to be adapting more effectively to technology) to ensure law academics are better informed about the careers market into which graduates are entering.

Third, law schools must engage and connect with disciplines other than law to incorporate cross-disciplinary knowledge and skills, such as interpersonal skills, emotional intelligence, teamwork and collaboration, legal project management skills, as well as the languages associated with other disciplines.

More than ever, legal education needs to reboot and adapt to a changing environment. It needs to remain independent but be far better informed if it is to fulfil its function as a lead actor in ensuring continuity and improvement of access to law and justice.

[97] Hunter (n 16).
[98] Eg, feedback received via university alumni networks.

# EMBRACING DISRUPTION IN TEACHING LEGAL RESEARCH TO UNDERGRADUATE LAW STUDENTS

*Samantha Kontra*[*]

## ABSTRACT

Legal research is a fundamental skill that law students need to grasp from early on in their studies. Various internal and external disruptions can significantly impact the ways in which legal research is taught to first-year law students, resulting in the need for constant re-evaluation and curriculum redesign. This article evaluates the impact of three such disruptions — the loss of a dedicated Law Liaison Librarian position, a content restructure, and the move to online and hybrid teaching — and analyses how these disruptions prompted the development of a stronger legal research training program.

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## I INTRODUCTION

The first semester of law school is incredibly challenging. Students need to simultaneously learn how to study law, understand and follow academic processes, acquire new terminology, and adjust to the tertiary study environment.[1] A first-year, first-semester topic must be carefully crafted to allow students to do all of this, while also gaining substantive knowledge and introductory practical skills, an exceedingly difficult task in such a crowded curriculum.[2] Legal research is an imperative and valuable component of the first semester of legal education,[3] and is a 'life-long skill'.[4] When taught well, and carefully scaffolded with the teaching of legal analysis, law students are able to use their legal research skills to evaluate and respond to a legal question, understanding the interconnectedness of research and analysis skills as key to problem-solving.[5] Legal research skills must therefore be taught alongside other key skills, allowing students to simultaneously grapple with legal research, reading primary and secondary sources, analysis, writing and referencing. While these processes are challenging, good learning is increased through repetition of difficult skills.[6]

Regardless of whether legal research is taught by academic staff or librarians,[7] frontloaded or scaffolded throughout various topics,[8] or even taught asynchronously online,[9] various disruptions can wreak havoc on careful planning and thoughtful topic design. This article addresses the way in which legal research teaching can be disrupted, before concluding that

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[1] Sally Kift, *Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education* (Final Report, Australian Law and Teaching Council Fellowship Program, August 2009), Appendix 1 <https://transitionpedagogy.com.au/wp-content/uploads/2014/05/Kift-Sally-ALTC-Senior-Fellowship-Report-Sep-09.pdf>.

[2] See, eg, Bobette Wolski, 'Why, How, and What to Practise: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52(1–2) *Journal of Legal Education* 287, 291–2.

[3] Even law students agree: Kay Tucker, 'Collaborating on Teaching the RAW Materials for a Law Degree — Research and Writing' (2008) 16(4) *Australian Law Librarian* 256, 257. In the United States: Tenielle Fordyce-Ruff, 'Research across the Curriculum: Using Cognitive Science to Answer the Call for Better Legal Research Instruction' (2020) 125(1) *Dickinson Law Review* 1. In the United Kingdom: David Hand and Matthew Terrell, 'Bridging the Gap between University and Practice: Findings from a Study on Legal Research Education' (2019) 19(3) *Journal of Information Management* 131.

[4] Clare Cappa, *Good Practice Guide (Bachelor of Laws) Research Skills* (Australian Learning and Teaching Council, 2012) 2.

[5] Ibid 2; Alyson M Drake, 'Building on CREAC: Reimagining the Research Log as a Tool for Legal Analysis' (2021) 52(1) *University of Memphis Law Review* 57; Caroline L Osborne, 'The State of Legal Research Education: A Survey of First-Year Legal Research Programs, or "Why Johnny and Jane Cannot Research"' (2016) 108(3) *Law Library Journal* 403, 407.

[6] Jennifer M Cooper and Regan AR Gurung, 'Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA' (2018) 62(2) *St Louis University Law Journal* 361, 369–70.

[7] Dedicated Law Liaison Librarian staff are becoming rare in Australia, but not in the United States or United Kingdom: Gillian Hallam and Kim Kelly, 'Law Librarianship — Legal Research: The Past, Present and Future of the Specialised Course Delivered by Queensland University of Technology' (2016) 24(3) *Australian Law Librarian* 47; Paula Everett, 'Engaging the Future with Legal Research Skills' (2021) 29(4) *Australian Law Librarian* 298. Cf Association of Legal Writing Directors, *2008 Survey Results* (Legal Writing Institute, 2009) <https://www.alwd.org/images/resources/2008%20Survey%20Report%20(AY%202007-2008).pdf> cited by Tucker (n 3) 256; Hand and Terrell (n 3) 134.

[8] Hand and Terrell (n 3) 134.

[9] Ibid 135; Khelani Clay and Shannon Roddy, 'Best Practices for Teaching Advanced Legal Research Asynchronously Online' (2018) 62(1) *Law Librarian Lights* 15.

disruption itself is beneficial for the improvement of teaching programs and the building of staff and student skills. After this Introduction (Part I), Part II of the article examines the educational requirements for undergraduate law courses in Australia, and contextualises the placement of legal research within these requirements. Part III explores the way in which legal research is taught and assessed in a first-year, first-semester topic at Flinders University — 'Essential Legal Skills'[10] — to set the scene for the disruptions that challenged this approach. The article then evaluates three disruptions to teaching legal research and the resultant changes to the topic: the loss of a dedicated Law Liaison Librarian position (Part IV); a content restructure (Part V); and the move to online and hybrid teaching (Part VI). Part VII analyses the overall lessons from these disruptions, and the way in which these have shaped the 2022 version of the topic. Ultimately, the article emphasises the need for careful planning and frequent evaluation, particularly in first-year topics.[11] It also provides a tale of resilience: even though each disruption was initially perceived as negative and somewhat insurmountable, the disruptions enhanced the topic design and resulted in better legal research learning opportunities for students.

## II REQUIREMENTS FOR TEACHING LEGAL RESEARCH

For admission to legal practice,[12] Australian law degrees require students to study legal knowledge, taught during undergraduate law studies (*Prescribed Areas of Academic Knowledge*),[13] and practical legal training (*PLT Competency Standards*).[14] Legal education is guided by the Threshold Learning Outcomes ('TLOs') for law, six areas outlining the minimum competency that graduates must achieve,[15] each with its own good practice guide.[16]

There is no mention of 'research' or 'legal research' in the *Prescribed Areas of Academic Knowledge*, though it is implied that some research may need to be undertaken to properly understand each area. In the *PLT Competency Standards*, 'research' is mentioned as part of the Problem Solving Competency Standard.[17] Here, as part of 'analysing law', graduates must have competently 'researched … questions of law properly, having regard to the circumstances'.[18] This should be undertaken through the use of 'law libraries, on-line searches, electronic data

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[10] Flinders University is in Adelaide, South Australia. The Law program is part of the College of Business, Government and Law.
[11] Kift (n 1) Appendix 2.
[12] Regulated by: *Legal Profession Act 2006* (ACT); *Legal Profession Uniform Law 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (QLD); *Legal Practitioners 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession (Admission) Rules 2009* (WA).
[13] Law Admissions Consultative Committee, *Prescribed Areas of Academic Knowledge* (Guidelines, December 2016).
[14] Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry-Level Lawyers* (Guidelines, January 2015).
[15] Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) 9 <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.
[16] See, eg, Cappa (n 4).
[17] Kift and Israel (n 15) [5.12].
[18] Ibid [5.12](a).

bases, legal citators and digests'.[19] By including this research component as part of 'analysing law', the *PLT Competency Standards* identify the link between legal research and legal analysis. However, it is the TLOs that cement this interconnection. Two TLOs are significant for legal research. TLO 4: Research Skills requires that graduates

> are able to identify the need for research, select and use appropriate information sources, and determine their authority. These skills also include the ability to read, comprehend, and paraphrase a range of legal and non-legal documents; as well as legal referencing skills; an understanding of the requirements of academic integrity; and the ability to manage, organise, and retrieve information effectively.[20]

This TLO essentially addresses standard legal research skills or 'text-based doctrinal research',[21] ie, being able to find and organise information. These skills, however, are only the tip of the iceberg when it comes to legal research.[22]

TLO 4 further requires graduates to 'find and use up-to-date primary and secondary legal sources in order to locate relevant material' and to 'evaluate' and 'synthesise factual, legal and policy issues'.[23] These additional elements shift the focus towards legal analysis by going beyond merely finding materials to understanding information that has already been found and identifying links between sources. This underscores the overlap between TLO 4 and TLO 3: Thinking Skills. The first two components of TLO 3 require graduates to

> a) Identify and articulate legal issues,
>
> b) Apply legal reasoning and research to generate appropriate responses to legal issues[24]

These components require graduates to use legal reasoning to apply research findings to a legal issue.[25] Together, these two TLOs emphasise a process of searching for legal materials, evaluating the validity and value of these materials, reading and understanding the materials, analysing the materials with a specific goal in mind, and applying the principles drawn from the legal materials to a legal problem. To a seasoned legal researcher, the concept of research and analysis being connected does not warrant further explanation. However, to a first-semester law student, these concepts are not only foreign but completely disparate. Accordingly, the way in which students are introduced to legal research is critical.

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[19] Ibid [5.12](a) Explanatory Note.
[20] Ibid 19.
[21] Cappa (n 4) 2.
[22] See, generally, Cappa (n 4); Drake (n 5).
[23] Kift and Israel (n 15) 20.
[24] Ibid 17.
[25] Ibid 18.

## III TEACHING LEGAL RESEARCH IN A FIRST-YEAR, FIRST-SEMESTER UNDERGRADUATE LAW TOPIC

Legal research can be taught by library or academic staff,[26] in embedded or standalone courses,[27] with the material frontloaded, integrated or online.[28] At Flinders Law, legal research instruction has always been a core focus of a compulsory first-year, first-semester topic currently called 'Essential Legal Skills'.[29] Research is one of many skills taught in the topic, which includes reading and understanding legal sources, conducting legal problem-solving and analysis, legal writing, interviewing clients, and negotiating. In 'Essential Legal Skills', the learning outcomes relating to legal research are to:

- Introduce students to legal research skills, including selecting, locating, using and updating appropriate primary and secondary sources [TLO 4]
- Introduce students to legal problem solving and analysis skills and allow students to develop and refine these skills [TLO 3][30]

The legal research components of this topic have been taught in various ways since 2012, with changes prompted by both technological advances and the disruptions discussed in Parts IV–VI below. Between 2012 and 2017 the topic was called 'Legal Research and Writing' and had a consequent strong focus on legal research, analysis and writing.

### A *Delivery of Materials*

In both 'Essential Legal Skills' and its precursor 'Legal Research and Writing', legal research has always been co-taught between academic staff and the Law Liaison Librarian, Heidi Savilla. This allowed stronger emphasis on research as a skill,[31] enabling more immediate feedback,[32] drawing on multiple types of legal research expertise, and engaging students through dialogue.[33] Co-teaching was a valuable component of this topic. Savilla was very well placed to deliver the material, and having a law degree enabled her to bring additional insights to curriculum design and teaching. She was able to prompt students through the process of

[26] See, eg, Cappa (n 4) 13; Tucker (n 3); Everett (n 7). For the American context, see Fordyce-Ruff (n 3).
[27] See, eg, Everett (n 7) 302–3.
[28] Hand and Terrell (n 3) 134: 46.6% of United Kingdom students prefer an integrated approach.
[29] Prior to 2018, the topic was called 'Legal Research and Writing'.
[30] 'Essential Legal Skills', *Flinders University Handbook* (Web Page, 2022) <https://handbook.flinders.edu.au/topics/2022/LLAW1312?year=2022>.
[31] Catherine Minett-Smith and Carole Davis, 'Widening the Discourse on Team-Teaching in Higher Education' (2020) 25(5) *Teaching in Higher Education* 579.
[32] Erica Britt et al, 'Why Collaborative Teaching? An Assessment of Merits and Methods' (2013) 6(1) *Scholarship of Teaching* 20; Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011) 280–1; Phil Race and Ruth Pickford, *Making Teaching Work: 'Teaching Smarter' in Post-Compulsory Education* (SAGE, 2007) 119.
[33] Rachael Field and Barbara Kent, 'Engaging First Year Students with an Effective Learning Environment: Combining Laurillard's Conversational Framework and Active Learning with Blended Delivery' (Conference Paper, Pacific Rim First Year in Higher Education Conference: Engaging Students, 12–14 July 2006).

searching-evaluating-reading-understanding-analysing-applying the law in a way that is not possible if the instructor does not have a law degree.

Savilla co-delivered three in-person, one-hour lectures with the Topic Coordinator ('TC'), explaining and demonstrating the process of legal research. Students attended three in-person, two-hour workshops, held in a computer lab in the library (to ensure equal access to computers by all students), where the tutor and Savilla would co-teach the relevant material. During the workshops, students were introduced to legal databases, exploring these by using a problem question to guide their research. Students learned how to plan a research strategy,[34] and how to record their research.[35] Workshops were part instructional and part interactive, allowing students to apply the skills they were learning.[36] Both online and physical resources were used, and students were taken on a tour of the law library.

## B *Assessment*

Between 2012 and 2017, students' assessments took various forms, initially including submission of the library skills workbook (a booklet that students completed during workshops), a library skills quiz (requiring students to navigate the catalogue and locate physical resources), and a research assignment (described in detail below). Over time, the focus shifted to online resources, and the law library tour and the physical components of the quiz were removed. The one legal research assessment that has remained constant is an authentic, experiential research assignment.[37] This assignment presents students with a problem question addressing an unfamiliar area of law. Students are required to draft a research plan, log their research, reflect on the research process, read the sources they have found, and apply their findings to the provided scenario by writing a letter of advice to the client. These skills are all scaffolded throughout the topic.

## C *Evaluation and Improvement*

In 2015, the TC and tutors, with Savilla's assistance, reformed the legal research component.[38] While the content remained similar, teaching was redesigned to better interconnect other components of the topic, placing greater emphasis on legal analysis, guided by a specific problem question, which students had already used as a basis to learn issue identification and application of case law to a fact scenario. The question was then used in legal research workshops, to teach students to find relevant secondary and primary sources. In this sense,

[34] Caroline L Osborne, 'The Legal Research Plan and the Research Log: An Examination of the Role of the Research Plan and Research Log in the Research Process' (2016) 35(3) *Legal Reference Services Quarterly* 179.
[35] Drake (n 5); Osborne, 'The Legal Research Plan' (n 34).
[36] Fillipa Marullo Anzalone, 'Some Musings on Teaching Legal Research' (2015) 20 *Legal Writing: The Journal of the Legal Writing Institute* 5, 6.
[37] Alyson M Drake, 'The Need for Experiential Legal Research Education' (2016) 108(4) *Law Library Journal* 511, 527–33.
[38] The author thanks Brendan Grigg, Senior Lecturer in Law at Flinders University, for his work and leadership in this redesign.

students were simultaneously researching (finding and updating sources) and analysing (evaluating and applying their findings to the scenario).

The original topic, 'Legal Research and Writing', has been frequently evaluated and improved. By 2017, the research component of the topic was very heavily interconnected with the other components of the topic and was working well. Although there were some challenges with student engagement, this was mediated through a detailed explanation of the importance of legal research, and the ways that students will use legal research skills in assessments, future studies and employment.[39] This was when the first of the three disruptions began to challenge the delivery of legal research teaching.

## IV DISRUPTION 1: LOSS OF A DEDICATED LAW LIAISON LIBRARIAN POSITION

Libraries typically offer two key service delivery models to support learning and teaching: a subject-specific model that includes having dedicated liaison librarians in key subject areas who work directly with academic staff in that area; or a functional-based approach comprising a team of non-subject-specialists who, together, offer learning and teaching support.[40] Subject-specific liaison librarians have been fairly commonly used since the 1970s,[41] and at Flinders University we have long had a dedicated Law Liaison Librarian in this role, who was fundamental to our teaching in the law degree. Globally, however, there has been a shift in the way library services are delivered. Functional-based models are more commonly adopted, particularly in the United Kingdom, America and Australia,[42] for reasons including 'ensuring consistency', '[a]cquiring new expertise', 'improving efficiency and focus' and 'budgetary constraints', amongst others.[43] While this change is often positively perceived, academic staff often voice serious concerns about a reduction in specialist knowledge and a decrease in quality.[44] After a university-wide restructure of professional services in 2017, the position of dedicated Law Liaison Librarian was replaced by a team of Learning and Teaching Librarians ('Librarians'): strong researchers, but with no background in law – an emerging trend in Australia.[45] This was perceived as a significant loss given how instrumental Savilla was to the legal research program.

The removal of the Law Liaison Librarian position led to a significant change in the co-teaching aspects of 'Essential Legal Skills'. At least two Librarians were present for each workshop. Although they had watched the previous year's lectures and reviewed the materials, this did not adequately prepare them for being in the classroom. They added good insight about

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[39] For stereotypes of legal research students, see Drake, 'Building on CREAC' (n 5).
[40] See, eg, Catherine Hoodless and Stephen Pinfield, 'Subject vs Functional: Should Subject Librarians Be Replaced by Functional Specialists in Academic Libraries?' (2018) 50(4) *Journal of Librarianship and Information Science* 345.
[41] Irene Doskatsch, 'From Flying Solo to Playing as a Team: Evolution of Academic Library Services Teams at the University of South Australia' (2007) 28(8/9) *Library Management* 460, 460.
[42] See, eg, Hoodless and Pinfield (n 40); Doskatsch (n 41).
[43] Hoodless and Pinfield (n 40) 349.
[44] Doskatsch (n 41) 464–5.
[45] See, eg, Hallam and Kelly (n 7) 48.

research techniques (eg, Boolean searching) and demonstrated the use of the databases in response to verbal instructions from the tutor but were not able to co-teach the materials. In part, this seemed due to a lack of confidence with law-specific materials (the Librarians were only one step ahead of the students) and a lack of familiarity with co-teaching. Tutors resultantly had an increased workload during workshops, simultaneously delivering the materials while instructing the Librarians about what to demonstrate on-screen, and ensuring students were following along. Previously this had been effortless, as Savilla had been involved in co-designing the materials and her legal background allowed her to fill in any gaps. Pausing to give detailed, clear instructions to the Librarians felt as though it was slowing down the class, while previous workshops with Savilla had felt more conversational. In hindsight, these clear and thorough instructions were useful for the students, particularly when teaching moved online (see Disruption 3 below).[46] However, including non-subject-specific librarians in the teaching of the topic meant that the previously clear links between research and analysis were weakened, as the Librarians did not have legal knowledge to draw on in assisting the lecturer to make these links. The emphasis in workshops was on finding materials, rather than on the intersection between planning, finding, evaluating, reading, analysing and applying. This meant that the true benefits of co-teaching and the hard work of redesigning the topic pre-2017 were lost.

Concurrent with these challenges arising, the Librarian team was redefining the process of teaching research skills, using learning theories, backwards design, threshold concepts and learning practices.[47] Savilla applied these theories to teaching legal research by developing materials that would help the non-legal-specialist Librarian team to understand legal research materials and processes, gain confidence, and be able to participate more fully as co-teachers in the workshops.[48] She drew on Meyer and Land's work on threshold concepts, which represent 'a transformed way of understanding, or interpreting, or viewing something without which the learner cannot progress'.[49] These must meet three criteria: 'transformative, troublesome, and irreversible',[50] that is, identify the key points in legal research at which the material clicks — the lightbulb moments after which the process becomes much easier. Savilla used Virginia Tucker's doctoral work to determine how the information environment, vocabulary and structures are drawn together to form these threshold concepts.[51] Using her research into threshold concepts for legal research and the concept of 'decoding the

[46] Clay and Roddy (n 9) 16.
[47] Heidi Savilla, 'Teaching Legal Research: Using Past Practice and Present Confusion to Inform Future Learning' (Conference Paper, Australian Law Librarians Association Virtual Conference, 2001) <https://vimeo.com/613256684>.
[48] This course was specifically designed to acclimate current library staff to legal research: cf Hallam and Kelly (n 7) 49.
[49] Jan Meyer and Ray Land, *Threshold Concepts and Troublesome Knowledge: Linkages to Ways of Thinking and Practising within the Disciplines* (Enhancing Teaching-Learning Environments in Undergraduate Courses Project Occasional Report, May 2003) <http://www.etl.tla.ed.ac.uk/docs/ETLreport4.pdf> 1, cited by Savilla (n 47).
[50] Meyer and Land (n 49) 4–5.
[51] Virginia Tucker, 'Acquiring Search Expertise: Learning Experiences and Threshold Concepts' (PhD Thesis, Queensland University of Technology, 2012) <https://eprints.qut.edu.au/63652/1/Virginia_Tucker_Thesis.pdf>, cited by Savilla (n 47).

disciplines',[52] Savilla reconceptualised the workbook used in 'Essential Legal Skills'. The Librarians completed the workbook, using weekly debriefs to identify questions and challenges and to determine where the threshold concepts lie in legal research education.[53] From these discussions Savilla identified the most challenging parts of legal research — areas not previously recognised because of the teaching staff's expertise in this area.

Savilla resultantly redeveloped materials for staff and students. The Librarians were given a more detailed version of the student workbook, which explained the differences between legal and non-legal sources and research processes, introducing legal principles and legal terminology.[54] Before co-teaching with academic staff, Librarians work through the materials across four weeks, with a weekly discussion and debrief. This also allows them to pre-empt questions that could arise in class. For students, Savilla created several diagrams to explain the process of legal research, which have become an integral part of 'Essential Legal Skills'. For example, one diagram considers the documents that are created through the process of a court case — from the pleadings and transcript to unreported, reported and authorised judgments.[55] The second part of the diagram describes how case citators report this information. Other diagrams explain the process of legal research and the world of legal research, which are used to teach legal research planning, listing resources in the order in which they should be used and updated. This is a highly valuable resource and provides the basis for all research activities in 'Essential Legal Skills'. This also serves as a valuable tool for students as they progress through their law studies, where they might rely more heavily on teacher-provided materials rather than utilising their legal research skills.[56]

Ultimately, the loss of the Law Liaison Librarian position was felt to be a strong blow in terms of teaching but having our former Law Liaison Librarian involved in redeveloping the teaching and learning materials for law has resulted in highly beneficial resources and a stronger team of Librarians who are developing expertise in legal research. Savilla is still part of the team and is involved in workshops when possible. While not all the Librarians feel confident with co-teaching the workshops, they are encouraged to sit in and observe the co-teaching between Savilla and one of the academics, before taking an active role. This has allowed co-teaching — and the benefits that accompany it — to be reinstated in the topic. That said, one lingering concern is the high turnover of staff in the Librarian team and reclassification of various library staff members, though this problem can only be addressed at university level.

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[52] 'Decoding the Disciplines', *Indiana University Bloomington Center for Innovative Teaching and Learning* (Web Page) <http://decodingthedisciplines.org>, cited by Savilla (n 47).
[53] Savilla (n 47).
[54] Brooke J Bowman, 'Researching across the Curriculum: The Road Must Continue beyond the First Year' (2008) 61(3) *Oklahoma Law Review* 503, 532–6.
[55] See, at Monash Law School, Kay Tucker (n 3) 260.
[56] Lisa Smith and Kay Tucker, 'Flexible Delivery of Advanced Legal Research: A Skills Unit for Later Year Undergraduate Law Students' (2004) 12(3) *Australian Law Librarian* 35, 35.

## V DISRUPTION 2: CONTENT RESTRUCTURE

In 2018, Flinders Law commenced a whole-of-degree curriculum refresh. This disruption was anticipated, which allowed time for more careful planning. Overall, this has been extremely positive, but did lead to challenges in redesigning the teaching of legal research skills in first-year topics. It is difficult to tell the exact impacts of this disruption, however, due to Disruption 3 occurring at the same time as the new curriculum commenced.

It was during the curriculum refresh that 'Legal Research and Writing' became 'Essential Legal Skills'. This caused a shift in emphasis and content. The new content was heavily influenced by external reports about the profession,[57] including *The Future of Law and Innovation in the Legal Profession*,[58] and an internal audit of the skills that first-year students are expected to develop. Another, related, challenge was a restructuring of the teaching pattern, moving from a weekly, in-person, one-hour lecture and two-hour workshop to a weekly two-hour, in-person seminar, and a weekly one-hour task alternating between in-person tutorials and asynchronous online tasks. This would enable students to engage in greater interaction and group work during the seminars, reserving tutorials for six key topics (including two skills assessments), with online tasks used to formatively test students' knowledge and facilitate reflection. This would also introduce online learning to students.

The legal research components of 'Essential Legal Skills' were restructured into three two-hour seminars. The research materials were dissected and scaffolded[59] across the entire semester to encourage learning through repetition.[60] To draw on as much expertise as possible, the content restructure was done by the TC, Savilla, and one of the Librarians with the most interest and confidence in teaching legal research. As a team, they dissected the teaching materials, lectures, workbook, workshop, and Savilla's findings relating to threshold concepts and 'decoding the disciplines'. For example, the materials about finding case law are now embedded into the week in which students learn how to read and analyse case law, likewise with legislation. Since the concepts had been scaffolded through previous weeks, the research seminars were devoted to teaching research skills themselves, paired with tasks from the previous workbook that students completed in groups. The skills quiz assessment was reintroduced, with questions about planning and conducting legal research, particularly examining which databases students would use to find particular resources.

While the changes to the content and teaching pattern were initially challenging, the curriculum refresh allowed the topic to be reconceptualised, which led to a design that, ultimately, could

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[57] Kift and Israel (n 15); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, 2000); Law Admissions Consultative Committee, *Prescribed Academic Areas* (n 13); Law Admissions Consultative Committee, *Practical Legal Training* (n 14).
[58] Law Society of New South Wales Commission of Inquiry, *The Future of Law and Innovation in the Profession* (Report, 2017); Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).
[59] Kift et al (n 32) 291–301.
[60] For excellent analysis of cognitive psychology and retrieval in learning legal research, see: Fordyce-Ruff (n 3) 36–42; Drake, 'Building on CREAC' (n 5) 70–6.

allow students more autonomy and flexibility, and better opportunities to engage in both in-person and online instruction. 'Essential Legal Skills' was taught for the first time in Semester 1, 2020, and within three weeks all in-person teaching moved online as a result of the pandemic. Consequently, the legal research components were not run as planned.

## VI DISRUPTION 3: THE MOVE TO ONLINE AND HYBRID TEACHING

When the move to online learning was announced,[61] the higher education sector was plunged into chaos. Although online learning had been a broad consideration within the education sector,[62] in a course that was only accredited for face-to-face teaching this move appeared unfathomable and, indeed, required approval from accrediting bodies. Students and staff alike were juggling work/study from home, unpredictable casual incomes, and constantly changing pandemic-related rules. This does not even include the resultant mental health impacts on students who were also trying to study law for the first time.[63] Resultantly, the study pattern of 'Essential Legal Skills' was again changed: the two-hour weekly seminar became a one-hour pre-recorded lecture and one-hour of synchronous online class discussion, embracing flipped pedagogy.[64] Many students attended the synchronous class, communicating mainly through the chat. Online tutorials were more difficult. Originally intended to be highly interactive, the move online meant that students did not necessarily have working cameras/microphones or were unable or unwilling to use these.[65] The technology was clunky and unfamiliar, particularly screen sharing and breakout rooms.

All online teaching methods in 'Essential Legal Skills' were initially an unplanned reaction to moving the whole topic online overnight — none of the planned materials or teaching methods had been intended for a fully online delivery.[66] While students found the pre-recorded materials useful, it was disconcerting for tutors who were unable to glance over students' shoulders to identify difficulties.[67] In the seminar, students were placed into breakout rooms to practice

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[61] In South Australia, this occurred on Monday 16 March 2020. See, eg, Daniel Keane, 'Coronavirus Prompts Declaration of Public Health Emergency in South Australia', *ABC News* (online, 15 March 2020) <https://www.abc.net.au/news/2020-03-15/coronavirus-prompts-declaration-of-public-health-emergency-in-sa/12057684>. See also Dean Faulkner, 'Gatherings of More than 10 People Banned in SA under Stricter Coronavirus Social Distancing Rules', *ABC News* (online, 28 March 2020) <https://www.abc.net.au/news/2020-03-28/sa-bans-gatherings-of-10-people-under-strict-coronavirus-rules/12099366>.

[62] Australian Government Productivity Commission, *5 Year Productivity Inquiry: From Learning to Growth* (Interim Report, 5 September 2022) 2.3 <https://www.pc.gov.au/inquiries/current/productivity/interim5-learning/productivity-interim5-learning.pdf>.

[63] Transitioning to law study is difficult enough: Nicholas Corder, *Learning to Teach Adults: An Introduction* (Routledge, 2nd ed, 2008) 3–4.

[64] Drake, 'The Need for Experiential Legal Research Education' (n 37) 530–1.

[65] The Learning Management System does not allow backgrounds to be blurred or customised.

[66] Online teaching requires careful and considered preparation: Ken Swift, 'Give It a Try, It's Not So Bad: Utilizing Distance Learning in First-Year Legal Research and Writing Courses' (2019) 32(2) *Second Draft* 30, 31.

[67] Hand and Terrell (n 3) 135.

research and receive peer feedback:[68] not one group shared their screen. Thankfully, Savilla attended the seminars, helping the TC give more attention to each group.

At this stage of the semester, students had been online for five weeks, and were overwhelmed by their study load, the global situation, and stay-at-home orders. They were doing minimal preparation, though typically still attending online classes. After some frank conversations with students, it became apparent that they did not understand how to study in this environment. As a result, the TC made a short video giving all LLBLP students tips about how to study when lacking motivation and focus.[69] Another student concern was the sheer number of low-tech videos across all topics, which did little to capture students' attention. In response, the TC changed the approach to legal research recordings — using one instructional lecture and an interview lecture based on conversational frameworks[70] in which they interviewed Savilla. Savilla was provided with several research questions used in past classes and talked through her approach while demonstrating the process on-screen. The TC loosely followed the 'decoding the disciplines' process, prompting Savilla to dissect the research process. This allowed the two experts to reinvigorate co-teaching and embed answers to questions asked in previous iterations of the topic. After viewing this interview, students were more willing to participate in the legal research seminars, and their research quiz grades were higher than expected.[71] Similar recordings are now used for five skills in 'Essential Legal Skills'.

In 2021, hybrid teaching was introduced, with classes taught simultaneously in-person and online, and recorded. Given the 2020 challenges with connection issues and teaching taking longer, the teaching pattern was altered to weekly one-hour pre-recorded materials and a weekly one-hour workshop. This enabled the reintroduction of three dedicated workshops for legal research. The material remained scaffolded throughout the topic, to link research with analysis, and the pre-university restructure workbook was reintroduced, now separated into secondary sources, primary sources and research planning.

Teaching hybrid legal research classes provided a new layer of difficulty. Effectively, these were two different cohorts being taught simultaneously.[72] It was hard to know which cohort to prioritise, and classes were plagued with connection difficulties and limited availability of technology in teaching rooms, while Covid-related density requirements minimised groupwork options. However, the in-person dynamic made it easier for the tutor to identify and assist students having difficulties. The same problems remained, though, in relation to not knowing how online students were faring. This was overcome, in part, by verbalising and recording an

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[68] Jennifer Hurley, 'Legal Research Skills Development for Online Law Students: The Essential Ingredients' (2013) 21(4) *Australian Law Librarian* 236, 238.
[69] The video page was accessed 241 times between 9 April and 30 June 2020. If viewed by 241 individual students, this would represent 46% of the LLBLP cohort at that time.
[70] Field and Kent (n 33).
[71] Of 88 students, 82 students completed the quiz. The median score was 8.4/10, the average was 8.3, and only seven students scored under 7/10.
[72] For a literature review on hyflex (hybrid) teaching, see Michael Detyna et al, 'Hybrid Flexible (HyFlex) Teaching and Learning: Climbing the Mountain of Implementation Challenges for Synchronous Online and Face-to-Face Seminars during a Pandemic' [2022] *Learning Environments Research* <https://doi.org/10.1007/s10984-022-09408-y>.

answer to each question students asked. A second method of overcoming this was a collaboration between the TC and the Flinders Law Students' Association Vice President (Careers, Education and Wellbeing) in creating a co-curricular Skills Seminar for law students to learn and further develop their research skills.[73] This prompted videos from 'Essential Legal Skills' to be duplicated online for students to revisit as required.

Unlike the loss of the Law Liaison Librarian position and the content restructure, the move to online and hybrid teaching — and the swift way it occurred — was unpredictable. Thoughtful curriculum design was abandoned, and everything moved online without careful planning. However, the biggest challenge was the unknown. Now, after a year of teaching online (in 2020) and another year of teaching in hybrid mode (2021), it has become easier to learn from these challenges and plan for future iterations of the topic.

## VII APPLYING THE LESSONS FROM DISRUPTION IN 2022

In preparing for teaching in 2022, the impacts of all three disruptions were still present. Despite this, each disruption has caused deep reflection into the way 'Essential Legal Skills' is structured and taught, resulting in a stronger topic and better legal research education. One of the most important parts of teaching is evaluation, particularly in first-year topics.[74] A critical and honest evaluation of teaching activities, how the materials were received, and how these skills were showcased in students' assessments is fundamental and transformative, allowing improvements to be made for the next cohort. Over the past few years, with the impacts of the pandemic, it has been more difficult to evaluate topics. For example, poor engagement or low marks may be attributable either to the students' work-life-health balance or to the topic itself. In addition, the move to online teaching has changed tertiary education forever: now, most materials are either pre-recorded or live-streamed, and both synchronous and asynchronous technology have a much larger role than ever predicted.

The three disruptions evaluated in this article resulted in three key lessons. First, it is important to have staff (academic *and* non-academic) with legal research expertise involved in both planning and teaching.[75] However, that expertise can be shaped in various ways, and including staff who are new to the components of legal research can create valuable learning for students and academic staff alike. Second, scaffolding legal research materials throughout the topic, leading to several weeks of specific legal research teaching and culminating in an assessment that allows students to demonstrate their legal research skills, heavily emphasises the integrated methodology of searching-evaluating-reading-understanding-analysing-applying. The links between research and analysis now heavily underpin the entire topic, and this has become one of its main strengths.

The first two disruptions addressed in this article have led to the most significant areas for growth in the topic. The move to online learning, however, has been the biggest disruption and

[73] For a similar approach at Adelaide Law School, see Everett (n 7) 303.
[74] Kift (n 1).
[75] Cappa (n 4) 13.

presents the third key lesson. Hybrid learning is here to stay, with a university requirement to have an online option in every topic. As a result, there has been one more change to the teaching pattern in 'Essential Legal Skills', and a reconsideration of how legal research content is delivered. The one-hour of pre-recorded videos remains the same, though these have been separated into shorter videos that are more easily watched. Students must watch these before attending workshops, while simultaneously working through certain parts of the workbook, creating a guided exercise.[76] This guided preparation commences the process of research and reflection, meaning that the workshops — now two hours — can focus on debriefing and providing feedback on the aspects of research that students identify as the most difficult. The second part of each workshop has become much more experiential,[77] with students applying their legal research skills to new areas. The Librarians assist with workshops: answering questions, demonstrating research processes and troubleshooting with students. There are usually two Librarians (typically including Savilla) and the tutor on hand to help the students, meaning that if one facilitator is struggling with a particular database or legal principle, another can assist. These struggles are turned into teachable moments to ensure students understand the difficulty and how to overcome this. For example, AGIS underwent an upgrade in the last year, first noticed during a workshop. This caused initial panic for facilitators, who then used this moment to show students that sometimes databases will look different, but that there are key aspects of each database that can be identified, helping students to learn to troubleshoot on their own.[78]

## VIII CONCLUSIONS

Ultimately, teaching is a journey of constant evaluation and change. While this is most commonly motivated by new research into teaching methods or changes to primary sources, this article demonstrates that various internal and external disruptions can heavily influence both curriculum design and teaching delivery. Designing a first-year, first-semester law topic has specific challenges, particularly balancing transition pedagogy with content, skills and processes that students are required to know before they progress to more legally complex topics. Legal research education is particularly difficult to plan, as it requires careful scaffolding of legal analysis with legal research processes, intersecting TLOs 3 and 4. While disruptions have large, often uncontrollable impacts, embracing disruption and the resultant uncertainty can lead to better curriculum design. Without the three disruptions examined in this article, 'Essential Legal Skills' would not be as strong. The opportunity to try different teaching methods, and to reflect on what was — and was not — working for students, too, has strengthened the legal research components of this topic. Given the uncertainty of the global situation, and how quickly technology is changing, there is no doubt that further disruptions will occur. Regardless, this journey of resilience had provided a framework and created a

[76] See, eg, Swift (n 66) 31–2.
[77] See, eg, Drake, 'The Need for Experiential Legal Research Education' (n 37) 520–2.
[78] Fordyce-Ruff (n 3) 19; Anzalone (n 36) 7.

culture of reflection and evaluation — at least in ‘Essential Legal Skills’ — that will serve as a solid foundation for the future.

# REFLECTION IN LEGAL EDUCATION — SO WHAT, NOW WHAT?: AN ACADEMIC'S REFLECTION ON THE BENEFITS AND CHALLENGES OF IMPLEMENTING REFLECTIVE PRACTICE IN AN ONLINE LAW DEGREE

*Haley McEwen*[*]

## ABSTRACT

Reflection in legal education has grown in prominence and is recognised as a core competency within the Threshold Learning Outcomes ('TLOs') for law. Yet there are challenges in implementing reflection in a way that is truly authentic and enables students to develop self-awareness and self-management as the TLOs require. This paper proposes multiple benefits for incorporating reflective practice early in the law degree and illustrates how it can be assessed in both a first-year subject and final-year capstone subject. Finally, the author offers a personal reflection as an illustration of how the practice of professional praxis can contribute to improvements in cultural understanding, curriculum design and teaching.

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## I INTRODUCTION

Reflective practice offers diverse benefits to students studying law, and to graduates entering the legal profession. Learning to reflect on one's skills, values and beliefs early on in a law degree will better equip students to positively manage the uncertainty that comes with change and to cope more effectively with a rapidly changing profession. Indeed, the importance of demonstrating reflective skill is acknowledged in three of the six Threshold Learning Outcomes ('TLOs') for the Bachelor of Laws in Australia.

This paper outlines some of the practical challenges of incorporating reflection in the curriculum, and potential avenues for assessment at both a first-year and final-year level of study. As institutional priorities shift our focus from effectiveness to efficiency, we must not lose sight of the bigger picture. Although capturing the opportunities for deep reflection in legal education takes time, planning and careful implementation, the transformative effects that self-, critical and collective reflection can offer are worth the investment. As a legal educator, my personal reflection on assessment design demonstrates the transformative effect that deep reflection can have on student self-management, self-awareness and cultural competency.

## II WHAT IS REFLECTIVE PRACTICE?

Definitions of reflective practice are varied but, in very simple terms, it is a strategy designed to promote learning via experience. Reflection as an activity involves a cycle of observation, experience and action that requires planning and active participation.[1]

As a process, reflection involves identifying an experience, then evaluating how theory, thoughts, feelings, attitudes and beliefs align with that experience, which can lead to a change in future action.[2] As a practice, it is about self-discovery and self-management, and engaging in continuous learning.[3]

Boud, Keogh and Walker describe reflection as 'an important human activity in which people recapture their experience, think about it, mull it over and evaluate it. It is this working with experience that is important in learning.'[4] More recently, Race described the act of reflecting as:

> one which causes us to make sense of what we've learned, why we learned it, and how that particular increment of learning took place. Moreover, reflection is

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[1] Neil Thompson and Jan Pascal, 'Developing Critically Reflective Practice' (2012) 13(2) *Reflective Practice* 311, 314–16.

[2] Russell Rogers, 'Reflection in Higher Education: A Concept Analysis' (2001) 26(1) *Innovative Higher Education* 37, 41.

[3] Leering suggests that reflective practice supports a practitioner's learning journey towards professional competence, continuous learning, professional growth and commitment to action: Michele Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 83, 100.

[4] David Boud, Rosemary Keogh and David Walker (eds), *Reflection: Turning Experience into Learning* (Routledge Falmer, 1985) 19.

> about linking one increment of learning to the wide perspective of learning — heading towards seeing the bigger picture.[5]

It is the linking of one increment to the next and preparing for future action that is common to models such as Kolb's Learning Cycle (1984), Boud, Keogh and Walker's reflection model (1985) and Gibbs' reflective learning stages (1998).[6] As a process, reflection need not be difficult or complex, but it must be purposeful and strategic.[7]

Donald Schön documented two types of reflection: reflection-in-action ('thinking on your feet'), which is the application of existing knowledge to new situations; and reflection-on-action ('thinking back and forward'), which involves an intentional analysis of experience that has taken place to prepare for future learning.[8] More recent proponents have added reflection-for-action (also referred to as 'reflection-on-practice' and 'reflection-on-knowledge'[9]), which often includes critical reflection on the social and political dimensions of one's experience.[10]

Legal academic and modern 'guru' of reflective practice in legal education Michele Leering posits five reflective domains that support professional praxis: self-reflection, reflection-on-practice, critical reflection, collective reflection and integrative reflection, which are each suited to different purposes and educational outcomes. She has outlined a range of opportunities, methods and techniques that can be utilised to address these domains in legal education.[11] Each one can contribute to the acquisition of the level of reflective skill required by the TLOs for law and can support the cultivation of professional praxis.

## III BENEFITS OF INCORPORATING REFLECTIVE PRACTICE IN EDUCATION

Reflective practice in its various forms can benefit students, practitioners and legal academics alike. Adopting Leering's taxonomy as it pertains specifically to legal education, reflection-on-practice promotes deeper learning and develops metacognition and the ability to self-assess and integrate theory and practice.[12] It can also promote greater personal and professional awareness, resilience, creativity and innovative thinking.[13] Self-reflection on one's values can lead to a better alignment of a person's occupational values and goals, and ultimately greater career satisfaction, performance and ethical and moral development.[14] Collective reflection,

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[5] Phil Race, *Evidencing Reflection: Putting the 'W' into Reflection* (ESCALATE Learning Exchange, 2002), cited in Georgina Ledvinka, 'Reflection and Assessment in Clinical Legal Education: Do You See What I See?' (2006) 9 *Journal of Clinical Legal Education* 29, 31.
[6] Ozlem Susler and Alperhan Babacan, 'Embedding Critical Reflection in Legal Education' (2021) 37(3*) Law in Context* 1.
[7] J Eyler, DE Giles and A Schmiede, *A Practitioner's Guide to Reflection in Service-Learning* (Vanderbilt University, 1996), cited in Sarah Ash and Patti Clayton, 'The Articulated Learning: An Approach to Guided Reflection and Assessment' (2004) 29(2) *Innovative Higher Education* 137, 151.
[8] Thompson and Pascal (n 1) 316–17.
[9] Leering (n 3) 96.
[10] Thompson and Pascal (n 1) 317.
[11] Michele Leering, 'Perils, Pitfalls and Possibilities: Introducing Reflective Practice Effectively in Legal Education' (2019) 53(4) *The Law Teacher* 431.
[12] Ibid.
[13] Ibid.
[14] Leering, 'Conceptualizing Reflective Practice' (n 3).

which involves an examination of one's attitudes, values and beliefs in company with others, can promote innovation and extend a person's journey towards cultural competency.[15] Critical reflection offers the potential for participants to reflect on law as a system, imbalances of power, class, gender, race and sexuality, and how the legal system creates and responds to disadvantage and marginalisation.[16] Critical reflection therefore presents opportunities for students, academics and practitioners to identify steps to bring about a more accessible legal system. Integrative reflection can foster professional growth, lifelong learning and professional praxis, ensuring that as professionals our theory of practice measures up with what we do, and what we say we do. This poses a particular challenge for academics to model reflection in their teaching and in their personal reflection on pedagogical practice.

## IV LEGAL EDUCATION IN AUSTRALIA

The value of reflective learning has been recognised since the 1980s in the fields of nursing, social work and teacher education.[17] Yet, the role of reflective practice in legal education has been slower to emerge.[18] Reasons for this include that, from a pedagogical perspective, legal education is teacher-centric and Socratic in nature.[19] The Priestley 11 subjects have an emphasis on technical rationality and instrumental problem-solving based on logical reasoning and the application of rules to set facts, which leaves little room for creative and critical thinking — questioning whether they are all the facts, why they are the facts and whether they are in fact, *fact*.

Current literature on legal education in Australia suggests that the extent to which universities incorporate reflective practice in legal education is varied in depth, scope, and where and when it is taught and assessed — being most often utilised in formal Clinical Legal Education subjects that naturally lend themselves to a focus on communication skills, self-awareness and professional development.[20]

Contemporary critics of the traditional approach to legal education have suggested that maintaining our focus on doctrinal knowledge and technical legal skills does not adequately prepare law students for practice.[21] In a time when the legal profession, global economies and industries are rapidly changing, graduates need, more than ever, to think flexibly and be

[15] Collective reflection involves reflecting with others to generate dialogue, share perspectives and problem-solve through methods such as peer review and communities of practice. Leering, 'Perils, Pitfalls and Possibilities' (n 11) 439.
[16] Ibid; Susler and Babacan (n 6).
[17] Thompson and Pascal (n 1) 312–13.
[18] Nathalie Martin, *Lawyering from the Inside Out: Learning Professional Development through Mindfulness and Emotional Intelligence* (Cambridge University Press, 2018) 58.
[19] Susler and Babacan (n 6).
[20] Ibid; Victoria Roper, 'Reflecting on Reflective Practices in Clinical Legal Education' (2019) 26(1) *International Journal of Clinical Legal Education* 216; Omar Madhloom, 'A Normative Approach to Developing Reflective Legal Practitioners: Kant and Clinical Legal Education' (2019) *The Law Teacher* 53(4) 416.
[21] Susler and Babacan (n 6); Madhloom (n 20); Marjorie Silver, 'Emotional Intelligence and Legal Education' (1999) 5(4) *Psychology, Public Policy and Law* 1173.

creative, adaptable, innovative, opportunistic and resilient.[22] Technical brilliance alone is no longer a guarantee to securing employment, or to sustaining it.

Whilst analytical skills and a knowledge of the law is, of course, critical, recent studies have revealed that employers, lawyers and clients identify relationship skills — such as listening skills, communication, empathy and compassion and the ability to sustain relationships — as well as virtues such as trustworthiness, integrity and resilience as critical to successful career development.[23] The importance of these skills for graduate lawyers is demonstrated by multiple references to the need 'to reflect' in three of the six TLOs agreed upon through extensive national consultation for the Bachelor of Laws in Australia. These outcomes represent what law graduates are expected 'to know, understand and be able to do as a result of learning' and are encapsulated in the 2010 *Learning and Teaching Academic Standards Statement* for the Bachelor of Laws in Australia.[24] TLOs 2, 3 and 6 explicitly incorporate these skills.

TLO 2: Ethics and Professional Responsibility ('TLO2') is about developing the values that underpin ethical conduct, professional responsibility and community service. It requires graduates to demonstrate:

> (a) an understanding of approaches to ethical decision-making,
>
> (b) an ability to *recognise and reflect upon*, and a developing ability to respond to, ethical issues likely to arise in professional contexts,
>
> (c) an ability to *recognise and reflect upon* the professional responsibilities of lawyers in promoting justice and in service to the community, and
>
> (d) a developing ability to exercise *professional judgement*.[25]

This statement is consistent with the Council of Australian Law Deans Standards that promote the development and internalisation of 'the values of ethical legal practice, professional responsibility, and community service'.[26] Essentially, it is encouraging students to engage in professional praxis — to combine an understanding of the expected standards of professional conduct with their personal judgement and moral compass, whilst promoting justice and serving the community.

TLO 3: Critical Thinking ('TLO3') requires graduates to: '… c) engage in critical analysis and make a reasoned choice amongst alternatives, and (d) think creatively in approaching legal issues and generating appropriate responses.'[27]

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[22] Martin (n 18) 62–3.
[23] Ibid 64; Leering, 'Perils, Pitfalls and Possibilities' (n 11) 437–8; Susler and Babacan (n 6).
[24] Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) 9 <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.
[25] Ibid 10 (emphasis added).
[26] Ibid 14.
[27] Ibid 17.

TLO 6: Self-management ('TLO6') requires graduates to: '… (b) *reflect on and assess their own capabilities and performance*, and make use of feedback as appropriate, to support personal and professional development.'[28] This outcome supports a commitment to lifelong learning and continuing education as a key aspect of legal professional competence and performance. It also recognises the need for emotional intelligence in practice, and the role of reflective practice in fostering resilience through personal awareness and coping skills.[29]

While the *Learning and Teaching Academic Standards Statement* recognises a whole-of-curriculum approach through learning, teaching and assessment to the attainment of the TLOs, the practical application of these skills is often facilitated through final-year Clinical Legal Education subjects.[30] While a scaffolded approach is certainly appropriate, there is potential — and great benefit — in designing the curriculum to address deeper reflection from an earlier stage in the degree.

Equipping students with the skills to reflect on their strengths and weaknesses as they begin studying law leads to greater self-awareness and self-management, which can improve performance and prepare students to be future leaders who can operate effectively in a complex society.[31] The integration of emotional intelligence (which includes knowledge of one's own emotional life and sensitivity towards others[32]) and self-awareness (of strengths, weaknesses and values) is closely aligned with self-management and can help students new to the study of law cope with the various impacts of circumstances beyond their control, which require them to be adaptable, ethical and resilient.[33] In the past 12 months across Australia, floods, fires and Covid-19 have presented myriad challenges to students' work, personal and family life, requiring many to change their enrolment pattern or place their studies on hold. This is in addition to the usual challenges of mental health conditions, poor organisation or 'life commitments' outside of study.

Learning to reflect honestly on one's skills, values and circumstances early on in a law degree will better equip students to positively manage the uncertainty that comes with change during study and stand them in better stead as graduates to cope with changing demands in the legal profession due to the impacts of technology and the evolving nature of the profession.[34] Many students study law expecting a clear pathway to graduation and employment, and when disruptions occur they struggle with the resulting uncertainty.[35] Teaching students the skills of

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[28] Ibid 22 (emphasis added).
[29] Ibid 23.
[30] Ibid 9; Susler and Babacan (n 6); Roper (n 20).
[31] David Boud and Rebeca Soler, 'Sustainable Assessment Revisited' (2016) 41(3) *Assessment & Evaluation in Higher Education* 400; Marcy Levy Shankman, Scott J Allen and Paige Haber-Curran, *Emotionally Intelligent Leadership: A Guide for Students* (Jossey Bass, 2nd ed, 2015).
[32] Silver (n 21) 1178.
[33] Susler and Babacan (n 6); Kift and Israel (n 24) 23.
[34] The FLIP inquiry documented the rapid technological changes facing the legal profession in 2016 and the role of education in teaching graduates to manage change and be adaptable, flexible and resilient: Law Society of New South Wales, *FLIP: The Future of Law and Innovation in the Profession* (Report, 2017) 77–9.
[35] Rachael Field, James Duffy and Anna Huggins, *Lawyering and Positive Professional Identities* (LexisNexis Butterworths, 2020) 114.

self-awareness (of their strengths, values, weaknesses and beliefs), self-management (emotional self-control, motivation and organisational skills) and reflection on the many adaptations in the practice of law can better prepare them to face these challenges with optimism and flexibility.[36] Having an open mind to different perspectives, asking questions and reflecting on their beliefs can lead to a greater awareness of self, of others and of context,[37] and can shape students' understanding of legal professional identity.[38]

## V CHALLENGES

Incorporating reflection in ways that promote creativity (TLO3) and the use of feedback (TLO6) in legal education is not easy. We are faced with a multitude of practical challenges, including a packed curriculum dominated by the Priestley 11 subjects and calls for electives to suit the needs of graduates in technology and areas of specialisation.[39] The transformation that comes with effective self-reflection requires trust and an investment of time and resources, which must be weighed against the increasing workloads and demands on academics.[40]

Whilst a reflective practice pedagogy lends itself to a scaffolded approach that imports reflection across the curriculum,[41] a cap on the number of assessments and task length limits places practical constraints on its implementation.[42] It is easier to adopt in summative assessment than in formative assessment, which limits the powerful transformative benefits that formative feedback can provide.[43] However, the tendency for assessment to be tied to discrete tasks in order to demonstrate a mastery of numerous technical skills and learning outcomes suggests that we don't often assess whether students have 'fed forward' the feedback they receive in a way that supports their personal development, as TLO6 requires.

Remote teaching and flexible learning present particular challenges for students developing self-awareness and resilience, as activities designed to develop these 'soft skills' often require participation and role play that is more effectively delivered face-to-face. For example, the ability of a student to first greet a 'client' in a mock interview scenario, to position themselves appropriately, to establish rapport and to respond to body language is hindered by the confines of an online meeting room. Another challenge is that in an online degree there is often a requirement for flexibility, enabling students to attend seminars live or to replay the recording

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[36] Ibid 116–17; Shankman, Allen and Haber-Curran (n 31).
[37] Leering, 'Perils, Pitfalls and Possibilities' (n 11).
[38] Jenny Gibbons, 'How Is Reflection "Framed" for Legal Professional Identity? Using Bernstein and Leering to Understand the Potential for Reflection in Our Curriculum as Written, Experienced and Assessed' (2019) 53(4) *The Law Teacher* 401. Professor Vivien Holmes has commented on the importance of cultivating professional judgement and professional identity as essential for law graduates navigating the complexity and uncertainty of practice: Vivien Holmes, Tony Foley, Stephen Tang and Margie Rowe, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15(1) *Legal Ethics* 29, 46.
[39] Leering, 'Perils, Pitfalls and Possibilities' (n 11) 442; Law Society of New South Wales (n 34) 77.
[40] Thompson and Pascal (n 1) 320.
[41] Roper (n 20).
[42] Leering, 'Perils, Pitfalls and Possibilities' (n 11) 443.
[43] Julie MacFarlane, 'Assessing the "Reflective Practitioner": Pedagogic Principles and Certification Needs' (1998) 5(1) *International Journal of the Legal Profession* 63.

at their convenience. Some students report preferring to watch the recording, not just out of convenience but because they do not want the pressure of participating in live discussion and prefer to take the material at their own pace. This presents a particular challenge for engaging students in the steps required to really reflect on their experiences, attitudes and beliefs. Indeed, most transformation results from the sharing of perspectives that challenge preconceived opinions or beliefs.[44] Furthermore, students often self-sensor what they would otherwise offer as immediate feedback when they are engaged in online meetings, as they are conscious of being recorded for the benefit of other students.

These constraints limit the opportunity to challenge students in the steps required to reflect on their experiences, attitudes and beliefs, and to engage in what Ash and Clayton refer to as the 'articulated learning' phase of reflection, which follows description and analysis of an experience, and is the phase that leads to a better understanding for informed future action.[45]

## VI HOW WE CAN DO THIS

Despite these challenges, there are numerous ways in which reflective practice can be embedded in the curriculum, even in an online learning environment. The following provides an overview of how reflection-on-practice, self-reflection, critical reflection and collective reflection on Indigenous cultural content is incorporated to varying degrees in a first-year and final-year subject in the Bachelor of Laws at Charles Sturt University.

In 'Writing & Communication for Legal Professionals' (a first-year subject that is a prerequisite for students progressing to the Priestley subjects), students study topics that focus on client representation skills, teamwork, cross-cultural communication, ethics and reflective professional practice.

As part of their intensive school program, students take part in an interview assessment, which has three parts: 1) preparation for the interview; 2) the mock interview itself — students are marked on their interview technique and provided with feedback on what they did well and where they could improve; and 3) utilisation of the '4Rs model' of Ryan and Ryan to report, relate, reason and reconstruct their interview experience,[46] taking into account the marker's feedback and their own understanding of the task and relevant theories. While an assessment of practical skill is somewhat hindered by the limitations of the online mode, as mentioned above, it offers the opportunity to easily record the interview, which can benefit the student's reflection for future practice. Summative assessment of reflection is incorporated in other tasks, one requiring students to critically reflect on how their cultural understanding informs their ability to communicate effectively with clients of diverse backgrounds. A further assessment task incorporates a reflective journal, which engages students in self-assessment of their

[44] Ibid.
[45] Ash and Clayton (n 7) 142.
[46] Mary Ryan and Michael Ryan, 'Theorising a Model for Teaching and Assessing Reflective Learning in Higher Education' (2012) 32(2) *Higher Education Research and Development* 244, 254.

negotiation skills, cross-cultural understanding, and collaboration skills utilised in a group assessment task.

By contrast, a final-year capstone subject 'Community Law and Culture' is a double-weighted unit with a three-day intensive program that includes a whole day cultural immersion with Wiradyuri Elders in Residence. Critical, self- and collective reflection is scaffolded throughout the subject and the assessment regime. Activities are populated across each topic that invite students to keep a reflective learning journal that is non-assessable but will prepare them for assessments. Topics cover issues specific to the rural, regional and remote context, legal need and access to services, the legal assistance sector, Indigenous social justice, legal pluralism, crime and social inequity, professional and interpersonal skills for legal practice, innovation, career planning, professional development and reflective practice.

The first assessment requires students to provide a critical opinion of a journal article, to evaluate what they learned from the text and what challenged their thinking with respect to the urban-centric bias of law, and to reflect on the experiences, attitudes and beliefs they bring to the study of law and culture.

Two further assessment tasks involve students working collaboratively in small groups to identify a law reform opportunity. Students present their proposal in an oral format at the intensive school and receive peer and instructor feedback, and then submit written submissions that formalise their proposal and reflect on the challenges and benefits of collaborative learning in the task.

The final assessment invites reflection on the students' learning across the subject, and their cultural competency journey across the degree. Part one involves an oral reflection on their cultural immersion experience and how it informed and challenged their knowledge in relation to Indigenous law and culture. Students are prepared for this by an oral debrief in the form of a yarning circle that follows the cultural immersion experience. Despite the online environment, the intensive nature of the immersion, linked to a three-day intensive school, fosters deep rapport between students and staff, which contributes to often emotional, candid and deep reflections. Part two requires students to research, analyse and critically reflect upon their understanding of contemporary debates on Indigenous issues and the relationship between Indigenous people and the legal system, and how their understanding informs their future professional identity and practices.

## VII PROFESSIONAL PRAXIS

Teaching students the skills for engaging in reflective practice is one thing, modelling it — by engaging in professional praxis — is quite another. Professional praxis requires us to be ethically informed, committed and guided by critical reflection of practice traditions and our

own practice.[47] In brief, it is action informed by reflection. To do this, we too must reflect on our capabilities, prejudices and practices and evaluate these in an institutional context. Implementing this skill benefits academics and lawyers in practice, just as it does students.

Action-informed practice takes into account the professional standards we are called to uphold as educators and the critical judgement we display in applying theory to context. As professionals, we have scope to build upon existing practice in our teaching and curriculum design by using our judgement to improve upon theory and standards.[48] Mahon et al define educational praxis 'as a kind of educational practice that is informed, reflective, self-consciously moral and political, and oriented towards making positive educational and societal change'.[49] In this way, it can be used to interrogate everyday practices in education and the conditions impacting on those actions. For example, Mahon et al note that the possibilities for enacting educational praxis have been increasingly eroded by the pressures of neoliberal and managerialist educational reforms, whereby demands for efficiency and competitive gains have shifted the focus from effective positive change to considerations of effectiveness and efficiency.[50]

Kemmis and Smith highlight the importance of educators taking morally responsive action to consider the interests of society and the world as well as their own interests or the interests of a particular group of people.[51] By critically reflecting on the inequities in our legal system and the existing justice gaps, we can use our morals and values to inform advocacy and law reform by involving ourselves in law reform opportunities and equipping students to take action against perceived injustices in the system they come to inhabit. Legal educators, I would argue, have a moral imperative to reflect and act on the purpose and effect of their teaching practices and the ways they contribute to positive social change. Not only does this develop praxis (action informed by reflection) but it models to students the expectations we have of them, helps to develop trust and demonstrates authenticity and a commitment to lifelong learning.

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[47] Joy Higgs, 'Realising Practical Wisdom from the Pursuit of Wise Practice' in Elizabeth Kinsella and Allan Pitman (eds), *Phronesis as Professional Knowledge: Practical Wisdom in the Professions* (Sense Publishers, 2012) 73, 75.

[48] Peter Massingham, 'An Aristotelian Interpretation of Practical Wisdom: The Case of Retirees' (2019) 5 *Palgrave Communications* 123:1–13, 3.

[49] Kathleen Mahon et al, 'What Is Educational Praxis?' in Kathleen Mahon et al (eds), *Pedagogy, Education, and Praxis in Critical Times* (Springer, 2020) 15, 15.

[50] Ibid 34. See also Ian Hardy et al, 'Critiquing and Cultivating the Conditions for Educational Praxis and Praxis Development' in Kathleen Mahon et al (eds), *Pedagogy, Education, and Praxis in Critical Times* (Springer, 2020) 65, 65.

[51] Stephen Kemmis and Tracey J Smith (eds), *Enabling Praxis: Challenges for Education* (Sense, 2008), cited in Mahon et al (n 49) 23.

## VIII MY PRAXIS — ACTION INFORMED BY REFLECTION

In reflecting on my recent practice, my action (to incorporate more reflective activities and assessment in subjects I teach) was informed by three distinct moments in which I experienced a 'disorienting dilemma' in response to a student action or comment:[52]

1. A student email, addressed to me, abruptly said 'call me', with very little additional information, no subject code, no context, not even a phone number to enable an efficient response.

2. A 'disruptor' (ie, that one student — often in first year — who requires a disproportionate amount of staff consultation time) repeatedly contacted every teaching staff member affiliated with the subject within the first six weeks of session, and pressed for collaboration outside class that was not welcomed by some students.

3. A First Nations student enrolled in our capstone subject 'Community Law and Culture' bravely reflected on the difficulty that studying colonisation, the Stolen Generation and Aboriginal deaths in custody presents for him personally when he said: 'We all read facts and figures and it can be overwhelming, but for me, I see faces and names'.

Each of these examples of individual actions brought up uncomfortable emotions for me — in an immediate sense, and later, as I found myself reflecting on each one. They made me ask 'what is it I am missing?' in the way I educate these students that fails to address their capacity for self-management, self-awareness, resilience or cultural safety.

My response to the first scenario ('call me') was informed by a belief that students should employ professional and courteous communication with staff at all times, which must also be modelled by staff to students. It demonstrates the importance of developing self-awareness and self-management in law students from an early stage in their studies. After reflecting on this type of student interaction with colleagues, I now frequently provide specific directions to tutors of first-year subjects of our expectations of professional communication by students, allowing time for skill development (for now is the time to make mistakes) but ultimately instilling a more professional approach to communication from the outset. In addition, I have moved away from assessing professional communication via the form of a legal memorandum, essay or letter of advice and implemented a professional email format for a reflective task in 'Legal Writing & Professional Communication', to address the more common mode of communication that is employed in practice but less commonly taught at university.

My response to the second scenario (the 'disruptor') was to question my assumptions as to that student's needs (age, educational background, any undisclosed disabilities that might hamper

[52] Margaret Wheatley identifies surprising or disturbing moments as 'gifts' that present opportunities for self-reflection: Margaret Wheatley, *Turning to One Another: Simple Conversations to Restore Hope to the Future* (Berrett-Koehler Publishers, 2002).

their awareness of self and of others) and my belief in the value of inclusive education, fostering opportunities for first-in-family students to study law, combined with the reality that education is a service that has necessary limits. My response to this individual student was informed by reflection with student support services, conversations with the student and the teaching team. It was obvious to me that the student sought and benefitted from more frequent opportunities for feedback than what was available to them in the ordinary course of classwork, assessment and consultation. While organisations need to strike a balance between supporting the outliers and servicing the norm, this example has motivated my adaptation of assessment tasks in this subject to include more formative assessment and the reflective journal, mentioned above, that encourages students to self-assess and develop greater self-awareness.

The third scenario ('I see faces and names') is a stark recognition of the continuing impact our legal system and legal education has on First Nations students, who have been anonymised and traumatised by our very recent history. It also illustrates the powerful reflection that is possible in a trusting environment where shared perspectives can impact on both students and staff. This student's honest perspective demonstrates the importance of generating cultural safety and trust in reflective activities and that we must move beyond technical rationality when addressing facts and figures to incorporate feelings, values and beliefs and a critical reflection on the legal system and its limitations.[53] Reflecting on the continuing impacts of colonisation on First Nations students who are studying law prompted me to critically evaluate how we assess the inclusion of lived experience in assessment tasks — not just in reflective assessments, but in traditional assessment forms — which could be a further step towards decolonising the law curriculum. The incorporation of oral reflections in our 'Community Law and Culture' subject provides flexibility in the mode of assessment and cultural sensitivity in its approach,[54] but I see greater potential to uphold the value of lived experience in written assessments when evaluating a student's use of academic research and credible sources, which is a larger task for the university as an institution to address.

Whilst these specific examples have motivated my enhancement of reflective activities and assessment in the subjects I teach, they do represent broader student needs that must be addressed on many levels, not just in curriculum design. My attempts to better equip students with the skills of self-awareness and self-management are, admittedly, works in progress. I share them to illustrate that the practice of praxis holds value for us as academics, as it does for practitioners, despite the fact that time constraints, bureaucratic demands and organisational policies can dictate the limits of our actions. We are all on a lifelong journey of learning.

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[53] In her PhD thesis 'Embedding Indigenous Knowledges in the Design of Higher Education Curriculum', Annette Gainsford, who designed the reflective activities and Indigenous content in this subject, notes that 'the creation of culturally safe learning spaces is heavily reliant on the constant reflection by academics in relation to Indigenous community engagement, curriculum development and teaching practice': Annette Gainsford, 'Embedding Indigenous Knowledges in the Design of Higher Education Curriculum: An International Study in Law Education' (PhD Thesis, Charles Sturt University, 2021) 378.

[54] For detailed information on how Charles Sturt has scaffolded Indigenous Australian content across the Bachelor of Laws, see Annette Gainsford, Marcus Smith and Alison Gerard, 'Accrediting Indigenous Australian Content and Cultural Competency within the Bachelor of Laws' (2021) 31(1) *Legal Education Review* 59.

Sceptics to the practice of reflection might suggest that we don't have the luxury of time to mull it over. Yet the benefits clearly show that the time is worth the effort.

# LETTING THEM LEARN HOW TO BE LAW STUDENTS: STUDENT PERCEPTIONS OF 'UNGRADED PASS/FAIL' ASSESSMENT IN THE FOUNDATIONAL SUBJECT OF A QUALIFYING LAW DEGREE

*Aidan Ricciardo and Julie Falck*[*]

## ABSTRACT

The significant body of literature devoted to the first-year experience in law school points to the importance of an intentional and holistic approach to engage learners, facilitate support, and create a sense of belonging by fostering involvement, engagement and connectedness. In an effort to achieve these objectives, the assessment method in the foundational unit of the Juris Doctor at the University of Western Australia was changed to 'ungraded pass/fail' ('UP/F') in 2021. This article reports and reflects on the data from a study that sought to understand how the UP/F aspect of the unit was perceived and experienced by students. Some key findings include that the vast majority of respondents thought being assessed UP/F was fair and that it 'levelled the playing field'. Most respondents also indicated that being assessed UP/F created a friendly atmosphere and helped them to focus on developing skills.

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# I INTRODUCTION

There is relatively little reported scholarship on the first-year experiences of students who commence a qualifying law degree after having already earned an undergraduate qualification.[1] However, given the increasing numbers of Australian law schools offering a postgraduate Juris Doctor ('JD') degree, there is a need for research about how to best support these students as they transition to legal studies.[2] This article contributes to addressing that need. It does so by reporting the results from a study that sought to understand how JD students at the University of Western Australia ('UWA') perceived and experienced the foundational unit of the degree being assessed on an 'ungraded pass/fail' ('UP/F') basis.

The foundational unit in the JD at UWA — LAWS4101 'Foundations of Law and Lawyering' ('LAWS4101') — runs as a two-week intensive prior to Semester 1. Students come to the JD with a range of different backgrounds, experiences and skills.[3] LAWS4101 aims to meet those students 'where they are' and build their knowledge, skills and confidence so that by the time the semester begins in earnest they are prepared to engage fully with their JD studies.

The authors of this article coordinate and co-teach LAWS4101. In 2021, we changed the assessment method in the unit to UP/F. Our motivations for the change stemmed from a desire to improve the first-year experience by creating an environment in which students felt most able to learn, develop skills, and form connections with each other.[4] In designing our UP/F assessment structure, we were informed by the scholarship relating to grading, feedback and motivation in law schools and universities more broadly.[5] Accordingly, all assessment items in the unit were returned swiftly with marks and feedback, but ultimately all students who passed overall had only 'ungraded pass' recorded on their transcripts.

Part II of this article sets out the relevant background relating to the first-year experience in law school and assessment in legal education. Part III then provides further context about the move to UP/F assessment in LAWS4101. The study's design is canvassed in Part IV, and the results are set out in Part V. Part VI then discusses the quantitative results with reference to some qualitative responses, noting that the vast majority of participants experienced and perceived the UP/F aspect of LAWS4101 positively. Most participants thought being assessed UP/F was fair, that it helped them focus on developing skills, and that it created a friendly

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[1] Wendy Larcombe and Ian Malkin, 'The JD First Year Experience: Design Issues and Strategies' (2011) 21(1) *Legal Education Review* 2:1–22.
[2] Ibid.
[3] Ibid 7–11; see also Susan Armstrong and Michelle Sanson, 'From Confusion to Confidence: Transitioning to Law School' (2012) 12(1) *QUT Law & Justice Journal* 21, 33.
[4] See, generally, Kate Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235, 235.
[5] See, eg, Steven I Friedland, 'Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education' (2018) 67(2) *Journal of Legal Education* 592; Alison Bone and Paul Maharg, *Critical Perspectives on the Scholarship of Assessment and Learning in Law: Volume 1: England* (ANU Press, 2019); Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52(1–2) *Journal of Legal Education* 75.

atmosphere. Overall, the findings from this study suggest that moving to UP/F assessment in a foundational JD unit contributes to a positive first-year experience in law school.

## II BACKGROUND

### A *First-Year Experience in Law*

The body of literature relating to the first-year experience in law school is 'significant and expanding'.[6] The extant literature considers the challenges first-year law students encounter, what law students want and expect from their first-year experience, and how educators can provide their students with a successful transition to law school. Although LAWS4101 is only one part of the broader JD first-year experience at UWA, it is the stepping stone into the first year. LAWS4101 runs as a two-week intensive before Semester 1 and is the first unit that UWA JD students must take. The unit introduces JD students to fundamental legal skills and knowledge, to their law school and fellow students, and to studying law. It is a crucial part of the first year; therefore, this article sits squarely within the body of literature relating to the first-year experience in law.

#### 1 *Challenges and Expectations*

As set out by Webster et al, first-year law students 'are enthusiastic and ready to learn but face considerable social, academic and practical challenges'.[7] The experience of adjusting to legal studies has been described as a 'trial by fire'.[8] A study by Armstrong, Campbell and Brogan found that two thirds of first-year students did not know how to approach the study of law and found studying law difficult.[9] That study also found that first-year law students exhibit much higher levels of anxiety, uncertainty and disengagement than was reported in national surveys of all first-year students across various disciplines.[10] Later research by Armstrong and Sanson found that one of the biggest challenges first-year law students face is coping with the volume of reading and other workload concerns, noting that 'graduate students in particular felt pressured by the heavy workload'.[11] Armstrong and Sanson found that 41% of first-year student participants report being 'completely overwhelmed'.[12]

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[6] Larcombe and Malkin (n 1) 1.
[7] Adam Webster et al, 'Enhancing the First Year Curriculum and Experience: Law School "Boot Camp"' (2018) 28(1) *Legal Education Review* 1:1–24, 2.
[8] Armstrong and Sanson (n 3) 34.
[9] Susan Armstrong, Marnie Campbell and Michael Brogan, 'Interventions to Enhance the Student Experience of a First-Year Law Degree: What They Really Wanted' (2009) 2(1) *Journal of the Australasian Law Teachers Association* 135, 139.
[10] Ibid 135.
[11] Armstrong and Sanson (n 3) 30.
[12] Ibid.

First-year law students are required to develop an entirely new skillset,[13] and learning to think, feel and act like a law student is often difficult.[14] As put by Christopher:

> Learning lawyering skills, and becoming competent or proficient in them, is a struggle. Legal educators need to acknowledge that students struggle, to expect it, and to convey to students that their struggle is normal. In fact, it's productive — learning is hard, and lawyers learn and struggle throughout their careers.[15]

It has been accepted amongst the scholarly literature that assessment, grading and ranking are primary stressors for students across all disciplines and that this is undoubtedly the case for first-year law students.[16] Some research indicates that these aspects of the university experience are particularly challenging for first-year law students because their expectations of their results may differ from their actual results.[17] As put by Bromberger:

> Most first-year law students (whether they come directly from high school or have completed an undergraduate university degree) are accustomed to receiving very high marks … Yet, when they reach law school, the first assessment grade they receive is almost never comparable to that to which they have become accustomed … Thus, the first experience at a law school learning task is almost universally disappointing to each student. This first and negative experience almost immediately creates an environment within a large section of the first-year law school cohort that produces low self-efficacy ...[18]

Indeed, the study by Armstrong and Sanson indicates a 'mismatch' between student expectations of their performance and the results they achieve, with some first-year law students expressing 'real surprise' about their results,[19] which causes some to seriously question if they are 'smart enough' for law school.[20] This is particularly concerning because the wider literature on the first-year experience at university indicates that alignment between expected and actual results is a marker of a successful transition to higher education.[21]

Research focusing on the wants and expectations of first-year law students has found, perhaps unsurprisingly, that they would like further guidance on how to overcome the challenges discussed in this section. Armstrong, Campbell and Brogan report that nearly 60% of participants in their study said they want 'more help about *how* to be a law student'.[22] Similarly,

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[13] Nikki Bromberger, 'Enhancing Law Student Learning — The Nurturing Teacher' (2010) 20(1–2) *Legal Education Review* 45, 54–5.
[14] See, generally, Mary Heath et al, 'Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education' (2017) 26(3) *Griffith Law Review* 430.
[15] Catherine Martin Christopher, 'Normalizing Struggle' (2020) 73(1) *Arkansas Law Review* 27, 28.
[16] Hess (n 5) 78; Webster et al (n 7) 17; Bromberger (n 13) 55.
[17] Armstrong and Sanson (n 3) 31.
[18] Bromberger (n 13) 55.
[19] Armstrong and Sanson (n 3) 31.
[20] Ibid 39.
[21] See, eg, Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings from a Decade of National Studies* (Final Report, Australian Government, Department of Education, Science and Training, 2005); Richard James, Kerri-Lee Krause and Claire Jennings, *The First Year Experience in Australian Universities: Findings from 1994 to 2009* (Report, Centre for the Study of Higher Education, March 2010).
[22] Armstrong, Campbell and Brogan (n 9) 139.

the later study by Armstrong and Sanson found that first-year students want more guidance about *how* to engage in their core learning and assessment tasks, remarking that this is particularly important for student cohorts with 'varied prior learning experience'.[23] Other research in this area has noted that academic staff also believe it is the responsibility of the first-year program to help students develop the foundational skills and awareness they will need for the remainder of their legal studies.[24]

### 2 *Approaches to Design and Delivery*

According to Kift, who has contributed enormously to the scholarship on transition pedagogies, the first-year experience

> should be engaging, inclusive, relevant and social for all students ... It must be all of these things so that the students who have been accepted into our university programs are supported to learn and, thus, are successful, retained and graduate …[25]

In an earlier publication, Kift, Nelson and Clarke emphasise the importance of a first-year curriculum that is intentionally designed to:

> 1. engage new learners in their learning and mediate support for that learning …
> 2. [facilitate] awareness of and timely access to … support services; and
> 3. [create] a sense of belonging through involvement, engagement and connectedness …[26]

Fostering a sense of belonging is necessary to prevent first-year students from becoming isolated and disengaged.[27] Promoting engagement also requires providing students with safe learning spaces to explore their potential and creativity.[28]

Writing of the first-year experience in law school specifically, Galloway et al state that 'students are most engaged and on-topic in an environment where they are not stressed or in fear of humiliation', noting that positive learning environments are characterised by an absence

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[23] Armstrong and Sanson (n 3) 34.
[24] Rachel Bradshaw et al, 'Renewal of the LLB Transition Curriculum for the New Quality Regime' in Leon Wolff and Maria Nicolae (eds), *The First-Year Experience in Law School: A New Beginning* (Halstead Press, 2014) 130, 135–7.
[25] Sally Kift, 'A Decade of Transition Pedagogy: A Quantum Leap in Conceptualising the First Year Experience' (2015) 2 *HERDSA Review of Higher Education* 51, 54.
[26] Sally Kift, Karen Nelson and John Clarke, 'Transition Pedagogy: A Third Generation Approach to FYE: A Case Study of Policy and Practice for the Higher Education Sector' (2010) 1(1) *International Journal of the First Year in Higher Education* 1, 4.
[27] Sally Kift and Rachael Field, 'Intentional First Year Curriculum Design as a Means of Facilitating Student Engagement: Some Exemplars' (Conference Paper, Pacific Rim First Year in Higher Education Conference, 29 June–2 July 2009) 6.
[28] Ibid 7.

of pressure, stress and despair.[29] Indeed, whilst creating the best environment for effective learning is a pressing matter for all educators, it has been described as 'particularly stark' when teaching first-year law students who experience heightened anxiety levels.[30]

Much has already been written about the various strategies, services and design choices that might help to achieve the above objectives in a first-year law program. They include, for example, providing students with opportunities to learn how to learn,[31] scaffolding student learning of skills and content,[32] giving meaningful and early feedback,[33] and providing integrated pastoral support.[34]

It is important to note that the vast bulk of scholarship on the first-year experience in law school relates to undergraduate Bachelor of Laws (LLB) students whose first year in law school is often also their first year in higher education.[35] By contrast, JD students are postgraduate students who have completed an undergraduate qualification before commencing the course. It is, therefore, fair to ask whether the scholarship applies to the JD context. As set out by Larcombe and Malkin, the answer to that question is 'yes':

> Students commencing studies in law as graduates are still involved in a process of transition: to the new disciplinary environment and its methods of inquiry; to learning how knowledge is constructed and communicated within law; and to becoming identified with the legal community and the professional careers for which the course is preparation. Further, graduate-entry students are similarly diverse in their expectations, preparedness, backgrounds and interests — in some ways, this 'diversity' may be even more pronounced in a commencing graduate-entry cohort …[36]

Whilst the needs of JD students are not identical to those of LLB students, 'the commonalities are likely to outweigh the differences'.[37] It is still the case in a graduate-entry law program that students have different starting points, and thus first-year teachers must be sensitive to varying frames of reference, competencies and needs.[38]

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[29] Galloway et al (n 4) 243 citing Sarah Moore and Nyiel Kuol, 'Matters of the Heart: Exploring the Emotional Dimensions of Educational Experience in Recollected Accounts of Excellent Teaching' (2007) 12(2) *International Journal for Academic Development* 87, 92.
[30] Bromberger (n 13) 54–5.
[31] Armstrong, Campbell and Brogan (n 9) 146.
[32] Bradshaw et al (n 24) 134–8.
[33] Bromberger (n 13) 56.
[34] Galloway et al (n 4) 239–40.
[35] See, eg, Armstrong and Sanson (n 3) 27.
[36] Larcombe and Malkin (n 1) 7–11.
[37] Ibid 8–9.
[38] Webster et al (n 7) 2. See also Heath et al (n 14) 442.

## B *Teaching, Learning, Grading and Assessing*

Although the first-year experience must encompass more than teaching, learning, grading and assessing, these are undoubtedly core aspects of any university course. Thus, the broader literature in these areas also forms part of the background of this article.

Our students are, after all, at law school to learn. Educators cannot meaningfully strive to improve their students' experience at law school without considering how our teaching practices impact student learning and wellbeing. As Friedland observes:

> Teaching and learning remain the core elements of law school. While it is easy to slip into conflating the two as a single entity, they are generally separate activities. Just because teaching is taking place does not mean learning is occurring as well.[39]

Law teachers can devote all the time in the world to teaching, but to determine whether learning is occurring, we need some assessment method. How we assess learning will also determine what is learned, as assessment 'drives what, how and how much students study'.[40] Law school assessment has received much attention from academics and accreditation bodies,[41] and law teachers know its importance to students.[42] As Bone and Maharg argue:

> The processes by which law schools make judgments upon their students is one of the most important activities that law school staff undertake, with effects that can be long-lasting on their students.[43]

Although the importance of law school assessment is widely recognised, not least because of its impact on students, Zimmerman notes that there is 'remarkably little' research considering law students' perspectives on assessment.[44] However, as discussed above, we do know that the *grades* attached to assessments generate great stress for law students.[45] Grades can also cultivate a competitive atmosphere that inhibits collegiality and collaboration, exacerbating the already intensely competitive atmosphere of many law schools.[46] Importantly, there is evidence that grading focuses student attention on superficial learning necessary to receive a good grade

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[39] Friedland (n 5) 596.
[40] Rob Wass et al, 'Annoyance and Frustration: Emotional Responses to Being Assessed in Higher Education' (2020) 21(3) *Active Learning in Higher Education* 189, 190.
[41] Bone and Maharg (n 5) 15.
[42] Olympia Duhart, 'It's Not for a Grade: The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom' (2015) 7(2) *Elon Law Review* 491, 504.
[43] Bone and Maharg (n 5) 15.
[44] Emily Zimmerman, 'What Do Law Students Want: The Missing Piece of the Assessment Puzzle' (2010) 42(1) *Rutgers Law Journal* 1, 4.
[45] Nathan A Preuss, 'Applying Motivation Theory to Improve 1Ls' Motivation, Self-Efficacy, and Skill Mastery' (2022) 114(1) *Law Library Journal* 59, 59.
[46] Duhart (n 42) 492.

and can have a negative impact on overall learning outcomes.[47] Despite this, graded assessment is ubiquitous in modern universities and most law schools.[48]

While grading can have a variety of negative impacts on student wellbeing and learning, the literature regarding assessment in law schools consistently supports the value of feedback.[49] Traditionally, law school assessments were dominated by the end-of-semester examination,[50] though in Australian law schools, the examination is now rarely the sole assessment item.[51] Exams are usually summative assessments, providing feedback (in the form of a grade) only once all teaching and learning have finished. On the other hand, formative assessments offer students feedback while learning is still in process.[52] Formative assessment allows students to practice skills, receive feedback, and then act on that feedback to improve their performance.[53] Completing formative assessment and receiving and reflecting upon feedback does not just assess learning; it is itself a learning experience. As Hess observes, 'the importance of formative feedback for student learning cannot be overestimated'.[54] Constructive formative feedback increases students' intrinsic motivation.[55] It may be even more effective if it is ungraded so that students focus on the suggestions for improvement and not the mark received.[56] As Hess explains:

> The quality of students' learning is closely tied to their motivation. Motivation is enhanced more by the chance to achieve rewards than the desire to avoid punishment. ... Motivation can be extrinsic (motivation for grades, money, or other rewards) or intrinsic (motivation based on curiosity, interest, and the desire to learn). Although both types of motivation can aid learning, students perform better when their motivation is intrinsic.[57]

Formative assessment increases intrinsic motivation because it usually has little or no impact on students' final grades and removes the fear of 'punishment' in the form of failure or a poor

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[47] Annemette Kjærgaard, Elisabeth N Mikkelsen and Julie Buhl-Wiggers, 'The Gradeless Paradox: Emancipatory Promises but Ambivalent Effects of Gradeless Learning in Business and Management Education' [2022] *Management Learning* 1, 2.
[48] Tony Harland et al, 'An Assessment Arms Race and Its Fallout: High-Stakes Grading and the Case for Slow Scholarship' (2015) 40(4) *Assessment & Evaluation in Higher Education* 528, 529; Andrea A Curcio, 'Assessing Differently and Using Empirical Studies to See If It Makes a Difference: Can Law Schools Do It Better?' (2009) 27(4) *Quinnipiac Law Review* 899.
[49] Armstrong and Sanson (n 3) 40; Hess (n 5) 86; Margaret Ryznar and Yvonne M Dutton, 'Lighting a Fire: The Power of Intrinsic Motivation in Online Teaching' (2020) 70 *Syracuse Law Review* 73, 85.
[50] Carol Springer Sargent and Andrea A Curcio, 'Empirical Evidence that Formative Assessments Improve Final Exams' (2012) 61(3) *Journal of Legal Education* 379, 380.
[51] Kelley Burton, 'Measuring and Enhancing the Authenticity of an Examination and Other Assessment Tasks' (2015) 8(1–2) *Journal of the Australasian Law Teachers Association* 25, 28.
[52] Derek Luke, 'From Filling Buckets to Lighting Fires: The ABA Standards and the Effects of Teaching Methods, Assessments, and Feedback on Student Learning Outcomes' (2019) 81(1) *University of Pittsburgh Law Review* 209, 223.
[53] Tony Harland and Navé Wald, 'The Assessment Arms Race and the Evolution of a University's Assessment Practices' (2021) 46(1) *Assessment & Evaluation in Higher Education* 105, 112.
[54] Hess (n 5) 106.
[55] Ryznar and Dutton (n 49) 85.
[56] Sargent and Curcio (n 50) 382.
[57] Hess (n 5) 99.

grade. It can also enhance students' interest and desire to learn by allowing them to test their understanding and learn from their mistakes.[58] Conversely, summative assessment measures students' learning at the end of a unit of study and is not directed toward encouraging further learning or helping students improve.[59]

Thus, we can draw three main ideas from the existing literature. First, assessment is necessary to ensure that learning does take place. Second, grading negatively impacts student wellbeing and may also negatively affect learning. Third, formative assessment improves learning and increases motivation as it decouples the significant benefits of feedback from the negative impacts of grading. In response, several researchers have proposed and experimented with gradeless learning.[60] In law schools, student and lecturer expectations, institutional and accreditation requirements, employer preferences, and general inertia present significant hurdles to gradeless learning.[61] However, in the right circumstances, low- or no-stakes assessment can work well.[62] A common model of gradeless learning records student performance on a pass/fail basis.[63] Some models have additional bands, for example, pass/fail/distinction, but adding passing levels is undesirable because this just replicates the logic of the grading process.[64] Models that allow students to choose between having their final mark or an ungraded pass/fail ultimately show on their transcript may be criticised for similar reasons.[65]

The pass/fail approach is particularly appropriate in professional schools where achievement to a minimum standard is required for admission to the profession, and professionals must continue learning throughout their careers.[66] Therefore, an ungraded pass/fail assessment structure — especially one that involves the provision of feedback and indicative grades — offers law teachers the ability to preserve the benefits of formative assessment and feedback whilst avoiding the detrimental effects of grading. As Duhart argues: 'Law school will always

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[58] Duhart (n 42) 508.
[59] Luke (n 52) 222.
[60] See, eg, Kjærgaard, Mikkelsen and Buhl-Wiggers (n 47); Preuss (n 45); Stuart Tannock, 'No Grades in Higher Education Now! Revisiting the Place of Graded Assessment in the Reimagination of the Public University' (2017) 42(8) *Studies in Higher Education* 1345; Muireann O'Keeffe, Clare Gormley and Pip Bruce Ferguson, 'Moving the Focus from Grades to Feedback: A Case Study of Pass/Fail Marking' (2018) 11(1) *Practitioner Research in Higher Education* 70; Robert A Bloodgood et al, 'A Change to Pass/Fail Grading in the First Two Years at One Medical School Results in Improved Psychological Well-Being' (2009) 84(5) *Academic Medicine* 655; Chris McMorran and Kiruthika Ragupathi, 'The Promise and Pitfalls of Gradeless Learning: Responses to an Alternative Approach to Grading' (2020) 44(7) *Journal of Further and Higher Education* 925.
[61] Kaci Bishop, 'Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience' (2018) 70(4) *Arkansas Law Review* 4:959–1005.
[62] Kelsey Chamberlin, Maï Yasué and I-Chant A Chiang, 'The Impact of Grades on Student Motivation' [2018] *Active Learning in Higher Education* 1, 13; Duhart (n 42) 508.
[63] O'Keeffe, Gormley and Ferguson (n 60) 71.
[64] Tannock (n 60) 1351.
[65] David J Malan, 'Toward an Ungraded CS50' (Conference Paper, Association for Computing Machinery Technical Symposium on Computer Science Education, virtual event, 13–20 March 2021) 1–2 <https://doi.org/10.1145/3408877.3432461>.
[66] O'Keeffe, Gormley and Ferguson (n 60) 71; Bloodgood et al (n 60); McMorran and Ragupathi (n 60) 926.

be difficult. And it should be challenging. But the high-stakes law school culture should not infect the assessment process.'[67]

## III MOVING TO UNGRADED PASS/FAIL IN LAWS4101

We first taught LAWS4101 together in February 2020. The incoming cohort was, on the whole, hardworking, highly motivated, and successful in prior academic study, and we were pleased with the standard of performance across all assessment items. However, despite the attention devoted to soft skills and student wellbeing over the intensive, we observed high anxiety levels and some unpleasant competitiveness emerging amongst the cohort. We also noticed — and this was consistent with our experience teaching in other JD units and the literature on assessment — that students tended to focus on grades to the exclusion of almost everything else. Any work, topics or activities that were not graded were not 'worth' anything and therefore did not need to be taken as seriously. Conversely, graded work generated a great deal of anxiety, and students seemed to focus on what was necessary for a high mark rather than the skills and knowledge it required them to develop.

Based on these observations and our review of the literature, we developed a proposal to change the unit to UP/F, which we planned to put before the Law School's Learning and Teaching Committee in early 2021 so that the change could be made for 2022. However, before the formal approval process could even commence, an unexpected Covid-related lockdown in February 2021 required us to move the entire first week of LAWS4101 in that year to online teaching. In response, we were able to obtain expedited approval to assess LAWS4101 as UP/F in 2021 to mitigate any unfair disadvantage some students might suffer because of the rapid shift in teaching mode. The change was communicated to students as an accommodation due to exceptional circumstances, and students seemed to accept it on that basis.

By 2022, the Learning and Teaching Committee had approved our proposal to implement UP/F assessment in LAWS4101 on an ongoing basis. Accordingly, LAWS4101 was also assessed UP/F in 2022, but this was not described to students as an accommodation. Instead, we explicitly communicated to students the pedagogical reasons for assessing the unit UP/F. For example, in the introductory lecture, we explained to students:

> This unit teaches you how to 'do' law school and how to be a future lawyer … and it feels quite unfair and antithetical to the unit's aims for us to say, on the one hand, that we're teaching you how to do those things and that this is a safe space to learn how to do that … yet on the other hand, for us to grade you on how well you do as you're learning to be a law student.

This change in messaging seemed to positively affect students' attitudes toward the UP/F assessment mechanism, as discussed in Parts V and VI below.

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[67] Duhart (n 42) 516.

Students completed three required assessment items in LAWS4101 in 2021 and 2022. The UP/F assessment structure meant that the grade recorded on students' transcripts was either 'ungraded pass' or 'fail'. However, each assessment item was fully evaluated, awarded an indicative mark (out of 100%), and returned with feedback. The feedback was detailed, and we gave students ample opportunity to meet with us individually to discuss their performance and, if necessary, seek clarification of the feedback. Our decision to award these indicative marks and provide feedback — irrespective of the unit ultimately being assessed as UP/F — was guided by the literature. We wanted to maximise the benefits of gradeless learning by providing genuine opportunities for improvement whilst also grounding expectations (given the 'mismatch' between expected and actual marks observed in the literature).[68] In 2021 the assessment items were a group assessment (which involved writing a judgment), a 'mock exam' (to allow students a low-stakes trial of this ubiquitous law school assessment), and a legal memorandum. In 2022 we replaced the memorandum with an online legal research exercise. Students knew that so long as they passed each assessment item, the precise mark awarded for each item was for their information only and would not be formally recorded.

## IV THE STUDY

### A *Aims*

An overarching aim of our study was to obtain information that would help guide and inform future decisions about assessing LAWS4101 as UP/F. In particular, the study sought to understand how LAWS4101 students perceived and experienced the UP/F aspect of the unit. We were also keen to understand whether different demographic groups within the LAWS4101 student cohort had differing views in this regard.

### B *Method*

In February 2021 we collaborated with a qualified and experienced empirical researcher[69] to design a survey instrument to help us understand how students perceived and experienced the UP/F aspect of the unit. The survey asked participants to indicate their agreement on a Likert scale (from 'strongly disagree'; 'somewhat disagree'; 'neither agree nor disagree'; 'somewhat agree'; to 'strongly agree') for each of the following statements:

1. Being assessed UP/F was fair.
2. Being assessed UP/F created a level playing field.
3. Being assessed UP/F helped me focus on developing skills.
4. Being assessed UP/F created a friendly atmosphere.
5. Being assessed UP/F made the unit feel like a waste of time.

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[68] Sargent and Curcio (n 50) 382; Armstrong and Sanson (n 3) 31, 40.

[69] We thank Associate Professor Jill Howieson for sharing her empirical research expertise in co-designing the survey instrument.

6. I would have preferred that LAWS4101 was fully graded.
7. I liked knowing the mark I would have received (that is, the grade for each task).
8. I was ok with my mark for LAWS4101 not showing on my transcript.

Participants were also asked to respond to two open-ended questions — the first asking why they thought being assessed UP/F was fair or unfair, and the second asking if there was anything else they wanted to share about being assessed UP/F. Participants were also asked to provide brief, relevant demographic information. Overall, the survey was designed to take 5 to 10 minutes to complete.

In March 2021, after all classes and assessments in LAWS4101 had concluded, we emailed all students enrolled in the unit that year to invite them to participate in the online survey using Qualtrics. We repeated this with the 2022 LAWS4101 cohort in March 2022, after the conclusion of LAWS4101 classes and assessments that year. Again, we emailed all students enrolled in the unit that year to invite them to participate in the online survey using Qualtrics. The 2021 and 2022 cohort datasets were kept separate.

Participation was voluntary and anonymous. All participants provided express consent to being involved in the study before participating. No personal identifying information was included in the data collection, and all data is reported here in group-form only.

## C *Ethics Approval*

This study complied with the National Health and Medical Research Council of Australia's *National Statement on Ethical Conduct in Human Research* (2007). We obtained institutional ethics approval from the UWA Human Research Ethics Office prior to commencing the study.[70]

## D *Limitations*

This study is limited in several ways. First, the data is self-reported and is therefore shaped by participants' subjective perceptions. Further, as participation was voluntary, selection bias may affect the reliability of the findings. The findings relate to a single unit taught in one law school. Although each Australian law school has a foundational unit similar to LAWS4101 in their qualifying law degree, the findings from our study may not be generalisable to other law school contexts. This is especially so given that some research relating to Australian law students has

[70] 'Exploring Student Perceptions of Ungraded Pass/Fail Assessment in a Foundational Law Subject', RA 2021/ET000188, UWA Human Research Ethics Office.

found that perceptions and experiences may differ between JD and LLB cohorts.[71] Therefore, the findings may be more relevant to the 17 other Australian universities that offer a JD.[72] Finally, despite our best efforts to conduct this research in an unbiased manner, our conscious and unconscious biases and preferences may have influenced the study's design and the way we interpreted the data.

## E *Participants*

As noted, we invited all students enrolled in LAWS4101 in 2021 and 2022 to participate in the study. There were 214 participants in total — we had 119 responses in 2021 and 95 responses in 2022. When combining the 2021 and 2022 cohorts, overall 72 participants held a law-related undergraduate qualification (a degree with a Business Law or Law and Society major), whilst 142 participants did not. Full demographic information of each participant group is set out in Table 1.

Table 1: Participant demographics

| | | **2021** | **2022** |
|---|---|---|---|
| Proportion of total LAWS4101 cohort | Total cohort (number of students) | 297 | 220 |
| | Participant group (number of students) | N = 119 | N = 95 |
| | Proportion of total cohort participating | 40.1% | 43.2% |
| Age (in years) | 20–21 | 40.3% | 32.7% |
| | 22–24 | 31.1% | 34.7% |
| | 25–29 | 11.0% | 8.4% |
| | 30–39 | 15.1% | 8.4% |
| | 40–49 | 1.7% | 10.5% |
| | 50–59 | 0.8% | 4.2% |
| | 60+ | 0.0% | 1.1% |
| Number of years since last enrolled in a university course | < 1 year | 68.1% | 54.7% |
| | 1–3 years | 13.5% | 20.0% |
| | 4–6 years | 9.2% | 9.5% |
| | 7–10 years | 4.2% | 6.3% |
| | > 10 years | 5.0% | 9.5% |
| Undergraduate qualifications held (note that some | Bachelor of Arts (Law & Society major) | 20.2% | 12.6% |
| | Bachelor of Arts (other major) | 30.3% | 33.7% |

[71] See, eg, Alex Steel, Anna Huggins and Julian Laurens, 'Valuable Learning, Unwelcome Assessment: What LLB and JD Students Really Think about Group Work' (2014) 36(2) *Sydney Law Review* 291, 301–21; Alex Steel and Anna Huggins, 'Law Student Lifestyle Pressures' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 50; Meredith Blake et al, 'Student and Staff Experiences of Online Learning: Lessons from Covid-19 in an Australian Law School' (2022) 32(1) *Legal Education Review* 129.

[72] In addition to the University of Western Australia, the following Australian universities also offer a Juris Doctor degree: Australian National University; Bond University; Deakin University; Flinders University; Griffith University; La Trobe University; Macquarie University; Monash University; RMIT University; University of Canberra; University of Melbourne; University of New South Wales; University of Newcastle; University of Southern Queensland; University of Sydney; University of Technology Sydney; Western Sydney University.

| | | | |
|---|---|---|---|
| participants held multiple undergraduate qualifications) | Bachelor of Commerce (Business Law major) | 19.3% | 14.7% |
| | Bachelor of Commerce (other major) | 10.1% | 18.9% |
| | Bachelor of Business | 1.7% | 1.1% |
| | Bachelor of Biomedical Science | 1.7% | 3.2% |
| | Bachelor of Economics | 1.7% | 3.2% |
| | Bachelor of Philosophy (Honours) | 1.7% | 2.1% |
| | Bachelor of Science | 16.8% | 16.8% |
| | Other Bachelor degree | 9.2% | 8.4% |
| | Professional degree | 2.5% | 2.1% |
| Weighted average mark (out of 100) in the degree completed most recently before commencing JD | 65–69 | 14.3% | 5.3% |
| | 70–74 | 31.9% | 29.5% |
| | 75–79 | 24.4% | 26.3% |
| | 80–84 | 13.4% | 15.8% |
| | 85–89 | 2.7% | 2.1% |
| | 90–95 | 1.7% | 0.0% |
| | Prefer not to say | 11.6% | 21.0% |

As set out in Part V below, we ultimately analysed the data by separating the 2021 and 2022 cohorts, as well as the law undergraduate and non-law undergraduate groups. We chose to analyse the data by year cohort because we were curious about whether the changed circumstances and messaging for each year made any difference to student perceptions. We also wondered whether students without a law-related qualification might be more likely to experience UP/F positively, as those with a law-related qualification would presumably be more familiar and confident with the content taught in the unit.

## V QUANTITATIVE RESULTS

### A *Fairness and 'Levelling the Playing Field'*

We asked participants whether being assessed UP/F was fair and whether it created a 'level playing field'. As seen in Figure 1, the vast majority of participants across both years agreed that it was fair: 90% in 2021 and 98% in 2022. Interestingly, in 2022 no participants perceived being assessed UP/F as unfair — this may be due to the shift in messaging and circumstances from 2021 to 2022 (as discussed in Part III).

A slightly smaller majority of participants across both years agreed that being assessed UP/F created a level playing field: 83% in 2021 and 93% in 2022.

Figure 1: Perceptions of fairness and levelling of the playing field by year cohort

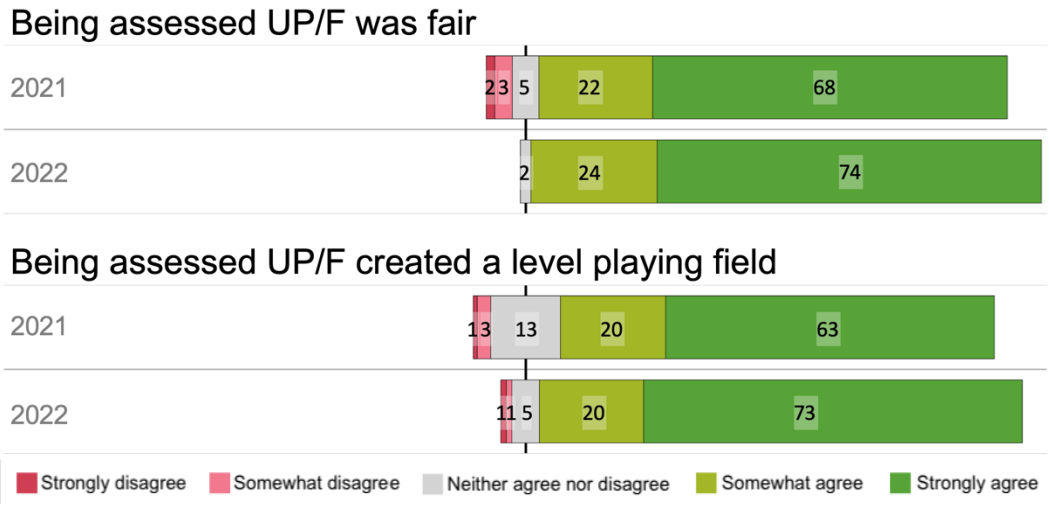
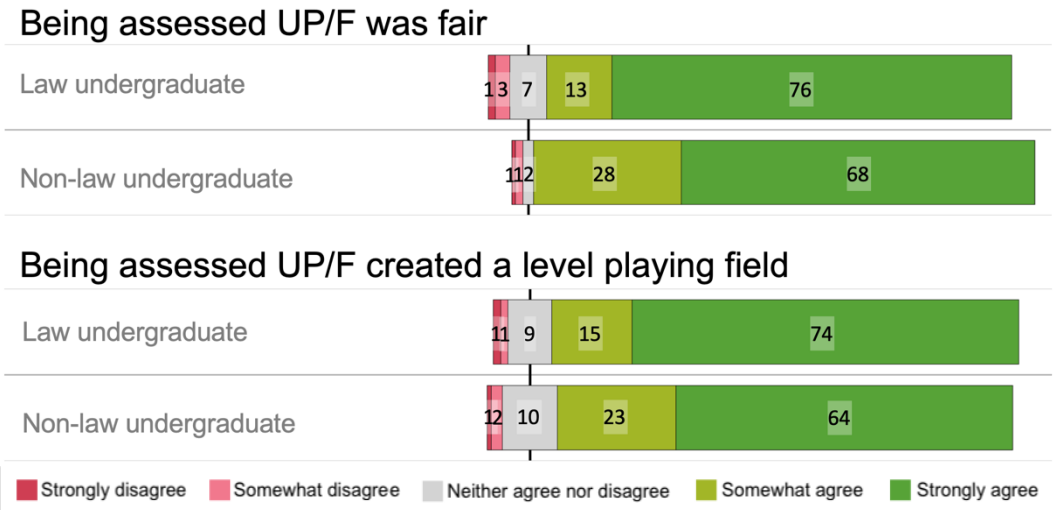



Figure 2 combines the 2021 and 2022 results and separates those who held a law-related undergraduate degree from those who did not. There was more agreement that being assessed UP/F was fair amongst the cohort that did not hold a law-related qualification (96%), than those who had previously studied a Business Law or Law and Society major (89%). Interestingly though, when considering whether being assessed UP/F levelled the playing field, there was slightly more agreement amongst those *with* a law-related qualification (89%) than those without (87%). Though not a statistically significant difference, we expected that those without a law-related qualification would be more likely to agree that being assessed UP/F levelled the playing field.

Figure 2: Perceptions of fairness and levelling of the playing field by undergraduate qualification



## B *Unit Experience*

We asked participants three questions about their experience in LAWS4101: whether being assessed UP/F created a friendly atmosphere; whether it helped them focus on developing skills; and whether it made the unit feel like a waste of time.

Figure 3 shows the responses to these unit experience questions separated by year cohort. Across both years, an overwhelming majority of participants agreed that being assessed UP/F created a friendly atmosphere: 92% in 2021 and 96% in 2022. Further, it is worth noting that a very high proportion of participants across both years strongly agreed with this: 79% in 2021 and 82% in 2022.

In 2021, 90% of participants agreed that being assessed UP/F helped them to focus on developing skills, whilst an overwhelming 98% of the 2022 cohort agreed with this. With this in mind, it is unsurprising that the vast majority of participants across both years disagreed that being assessed UP/F made the unit feel like a waste of time. Only 6% of participants in 2021 and 4% in 2022 agreed that being assessed UP/F made the unit feel like a waste of time, with most participants in each year strongly disagreeing with this.

Figure 3: Unit experience by year cohort

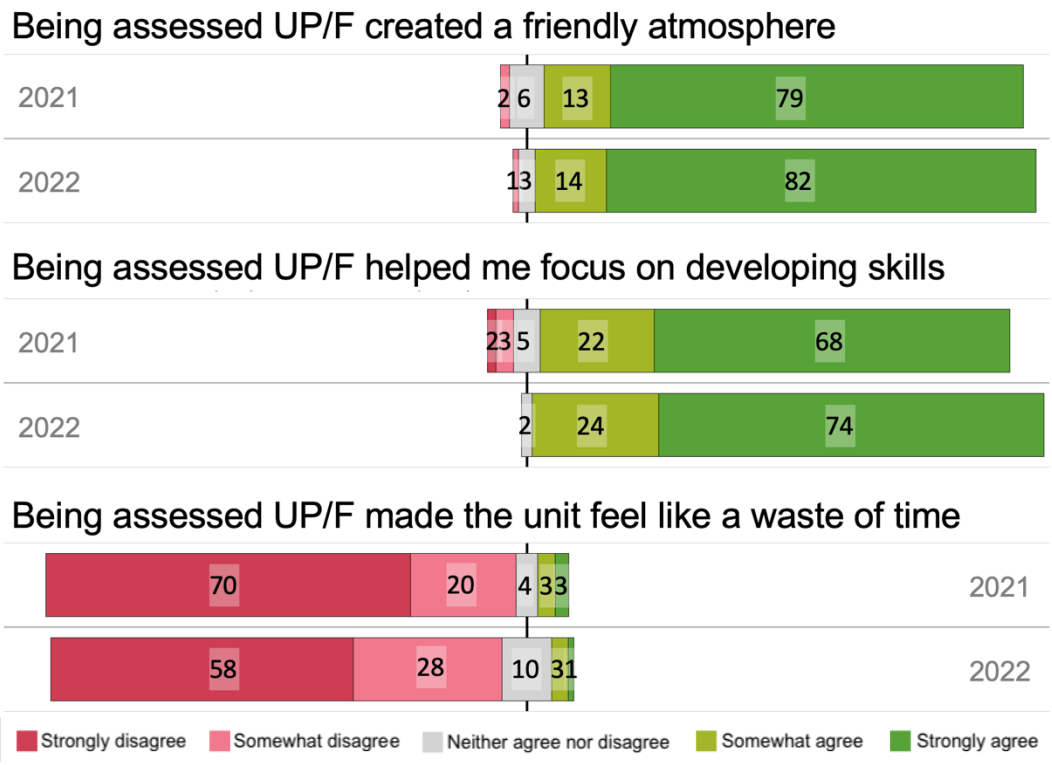
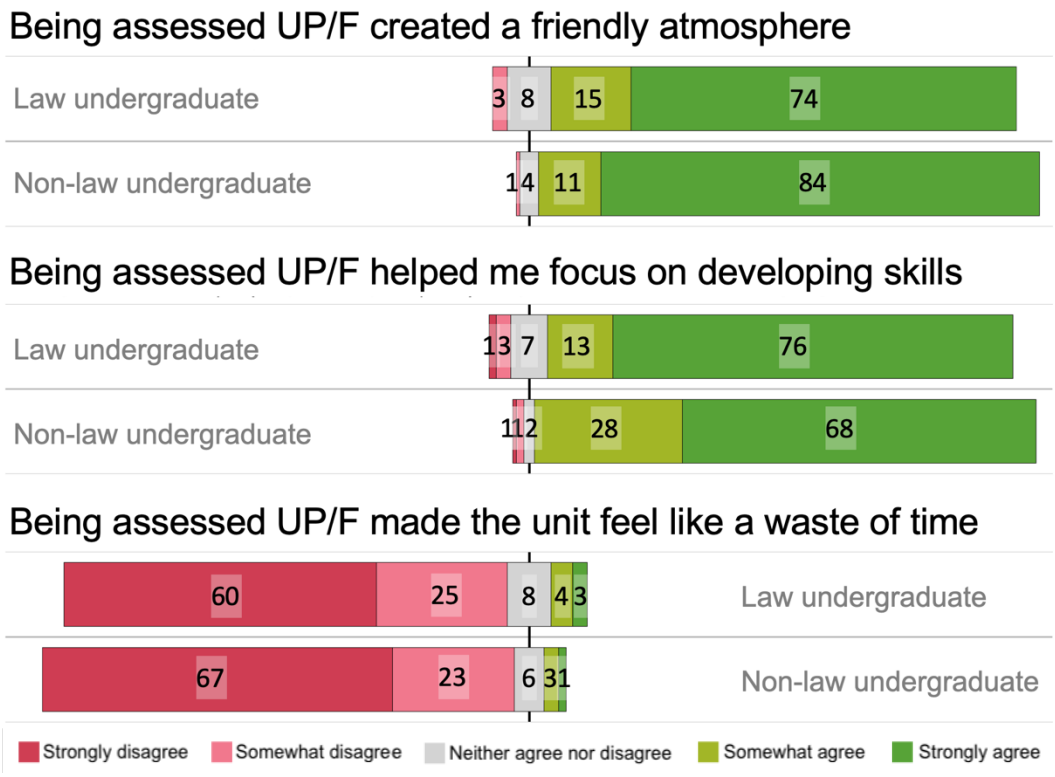



Figure 4 shows the responses to the same unit experience questions but separates those who held a law-related undergraduate degree from those who did not. In the group without a law-related qualification, participants agreed that being assessed UP/F created a friendly atmosphere (95%) and that it helped them focus on developing skills (96%), compared to 89%

in the group with a law-related qualification for both statements. Only 4% of those without a law-related qualification agreed that being assessed UP/F made the unit feel like a waste of time, compared to 7% of those with a law-related qualification.

Figure 4: Unit experience by undergraduate qualification




## C *Grades and Marks*

We asked participants three questions relating specifically to their grades and marks in LAWS4101: whether they would have preferred that the unit was fully graded; whether they liked knowing the mark they would have received for each task; and whether they were ok with their final mark not showing on their transcript.

As shown in Figure 5, most participants in both 2021 (70%) and 2022 (70%) disagreed that they would have preferred if LAWS4101 were fully graded. In 2021, an overwhelming majority of 96% of participants agreed that they liked knowing the mark they would have received for each task, compared to 89% in 2022. Most participants across both years also agreed that they were ok with their final mark for LAWS4101 not showing on their transcript: 73% in 2021 and 68% in 2022.

Figure 5: Grading preferences by year cohort

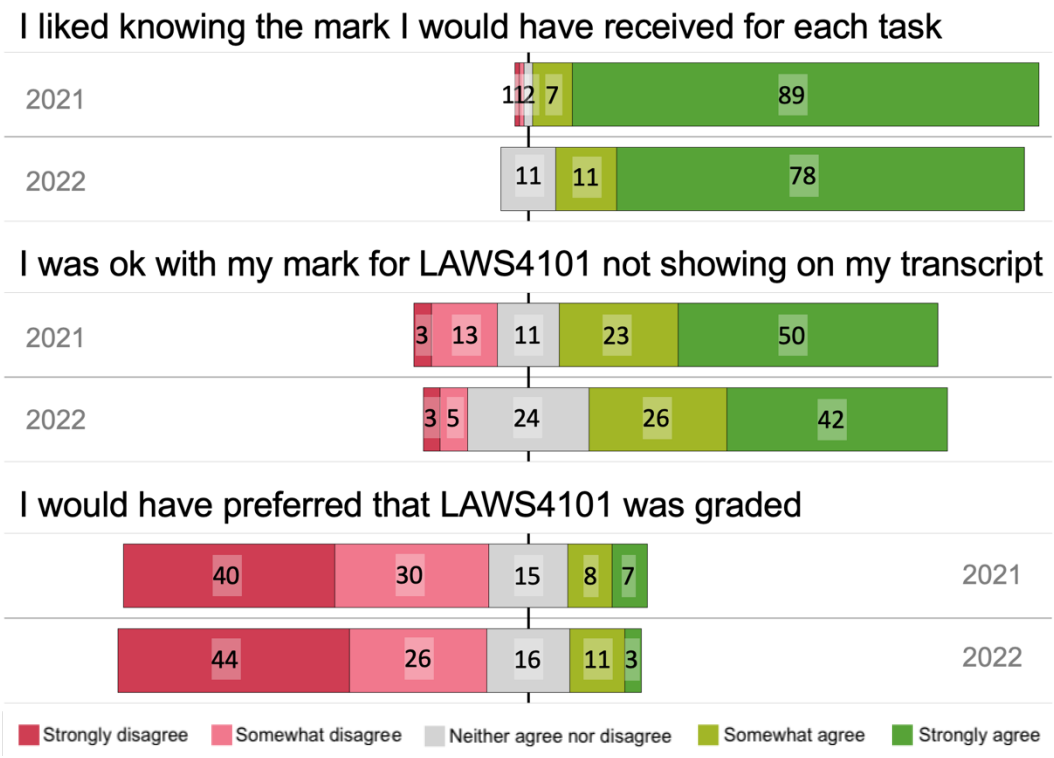
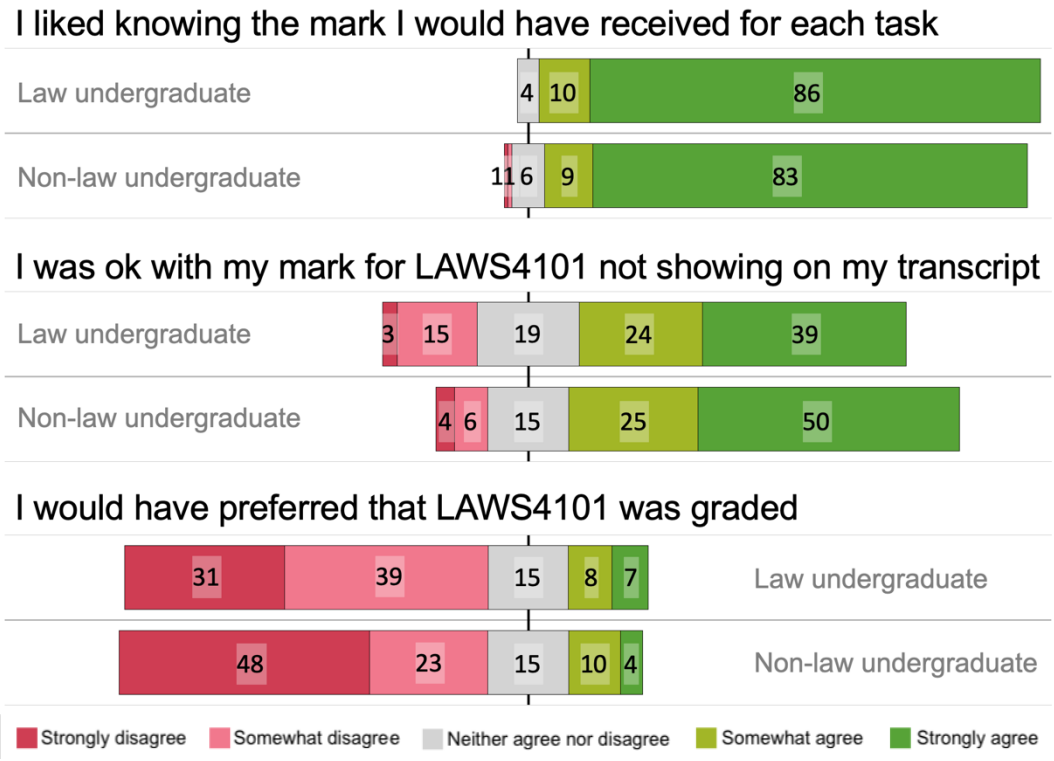



Figure 6 shows that 70% of those with a law-related qualification and 71% of those without disagreed that they would have preferred if LAWS4101 were fully graded. A large majority in both groups agreed that they liked knowing the grade they would have received for each task: 96% of those with a law-related qualification and 92% of those without. Whilst a majority from each group agreed that they were ok with their final mark for LAWS4101 not showing on their transcript, there was a lower rate of agreement amongst those with a law-related qualification (63%) as compared to those who did not have a law-related qualification (75%).

Figure 6: Grading preferences by undergraduate qualification




## VI DISCUSSION AND QUALITATIVE RESPONSES

It is clear from the quantitative results that the vast majority of students responded positively to being assessed UP/F. It is interesting that perceptions of fairness and unit experience were slightly stronger in 2022 than in 2021. The difference in messaging — from an accommodation due to challenging Covid-related circumstances (2021) to a pedagogical choice (2022) — may have contributed to this difference. The 2021 cohort also had to deal with significant disruption to the unit and their lives due to the Covid-related lockdown.[73] As the 2022 unit was not disrupted in the same way, it is not surprising that students had a greater opportunity to experience a friendly atmosphere and to focus on developing skills.

This Part discusses the quantitative results in light of themes that emerged from qualitative responses to the survey's open-ended questions. Most participants chose to respond to the open-ended questions in the survey, with responses coalescing around perceptions of fairness and reports of the unit experience. This Part draws on quotes that are representative of the general themes and sentiments expressed by participants, but it does not intend to comprehensively analyse the qualitative responses.

[73] See, generally, Blake et al (n 71).

### A *Fairness*

A vast majority of participants, irrespective of year cohort and undergraduate background, either agreed or strongly agreed that being assessed UP/F was fair. These qualitative responses are representative of those who thought UP/F assessment was fair:

> It made me feel like I wasn't being punished for doing a non-law undergraduate degree.
>
> Everyone [had] an equal playing field to try new things. For a lot of people this would be the first time writing in a certain style … it gives them a chance to adapt without harsh penalties.
>
> Despite studying really hard for the exam, I still failed because it was completely different to anything I'd ever done. The UP/F gives me a chance to fix my marks and not have this affect my transcript.
>
> It was a low pressure way to engage with new material without starting off the year with immense stress in what is already an intimidating unit for some.
>
> It's good for students to get a feel for the subject rather than being thrown in the deep end.

These responses are significant given the literature's acknowledgement that the transition to law school must be suited to the needs of students who come from a diverse range of backgrounds and experiences.[74] The results indicate that the UP/F assessment mechanism helped lay the foundation for an effective and positive first-year experience.[75]

Notably, no participants in 2022 thought that UP/F assessment was unfair. Very few participants in 2021 thought UP/F assessment was unfair (six participants disagreed or strongly disagreed with the statement that it was fair). However, some participants who neither agreed nor disagreed with the statement that UP/F was fair did express some perception of unfairness in their qualitative responses. This comment by a participant in 2021 is typical of the reasons offered for this perceived unfairness:

> I think there should have been an option to have it as a regularly graded unit. I put in the exact same effort as if it were graded … because I had to make sure I passed. UP/F makes it such that I have to put in effort, but I am then not rewarded for that effort. I would rather have the option to choose, even if it's only available before the course starts, to have my grades count.

There are two sentiments here: students should be able to choose whether a grade would show on their transcript, and reward for effort should take the form of a grade. These sentiments were common in responses from students who strongly disagreed, disagreed, or neither agreed nor disagreed with the statement that UP/F assessment was fair.

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[74] Webster et al (n 7) 2; Heath et al (n 14) 442.
[75] Galloway et al (n 4) 243; Kift, Nelson and Clarke (n 26) 4; Armstrong and Sanson (n 3) 24, 28–9.

Many students expressed a desire to choose whether to be assessed UP/F or have their grades recorded, even when they agreed that the UP/F assessment was fair. This expectation is only apparent in the responses from 2021, perhaps because UWA had allowed students to choose between UP/F and traditional grading in all their 2020 units due to the disruption caused by the Covid-19 pandemic.[76] Offering students a choice in this respect would require us to run the unit exactly as if it were a traditional graded unit, and then some students could then elect not to have their precise grade show on their transcript. Students would still be relying on extrinsic motivation (being rewarded with grades), but the fear of being 'punished' for a poor grade would be alleviated. While students' desire for choice is understandable, especially given the institutional context, we feel that an optional UP/F assessment structure negates much of the anticipated positive impact of moving to gradeless learning. Research reporting on the experience at the National University of Singapore, which adopted optional pass/fail grading for first-year, first-semester students in 2014, supports this view.[77] As we did not observe this sentiment in the 2022 responses, it seems the change in messaging and the emphasis on the pedagogical reasons for UP/F assessment successfully improved student perceptions of fairness.

The other sentiment that comes through strongly in responses from both 2021 and 2022 is that UP/F assessment means hard work is not 'rewarded'. Even some participants who thought the assessment structure was fair expressed this sentiment. For example, two participants in the 2022 cohort, who agreed that the UP/F assessment was fair, noted that 'I don't think it necessarily rewarded people who put in more effort' and that it was 'potentially unfair for students who wanted to get a good mark to boost their WAM'. Similarly, a participant in 2021 observed that UP/F assessment 'doesn't really reward those who put in the work to excel'. This sentiment is unsurprising. As noted in Part II, university teachers have traditionally relied on extrinsic motivators, like grades, to ensure that students complete assigned tasks and meet requisite standards. Prior research shows that addressing student concerns about a lack of reward for excellence is a common challenge when moving to gradeless learning.[78] This may be partially ameliorated by adopting another method of rewarding high performance.[79]

### B *Unit Experience*

The strong indication that UP/F assessment contributed to creating a friendly atmosphere is significant in the context of the literature emphasising the importance of connectedness and building strong support networks in the first year at law school.[80] Many participants discussed the impact of the assessment mechanism on the cohort atmosphere when the survey asked if there was anything else they wanted to share. For example:

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[76] See, generally, Blake et al (n 71) 157.
[77] McMorran and Ragupathi (n 60) 928.
[78] O'Keeffe, Gormley and Ferguson (n 60) 76.
[79] Ibid.
[80] Kift, Nelson and Clarke (n 26) 4; Armstrong and Sanson (n 3) 24, 28–9.

> It felt like we were all in it together, it encouraged friendships and teamwork …
>
> [It] was a clever strategy to introduce students to law and each other before the inevitable competitiveness begins — this unit has enabled us to see each other as fellow students rather than potential competition in the long run.

Similarly, we were pleased to see that participants felt being assessed UP/F allowed them to focus on developing skills — another aspect of the first-year experience that much of the literature regards as essential.[81] Looking at the qualitative responses, it appears that UP/F assessment contributed to creating an environment where students felt comfortable learning. For example:

> It gave us a chance to learn without the intense pressure of failure … so this was a great way to develop skills …
>
> [I]t really lessened my anxiety and allowed me to focus on learning ... I retained so much more because the pressure was off. I feel very well placed to tackle my other units this semester because I was given this solid foundation in a low-pressure environment.

This is consistent with the literature canvassed in Part II, which contends that positive and effective learning environments are characterised by an absence of pressure, stress and despair.[82]

## VII CONCLUSION

Scholarship of teaching and learning in law consistently emphasises the significant personal, professional and intellectual challenges law students face, especially in their first year.[83] The literature acknowledges that law school environments can be isolating, overwhelming, competitive and stressful.[84] Many students feel immense pressure to succeed and are fearful of falling short.[85] Students enter law school with various personal, professional and educational backgrounds, and all must rapidly transition to 'thinking like lawyers'.[86] Conscious of these challenges, we changed the assessment structure of a foundational first-year JD unit to UP/F and asked students how they felt about it. Overwhelmingly, they felt good about it. They thought this change was fair, helped create a level playing field, and fostered a friendly atmosphere. They found it helped them to focus on developing their skills and did not think that UP/F assessment made the unit feel like a waste of time. These findings are significant in light of the literature — they suggest that moving to UP/F assessment in a foundational JD unit can help address many of the challenges new law students face. They indicate that UP/F assessment contributes to a positive first-year student experience, reduces stress, and assists students with their transition to legal study. The findings from this study suggest that there is

[81] Bradshaw et al (n 24) 134–8; Armstrong, Campbell and Brogan (n 9) 139.
[82] Galloway et al (n 4) 243; Moore and Kuol (n 29) 92.
[83] Webster et al (n 7) 2.
[84] Duhart (n 42) 492.
[85] Armstrong and Sanson (n 3) 39.
[86] See, generally, Heath et al (n 14).

merit in future research that evaluates the appropriateness of UP/F assessment in the foundational units of other law degrees (eg, the LLB), as well as in other (non-foundational) law units.

We do not (yet) propose a radical overhaul of assessment culture that would have law schools disavowing grades altogether. However, the potential benefits to student wellbeing and the learning environment indicate that some extension of this approach beyond a foundational unit is worth considering.

# 'SCARY BUT FUN!': A REFLECTION ON THREE YEARS OF MOOTING IN TORTS AT THE JD LEVEL

*Marco Rizzi*[*] *and Kate Offer*[**]

ABSTRACT

In a very full curriculum, finding time and space to develop important skills such as communication and collaboration can be difficult. These issues are exacerbated in a postgraduate Juris Doctor ('JD') degree. In this article, the authors describe and evaluate the moot exercise that has been introduced into their first-year JD core unit 'Torts' at the University of Western Australia and particularly how it has provided students with the opportunity to develop crucial skills that align with the national Threshold Learning Outcomes ('TLOs'), notably TLO 5: Communication and Collaboration.

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## I INTRODUCTION

There is a 'long standing, if not timeless tension' between the roles theory and practice should play in the study of law,[1] but the *practice* of law is ultimately vocational.[2] From an educational perspective then, a successful law graduate should have acquired, in addition to substantive content, a significant and diverse range of relevant practical skills. Of those skills, students should, at the very least, have had the opportunity to acquire a good level of advocacy and communication competencies, which are critical to practice in the legal profession.[3] This is obviously the case for those students who intend to be involved in court work. However, the ability to formulate complex oral arguments and be responsive to counterarguments, objections or unexpected turns of events constitutes a valuable competency for those who will undertake different career paths, such as solicitors, in-house counsel and working in the public service.

Incorporating the assessment of skills in a meaningful way throughout any law course can be challenging,[4] but doing so in the course of a three-year postgraduate Juris Doctor ('JD') degree, while maintaining high levels of substantive rigour, can be a particularly complex task. This is exacerbated by current trends in higher education that push towards the shortening of teaching periods and the need to 'do more with less', among other things.[5] Additionally, a significant difficulty that we as legal educators face is how to guarantee that every law student has the opportunity to develop and be assessed on advocacy skills when we are dealing with increasingly large cohorts.[6]

This article examines our experience in utilising mooting as a mid-semester assessment in 'Torts', a core JD unit at the University of Western Australia Law School ('UWA').[7] By using this well-established type of exercise, which is grounded in a constructivist pedagogical theory, we aim to integrate advocacy and other valuable skills into the core curriculum of the degree, thereby enhancing the overall calibre and versatility of our graduates. Constructivist theory supports a participative learner-centred approach, placing an emphasis on the construction of meaning by the learner through appropriate activities and assessments that leads to enhanced

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[1] Michael Coper, 'Introduction and Overview' in K Lindgren, F Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2018) 1, 3.
[2] Frederick Allen, 'The Law as a Vocation' in *Twentieth-Century Legal Treatises: UK* (Harvard University, 2019).
[3] Natalie Skead and Kate Offer, 'Learning Law through a Lens: Using Visual Media to Support Student Learning and Skills Development in Law' (2016) 41(3) *Alternative Law Journal* 186, 186.
[4] Kate Galloway, Kate Offer and Natalie Skead, 'Disrupting Legal Education' (2017) 44(10) *Brief* 10, 10.
[5] Martin Tsamenyi and Eugene Clark, 'An Overview of the Present Status and Future Prospects of Australian Legal Education' (1995) 29(1) *The Law Teacher* 1, 20; Madeline Breeze, Yvette Taylor and Cristina Costa, 'Introduction: Time and Space in the Neoliberal University' in Madeline Breeze, Yvette Taylor and Cristina Costa (eds), *Time and Space in the Neoliberal University: Futures and Fractures in Higher Education* (Springer, 2019) 1, 2. At UWA, where the authors are based, the teaching semester was reduced from 13 weeks to 12 weeks in 2019.
[6] Tsamenyi and Clark (n 5) 9.
[7] 'Torts [LAWS4106]', *The University of Western Australia Handbook 2023* (Web Page) <https://handbooks.uwa.edu.au/unitdetails?code=LAWS4106>.

learning.[8] Lynch in particular has analysed how mooting fits into established theories of learning, including constructivism, noting that students who moot must engage in legal research in order to develop their argument. They 'construct [their argument] from the materials they will discover through their research', which 'exposes students to areas with which they are unfamiliar, or at least require a much deeper understanding than was necessary when the students were first introduced to the material'.[9] Kinchin, who conducted a study at the University of Wollongong Law School in relation to a mooting assessment in their undergraduate 'Administrative Law' unit, also notes the importance of collaboration to constructivism, as it allows students 'to test their own understanding and to examine the understandings, or alternative views, of others'.[10]

In this article we provide some background to contextualise our initiative, describe 'the how and the why' of mooting in the JD, and reflect upon the successes and challenges of the experience. It is also worth noting that, while in-semester mooting is overwhelmingly a positive experience that attracts good-to-enthusiastic feedback from students, some aspects require constant fine tuning (particularly in the wake of the Covid-19 pandemic).

This article should be read as an extended reflective piece on the back of three consecutive years of running this assessment. As such, it is not methodologically grounded on quantitative or qualitative data, but rather on that particular type of scholarship of teaching and learning that is based on self-reflective practices.[11] Reflective practice can encourage improvement through reflecting on one's own teaching methodologies and practices, to move towards, as Biggs and Tang put it, 'transformation from the unsatisfactory what-is to the more effective what-might-be'.[12] The observations that follow are based on our experiences as unit coordinators, as well as the formal and informal feedback that we have received over the past three years, of an assessment practice in which we have endeavoured to create an effective 'what-is'.

## II MOOTING IN POSTGRADUATE LEGAL EDUCATION AND THE 'SHORT DEGREE WITH SHORT SEMESTERS' DILEMMA

Traditionally, the journey through law school involves an undergraduate degree (LLB) over a four-year timeframe, with core subjects either taught as year-long units or split into semester-

[8] John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (McGraw Hill, 3rd ed, 2007) 28; John Biggs, 'Enhancing Teaching through Constructive Alignment' (1996) 32(1) *Higher Education* 347; Bärbel Inhelder, Harold H Chipman and Charles Zwingmann, *Piaget and His School: A Reader in Developmental Psychology* (Springer-Verlag, 1976); John Dewey, *Experience and Education* (Free Press, 1998).

[9] Andrew Lynch, 'Why Do We Moot? Exploring the Role of Mooting in Legal Education' (1996) 7(1) *Legal Education Review* 67, 78.

[10] Niamh Kinchin, 'Assessable Moots in Administrative Law: The Role of Student Feedback in Creating Cohesion' (2020) 29(1) *Legal Education Review* 1, 3.

[11] See, eg, Roberta M Berry, 'Teaching Health Law: Problem-Based Learning Regarding "Fractious Problems" in Health Law: Reflections on an Educational Experiment' (2011) 39(4) *The Journal of Law, Medicine & Ethics* 694; Ming-Sung Kuo, 'Reconciling Teaching and Research in Law: An Expatriate Law Teacher's Interdisciplinary Reflection (2015) 32(2) *The Journal of Legal Studies Education* 229; Eleanor Stein, 'Ignorance/ Denial-Fear/ Paralysis/ Engagement/ Commitment: Reflections on a Decade Teaching Climate Change Law' (2015) 102 *Radical Teacher* 17.

[12] Biggs and Tang (n 8) 43.

long components.[13] This setting provided educators with significantly more time to explore complex subject matter as well as develop crucial legal skills. However, the move to the postgraduate model (a three-year-long JD), combined with the shortened teaching periods, has drastically reduced the time available. Arguably, there are sound pedagogical reasons to teach law at postgraduate level;[14] students come to their legal studies already with a tertiary education background and having learned much of the foundational work that is required at undergraduate level. At UWA, where many students have undertaken undergraduate majors in Law and Society or Business Law, substantive and vocational content that is specific to the study of law has been studied and can reliably be built upon. Nevertheless, from a practical perspective the move to postgraduate legal education entails changing and adapting teaching styles as well as assessment structures in core subjects that have a long and established teaching tradition.[15]

Aside from the obvious challenges that a shortened timeline presents for the transmission of substantive content, the condensed format can be particularly detrimental to an educator's capacity to facilitate students' acquisition of appropriate levels of the so-called 'soft' skills. The importance of these skills was recognised by the government-funded Learning and Teaching Academic Standards Project in 2009, which was established to identify and define learning standards across all disciplines.[16] The six Threshold Learning Outcomes ('TLOs') prescribed for the JD are: Knowledge (TLO 1); Ethics and Professional Responsibility (TLO 2); Thinking Skills (TLO 3); Research Skills (TLO 4); Communication and Collaboration (TLO 5); and Self-management (TLO 6).[17]

In choosing to assess 'Torts' with a moot, we were particularly focused on TLO 5: Communication and Collaboration. TLO 5(a) provides that JD graduates will be able to communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences. TLO 5(b) provides that JD graduates will be able to collaborate effectively; collaboration and the ability to work as a part of a team are particularly crucial skills in the modern workplace. Of course, a moot goes beyond the development of broader communication and collaboration skills and can give students the opportunity to hone advocacy skills. Advocacy skills include the ability not only to deliver a persuasive argument but the ability to respond effectively to the arguments of one's counterparty, which is the crux of the adversarial system.

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[13] Sally Kift and Mark Israel, *Learning and Teaching Academic Standards Project: Bachelor of Laws, Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010) <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.

[14] See Natalie Skead and Penelope Carruthers, 'The Juris Doctor: A New Era of Legal Education at the University of Western Australia' (2018) 45(3) *Brief* 12; Natalie Skead, Sarah Murray and Penelope Carruthers, 'Taking Up the Challenge: Embedding, Mapping and Maintaining Threshold Learning Outcomes in the Transition to the JD — The UWA Experience' (2013) 47(2) *The Law Teacher* 130.

[15] Skead and Carruthers (n 14) 13.

[16] Australian Learning and Teaching Council and Council of Australian Law Deans, *Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment* (Final Report, 2009) <https://ltr.edu.au/resources/altc_LawReport.pdf>.

[17] Skead, Murray and Carruthers (n 14) 134.

It would be unrealistic to suggest that the complex process of acquisition of oral advocacy skills can be fully integrated within the scope of one content-heavy core substantive unit — of course, it cannot. Rather, the contention here is that adding a structured advocacy component to a content-focused assessment provides an important opportunity for students to develop their oral and rhetorical skills beyond traditional communication, and in a more effective way than simply assessing students' participation in tutorials.

The issue of over-assessment is particularly severe in law schools,[18] and our experience is no exception. For context, full-time JD students take four units per semester.[19] In Semester 2 of their first year, students take 'Foundations of Public Law', 'Legal Interpretation', 'Land Law' and 'Torts' — four core units. University policies prevent final exams being worth more than 60% of the total mark; as a result of this, every unit needs to run a weighty mid-semester assignment (worth typically between 30% and 40% of the mark). This is in contrast with the unit structures that used to take place in the LLB, where big core units were either split across two semesters, thus allowing greater in-depth coverage of content, or run for an entire year, with a final, end-of-year examination carrying the bulk of the total mark. This observation illustrates how studying law in a three-year degree entails a significant compression of the time available to students to digest complex content. Moreover, it is important to consider that postgraduate students are a more mature cohort that tends to have overall more external constraints than undergraduates (such as work commitments, caring duties, and so on).[20] In this context, it becomes apparent that, for students to focus on particular skillsets such as advocacy and communication skills, it is essential to carve out a dedicated space.

Not unconnected to this, at UWA, recent trends show a disproportionate number of deadline extension requests in relation to written assessments (with research essays the most common form of mid-semester assessment in law schools),[21] with anecdotal consensus among colleagues that the Covid-19 years have put unprecedented pressure on both students and the system. Additionally, there is well-established research demonstrating how law students suffer from above-average assessment-related stress with measurable impact on their mental health.[22] In this sense, offering an alternative approach to assessment can provide some relief from the

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[18] Melissa Henke, 'When Your Plate Is Already Full: Efficient and Meaningful Outcomes Assessment for Busy Law Schools' (2020) 71(2) *Mercer Law Review* 529.

[19] The structure of the course is available at: 'Juris Doctor [20820]: Course Overview', *The University of Western Australia Handbook 2023* (Web Page) <https://handbooks.uwa.edu.au/coursedetails?code=20820>.

[20] Arlie Loughnan and Rita Shackel, 'The Travails of Postgraduate Research in Law' (2009) 19(1) *Legal Education Review* 99, 121; Tricia Marie van Rhijn et al, 'Unmet Needs: Challenges to Success from the Perspectives of Mature University Students' (2016) 28(1) *Canadian Journal for the Study of Adult Education* 29, 31; Cathy Stone and Sarah O'Shea, 'Time, Money, Leisure and Guilt: The Gendered Challenges of Higher Education for Mature-Age Students' (2013) 53(1) *Australian Journal of Adult Learning* 95, 97.

[21] Whilst the data is not publicly available, we are privy to this information given the service roles we cover in the Law School.

[22] Wendy Larcombe and Katherine Fethers, 'Schooling the Blues? An Investigation of Factors Associated with Psychological Distress among Law Students' (2013) 36(2) *UNSW Law Journal* 390; Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students across Diverse Fields of Study' (2015) 37(2) *Sydney Law Review* 243; Natalie Skead and Shane L Rogers, 'Stress, Anxiety and Depression in Law Students: How Student Behaviours Affect Student Wellbeing' (2014) 40(2) *Monash Law Review* 564.

constant grind of written assessments, which represent the vast majority (if not entirety) of assessments in other core units of the degree.

The use of alternative assessments to research papers has the advantage of accommodating students' differing learning styles. Learning styles are defined as 'stable ways of approaching [academic] tasks that are characteristic of individuals'.[23] Since learning styles vary between individual students, particularly so in a postgraduate law degree where there is likely to be a more diverse cohort, providing a wider range of assessment styles would be a more equitable approach to assessment.[24]

A related issue, which is not specific to law schools but rather applies to universities across the board, is that of increasing contract cheating in the context of take-home assignments (such as research essays) and online cheating, such as during online exams.[25] Adopting a moot as a form of assessment can help mitigate these issues, as the in-person and interactive nature of the mooting assessment substantially reduces opportunities for plagiarism and collusion.

## III THE *WHY* AND THE *HOW* OF MOOTING IN THE JD

### A *Why?*

The fact that mooting is an overall valuable learning and skills development exercise for law students and one that is particularly beneficial to the development of communication skills is amply demonstrated in the legal education literature.[26] What sets the moot we currently conduct at UWA apart from other experiences is that it is the first of its kind to be conducted at postgraduate level in Australia, and within the scope of the condensed three-year JD timeframe. Moots that already exist as a part of the Law School curriculum will usually be located in standalone units. These moots can be internal, state, national or even international competitive programmes, or extracurricular activities.[27] While immensely rewarding and beneficial for the students who participate (typically after a process of selection), they do not achieve the intended goal of providing access to advocacy development to all students in the cohort.

The fundamental question we faced as unit coordinators was whether the demonstrated benefits of mooting can be maintained in the context of the JD, or whether the degree's constraints made mooting as an assessment impractical in a core unit. To answer the question, we sought

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[23] John Biggs, 'Approaches to Learning and to Essay Writing' in RR Schmeck, *Learning Strategies and Learning Styles* (Plenum Press, 1988) 185.
[24] Mihail Danov, 'Teaching International Commercial Arbitration at Postgraduate Level: Techniques for Enhancing Students' Learning' (2011) 45(1) *The Law Teacher* 101, 103.
[25] Kamrul Ahsan, Suraiyah Akbar and Booi Kam, 'Contract Cheating in Higher Education: A Systematic Literature Review and Future Research Agenda' (2022) 47(4) *Assessment & Evaluation in Higher Education* 523.
[26] See, among others, Ruth Jones, 'Assessment and Legal Education: What Is Assessment and What the *# Does It Have to Do with the Challenges Facing Legal Education' (2013) 45(1) *McGeorge Law Review* 85; Lang Tang, 'The Effective Application of "Moot Court" in Law Teaching' (Conference Paper, International Conference on Computers, Information Processing and Advanced Education, May 2021).
[27] For example, participation in the Philip C Jessup International Law Moot Court Competition, which is undertaken as an elective unit, is limited to only five students.

to develop a model that would accommodate yearly cohorts of about 250 students, with a maximum of three teaching staff involved in the assessment. What follows is a description of the structure of the assessment, which we hope may provide some useful inspiration for colleagues attempting to integrate this type of assessment in their curriculum.

## B *How?*

'Torts' runs in Semester 2 of the first year of the JD. During the winter break, we design a complex factual scenario, supplemented by extra materials such as made-up statutory provisions, contractual obligations, industry standards, witness statements and the like. This scenario typically involves two separate claims; with two plaintiffs and two defendants we can accommodate four different submissions. The problem is released to students via our Learning Management System in week 2. The moot then takes place in the mid-semester break and is focused on the content of the first four weeks of semester, ie, Duty of Care and Breach of Duty in Negligence.

Each moot takes place in a 60-minute block, during which four students are assessed. Students work in teams of two. Students are free to decide who they want to work with and are responsible for signing themselves up to an assessment time slot on an online calendar system.[28] If a student does not have a preferred teammate they simply register individually, and we pair them up with another student who registers for the same time slot.

Prior to their moot, teams must provide 800-word written submissions for both the plaintiff and the defendant. This is a very basic skeleton argument highlighting the key issues of fact and law (and relevant authorities) that will be raised in the oral arguments. Crucially, each team of two students must be prepared to argue either side of the problem (plaintiff or defendant), and whether a team appears for the plaintiff or the defendant is decided on the day, on the basis of a coin toss. This ensures that students cover every angle of the problem in their preparation.

During the moot, each student is required to speak for up to eight minutes, and each team is given an extra eight minutes at the end for rebuttal and rejoinder, in the following format:

> **Plaintiff 1** — 8-minute argument
> **Plaintiff 2** — 8-minute argument
> **Defendant 1** — 8-minute argument
> **Defendant 2** — 8-minute argument
> **Plaintiff team** — 8-minute rebuttal
> **Defendant team** — 8-minute rejoinder

The moot assessment is worth 35% of the unit's total mark. The written submission is marked jointly and is worth 10 marks. The oral component is marked individually and is worth 25

[28] There are a number of free services available for this purpose, although we currently use a live Excel signup sheet embedded into our institutional MS Teams platform.

marks. The oral argument is marked out of 18 and the advocacy component is marked out of 7.

It is important to note that the emphasis of the assessment is on the substance of the argument rather than compliance with court procedures and formalities. So, for example, it is sufficient for students to commence their oral submissions as follows: *'Your Honour, my name is XX, and I appear with my learned colleague, YY, on behalf of the Plaintiff/Defendant.'* This is an important distinction from other mooting competitions where emphasis is placed on strict adherence to protocol. Thus, the key assessment criteria are as follows:

- Clearly identify relevant factual and legal issues and apply legal principles to resolve each issue.
- Demonstrate a deep knowledge and understanding of legal principles, relevant case authority and commentary.
- Develop a clear and cogent oral argument.
- Where necessary, respond clearly and relevantly to key points raised by counterparties.

We made the conscious choice of allocating a relatively low number of marks to the advocacy component. Specifically, we want the moot to be a positive formative experience, and not yet another daunting task. JD students come from diverse backgrounds and not all of them have necessarily developed strong public speaking skills at this stage of their law degree. We are also cognisant of the potential added stress for students dealing with mental health issues. Allocating 7 marks to advocacy and putting the emphasis on the substance of the arguments presented is designed to achieve a double objective. On one hand we seek to create a *sui generis* 'sandbox' where students can experiment and trial out their advocacy with relatively low stakes. In that spirit, we mark advocacy generously, rewarding effort over objective success. On the other hand, there are sufficient marks attached to ensure that students take the exercise seriously.

## IV REFLECTING ON THE ASSESSMENT THREE YEARS ON

We have now run three iterations of this assessment, and so are able to reflect on its impact and outcomes thus far. Overall, we believe that the question of whether it is possible to successfully integrate mooting as an assessment within the scope of a JD core unit can be answered in the positive.

Indications of the experiment's success can be found, for the first iteration (2020) in the Students' Unit Reflective Feedback Reporting. Specifically, the statement 'The assessment tasks were closely linked to the unit objectives' received a score of 3.77/4 — well above the school (3.43) and university (3.47) average for the year. In the same year, the Student Perceptions of Teaching survey included the statement 'The teacher organized and conducted the assessment (moot) effectively and fairly', which received an excellent 4.71/5.

For the second iteration of the moot, in 2021, the unit was scored according to a different system, the Student Experience of Learning and Teaching ('SELT'), which is now the current student evaluation used at UWA. The SELT report for the unit recorded an excellent 4.60/5 for the statement 'The assessment tasks in this unit helped me learn'. Naturally, this is not limited to the moot and includes the final exam. However, it is possible to augment this score with observations from the open-ended comments section of the SELT report, which provides qualitative validation to these quantitative stats:

> The moot assessment was very useful, it was good to prepare and research both sides of the argument and have an introduction to advocacy.
>
> I really enjoyed the assessment structure in the unit with the moot making for a refreshing and stimulating challenge.
>
> Although daunting, the moot was really enjoyable; it was nice to get a feel for what trial advocacy looks like.

From our perspective, so far the assessment has achieved a number of positive outcomes, which prompt a series of observations we now discuss in turn.

### A *Mooting in the JD: TLO 5 Communication and Collaboration*

First, mooting integrates advocacy into a condensed degree that otherwise tends to sacrifice oral and rhetorical skills in favour of more manageable written assessments.

As already suggested, the moot assessment aligns with TLO 5's requirement that students develop appropriate communication skills. On a broader level, these skills are already assessed in more traditional settings, such as tutorial participation. However, mooting allows students to delve deeper into the specific type of communication that is involved in advocacy work, ie, the art of crafting a persuasive argument on behalf of another, anchored to evidence and principles.[29] Students are also provided with an opportunity to work another aspect of advocacy: their responsiveness and ability to 'think on their feet'. Advocacy and responsiveness are critical skills for law graduates, regardless of whether they end up working as litigators, solicitors or elsewhere.[30] Yet, such skills do not receive many other opportunities for development over the course of the JD, and certainly not in core subjects. In this sense, there are also significant benefits to exposing students to advocacy early in the degree, as further discussed below.

In addition to individual advocacy, the structure of the mooting assessment described above allows students to work on their collaborative and team-building skills. This is critical, as the legal profession, although often still regarded as solitary and individualistic, is a collaborative

[29] David Bennett, 'The Art of Persuasion through Oral Advocacy' (2007) 28(1–2) *Adelaide Law Review* 145.
[30] Neil J Dilloff, 'Law School Training: Bridging the Gap between Legal Education and the Practice of Law Symposium — The Future of the Legal Profession' (2013) 24(2) *Stanford Law & Policy Review* 425, 450; Galloway, Offer and Skead (n 4) 11.

endeavour and successful lawyers are generally able to work well with others.[31] We note that students do have the opportunity to develop these skills in other units and through other activities and assessments. While this is therefore not unique to our assessment, the collaborative context created by mooting certainly is. Students develop their arguments by working in pairs and can confer with each other during their assessment — particularly in preparation for the rebuttal/rejoinder part of the moot. While some pairs of students simply divide up the work neatly and develop their arguments separately, we strongly encourage teamwork. Consistent anecdotal evidence over the course of the past three years points to the conclusion that teams that do collaborate perform better both in their team mark for the written submission and in their individual marks for oral submissions.

### B *Mooting in Torts: Delving into the Culture of Argument*

Mooting befits the subject matter. Indeed, as we note elsewhere, '[t]ort law is embedded in a culture of argument that uses principles and policy considerations to justify the construction and application of rules of conduct that will guide us in the pursuit of justice and resolution of disputes.'[32]

Students are exposed to this aspect of the discipline throughout the course of the unit, which is rife with references to the inductive, fact-dependant and argumentative nature of decision-making in leading cases. Examples of this are varied. One is the very different treatment of secondary victims of mental harm in the UK and Australia, partially a product of the factual scenarios underpinning the two countries' respective leading cases. Students are particularly fascinated by the arguments brought forward in the context of the UK's *Alcock* case,[33] which was essentially a mass tort scenario, and contrast them with the very different arguments of the Australian *Annetts* decision,[34] involving the tragedy of one single family. Similarly, the different presentation and discussion of scientific evidence in the UK's *Fairchild* decision[35] and the Australian *Amaca v Booth*[36] led to the adoption of two significantly diverging alternative tests for establishing factual causation, respectively the 'material increase in risk' and the 'material contribution to harm' tests.

Providing students with a sufficiently complex and open-ended scenario and allowing them to craft arguments in teams and litigate them in the safe and controlled environment of the mooting assessment achieves a dual purpose. First, it provides students with a lived experience and practice of this culture of argument, which they would otherwise largely only understand in the abstract. Second, it provides students with the opportunity to achieve a higher

[31] Janet Weinstein et al, 'Teaching Teamwork to Law Students' (2013) 63(1) *Journal of Legal Education* 36, 38.
[32] Julia Davis, Marco Rizzi and Kate Offer, *Connecting with Tort Law* (Oxford University Press, 2nd ed, 2020) 53.
[33] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.
[34] *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449.
[35] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.
[36] *Amaca Pty Ltd v Booth* (2011) 246 CLR 148.

understanding, not only of the substance of the law of torts, but of the distinctive internal dynamics that are so fundamental to its shaping.

### C *Mooting in Year 1: Early but Not Too Early*

Integrating mooting as an assessment in a first-year law unit is, on its face, a significant risk. Other recorded experiences typically reserve mooting for more senior students, who have had the opportunity to gain greater exposure to law subjects and reasoning. However, these testimonies discuss mooting in the LLB, that is at undergraduate level. Unlike their LLB counterparts, first-year JD students are not school leavers. They have already completed a degree and have already developed important academic skills. Their law degree is also significantly shorter. Given the greater maturity of the JD cohort, exposing first-year students to this type of assessment can have several beneficial impacts, as corroborated by our experience.

First, it gives students an early opportunity to be exposed to advocacy. This is beneficial for pedagogical reasons, as not only torts but most common law subjects are embedded, at least to a degree, in a culture of argument. Thus, early experiential exposure to this feature of the common law can be the source of important tools for a deeper understanding of a broader range of legal fields than only torts. Moreover, getting a sense of advocacy and mooting opens opportunities that many JD students would not necessarily reach for. Indeed, students who are independently motivated will generally seek to participate in available extracurricular mooting competitions, but not every student is naturally inclined to do so, even though they might be perfectly good at it and would enjoy the experience.[37] Integrating mooting in torts ensures that, by the end of the first year, every student is given the chance to have that experience at a basic level, which puts everyone on more level ground when opportunities for advanced mooting units or extracurricular competitions arise. It is also important to remember that we only allocate 7 marks in total for the advocacy component. As discussed, we are keen to provide students with a 'sandbox' to experiment with their skills rather than a gauntlet they have to get through, particularly in their first year.

Second, mooting in a team and facing a team of colleagues appears to increase our students' sense of responsibility towards each other and contributes to measurably reducing the amount of extension requests for the unit's mid-semester assessment compared with previous years in which we ran a more traditional research essay. Seeking an extension with the moot impacts on three colleagues, not just the student themselves, and it appears that only the truly exceptional cases resort to it, with students in this situation generally proactively reaching out to their colleagues to find a workable alternative time. While this is largely dictated by the nature and structure of this assessment, creating early opportunities for students to develop

[37] Mary E Keyes and Michael J Whincop, 'The Moot Reconceived: Some Theory and Evidence on Legal Skills' (1997) 8(1) *Legal Education Review* 25.

restraint with regards to seeking extensions is of great pedagogical significance, particularly in the current environment.

Finally, as we noted above, this type of assessment, where only 10 marks are allocated to the 800-word written submissions and the bulk of the marks are from the presentation of the argument and students' advocacy skills, seems to mitigate against issues of cheating and recourse to ethically dubious websites.[38] Indeed, over the past three years we have had only one case of misconduct in a total of almost 750 students assessed; a marked reduction from plagiarism instances in written papers. Admittedly, it is unclear whether this has any positive effect on subsequent assessments and this positive impact may be limited to our moot — which would still be in and of itself worth noting.

### D *Mooting from the Other Side: A Better Marking Experience*

Finally, but significantly, from a marking perspective this is a much more enjoyable assessment than facing hundreds of written papers to mark. While the moot problem is the same for everyone taking part, no two students will ever present their arguments in the exact same way. Presenting orally also allows for diverse personalities and approaches to emerge much more vividly than in writing. The moot is also arguably a more efficient use of a marker's time because the marking takes place over a defined period (after which it is over!!). In this sense we may even go as far as to suggest that this assessment, while seemingly daunting at first, makes for a significantly less resource-intensive assessment to mark within individually allocated workloads (and in compliance with current university policy timeframes for marking and feedback) than the more traditional written assessment items. The only downside we have encountered is that, compared to marking written assessments at one's own pace, the assessor must keep their focus up for the duration of the day's allocated moot exercises, with less flexibility for taking breaks or having moments of distraction. But, overall, we find this to be a very manageable and worthwhile trade-off.

## V CONCLUSION

One aspect that we have reflected upon since starting this assessment is that it would be appropriate to provide additional resources to further assist students in developing advocacy skills. The moot has been an effective assessment, but we realise that more is required in terms of provision of some preliminary training to students. This year we have collaborated with the Blackstone Society, the UWA Law Students' Society who delivered a well-attended workshop providing guidance to the students with respect to presenting their arguments and their written submissions. Relying on peer mentoring, in an environment where resources are increasingly scarce, is certainly an avenue worth exploring further, particularly given the positive feedback from this year.

[38] Ahsan, Akbar and Kam (n 25) 523.

In this article we have described and evaluated the moot exercise that has been introduced into the first-year JD core unit 'Torts'. We believe this has been a success, allowing as it has for opportunities for students to develop crucial skills that align with the national TLOs, particularly TLO 5: Communication and Collaboration. Using moots as a mid-semester assessment tool has allowed students to engage with a constructivist model of learning, for not only the broad communication and collaboration skills that students need to acquire, but also for the practice of the more specific arts of advocacy and teamwork in a time-pressured environment. This is an assessment that we would certainly encourage others to implement, even within the constraints of a postgraduate law degree.