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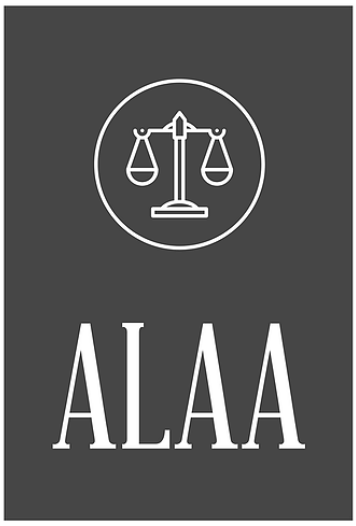

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Contents

FOREWORD

Jonathan Barrett, Editor

Most articles in this volume were developed from papers presented at the 2023 ALAA Conference, hosted by the University of Canterbury in Christchurch, New Zealand. I wish to pay my respects to Kāi Tahu Whānui, who are the traditional kaitiaki (guardians) of the part of Te Waipounamu (the South Island) where the conference was held.

Reflections on legal education feature strongly in this edition. David Barker discusses the greatly forgotten but seminal role Sir David Hughes Parry, a Welsh academic, played in the development of New Zealand's universities, including its law schools. Stephanie Falconer and Emma Henderson engage with questions that many teachers across the academy are asking about the efficacy of online teaching and how to inculcate practical skills remotely. Noeleen McNamara and Kerstin Braun also examine the challenges of online teaching, in particualar, students' transition to the law school, and how to establish practices of academic integrity.

Many non-Indigenous academics in Australia and New Zealand are increasingly interested in the role First Nations' normative systems can play in the postcolonial law school and broader society. It is then particularly illuminating to learn about the experiences of our Pacific colleagues who teach in the two worlds of modern law and traditional custom. From the perspective of Papua New Guinea, Brian Tom reflects on how ancient traditions, including customs relating to land, can be most effectively included in the curriculum of a contemporary law school.

The last teaching article has been developed from a panel discussion that took place at the 2022 ALAA conference in Melbourne. The panel included two Deans, one of ALAA's most experienced academics, and the immediate past editor of the *Legal Education Review*. David Barker introduces Nick James, Michael Adams and Kate Galloway. This article is essential reading for anyone who is interested in the ideas, insights and aspirations of some of Australia's leading legal education thinkers.

While *JALAA* is a popular vehicle for publishing legal education research, we also aim to publish articles on the full range of legal research conducted by ALAA members. It is therefore pleasing to publish Trish Keeper's meticulous analysis of a troublesome provision included in New Zealand's receiverships legislation.

As always, I wish to thank the authors for choosing to submit their work for publication with *JALAA*. I am especially grateful to the reviewers for their time, thoughts and constructive feedback. ALAA is a particular community of scholars and a sense of common purpose is invariably reflected in the review process. As editor, I have greatly benefited from the support of the Editorial Board, and the three ALAA Chairs – Nick James, Natalie Skead and, now, Kate Galloway. Finally, I would like to thank Leylani Taylor for her administraive support, especially for the aesthetics of the *JALAA* webpage.

SIR DAVID HUGHES PARRY, WELSH LAW ACADEMIC – CONTRIBUTOR TO THE FOUNDATION OF MODERN NEW ZEALAND UNIVERSITY EDUCATION AND ITS EVENTUAL LEGAL EDUCATION OUTCOMES

David Barker AM[*]

ABSTRACT

This article examines the background and influence of the leading Welsh Legal Scholar David Hughes Parry who chaired the committee on New Zealand Universities and whose Report was published in 1960. Besides his role as a leading legal educator, a major part of this presentation is concerned with the role of the Parry Report which was to be regarded as watershed in the history of higher education in New Zealand. The report led to the demise in 1962 of the federal University of New Zealand and the granting of the designation and title of 'university' to each of the then four 'colleges' of the former federal University of New Zealand.

The report was also recognised for its challenging and resonating observations in respect of the culture of contemporary New Zealand Universities wherein teaching was regarded as being their sole function. Because of financial limitations there was little, if any, innovative research being supported and undertaken. The Parry Report held that the need to address and remedy this deficiency was essential.

This article examines the period following the publication of the Parry Report which saw a dramatic growth in New Zealand's universities as new universities were founded, and New Zealand law schools benefitting from the increased emphasis on the general improvement of facilities. This, along with improved academic and teaching standards, owed a great deal to the implementation of the recommendations within the Report.

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I INTRODUCTION

There is a major challenge in dealing with such a wide-ranging topic of reviewing the career of an outstanding law academic, who also had an important influence on the development of the modern New Zealand Universities system. The dilemma is knowing how to ensure that appropriate emphasis is given to explaining the character and background of the individual concerned, while maintaining the focus on the outcome of his influence as a law academic. It is also relevant to consider how this led to him being invited to chair a committee whose Report had such an important effect on the development of the modern New Zealand university system.

Hughes Parry studied for his first law and economics degree in 1910 at Aberystwyth University College, Wales, where he was awarded first-class honours. He subsequently enlisted in World War I, saw active service in France where he was wounded, returning to the United Kingdom for the remainder of the War. At the end of his military service, he undertook further legal studies at Peterhouse College, University of Cambridge. This led to an appointment in 1920 as an assistant lecturer at the Aberystwyth Law Department. However, his formative years (1930 to 1959) as Professor of Law were spent at the London School of Economics (LSE), University of London where had been appointed as a lecturer in 1924 and Reader in 1928. It was during this time covering a period of almost thirty years that his tenure as Head of the Law Department has been described as seeing 'the Law department emerge as one of the most important centres of legal scholarship in the United Kingdom and, indeed, the common-law world.'[1] For those unfamiliar with the University of London, at that time it was an amalgamation of Colleges, most of which had law schools, the principal of which other than the LSE, were Kings College (headed by Harold Potter) and University College (George Keeton). Among other leading law academics was LCB (Jim) Gower who was one of the first law academics to realize the problem facing law academics as caught between teaching law as a critical subject while at the same time preparing students for practice.

Hughes Parry was not only an active law academic, but he also took a keen interest in the Society of Public Teachers in Law, becoming its President in 1948-49, always insisting that that a university legal education was a part of an essential stage in the intending lawyer's preparation for professional practice.

His role in academic administration was enhanced when he was elected as Vice-Chancellor of the University of London 1945-48. It was therefore not surprising that 1947 Hughes Parry was appointed as director of the newly founded Institute of Advanced Legal Studies (IALS). It was this role, especially its connection with its collation of information on legal research degrees within British and Commonwealth universities, which brought Hughes Parry to the notice of the wider international legal community.

[1] R Gwynedd Parry, *David Hughes Parry – A Jurist in Society* (University of Wales Press, 2010) 45.

II THE FOUNDATION OF THE FEDERAL UNIVERSITY OF NEW ZEALAND

The establishment of a university system in New Zealand originated with the impetus from the country's Scots Presbyterians who needed an institution in which to train their minsters. As they had strong influence in the Province of Otago, this led to the foundation of the University of Otago in the Province's capital Dunedin in 1869.[2] 'Other universities opened in Christchurch (Canterbury) in 1873, Auckland in 1883, and Wellington (Victoria) in 1899; Massey (Palmerston North) followed in 1964, Waikato (in Hamilton) in 1965, and Lincoln (Outside Christchurch, Canterbury) in 1990.'[3]

In 1870, very soon after the creation of Otago University, the New Zealand Government decided to take control of the university movement, which resulted in the enactment[4] of the *New Zealand University Act 1870* (NZ).[5] An immediate outcome was that Otago University was discontinued as an independent institution with its degree awarding powers suspended and its subsequent amalgamation into the new national university. As the legislation states, it was enacted 'to promote sound learning in the Colony of New Zealand'.[6] It could be argued that the legislation was 'more than a vehicle for the promotion of education… [It was actually] a further means of maintaining central political control over the development of university education in the country.'[7] One might conclude that the wider outcome of the legislation could be assumed as being that 'the founding of the national University of New Zealand was accordingly driven by wider political and social motives.'[8]

III THE OUTCOME OF THE 1879 ACT AND SUBSEQUENT LEGISLATION

Both the initial legislation of 1870 and the subsequent *University of New Zealand Act 1874* (NZ), which created the Christchurch (Canterbury) University College, set out that the prime function of the University of New Zealand was to serve as an examining body for its constituent institutions: the Act provided:

> The University hereby established is so established not for the purpose of teaching, but for the purpose of …ascertaining by means of examination the persons who have acquired proficiency in Literature, Science or Art by the pursuit of a liberal course of education, and of rewarding them by academic degrees and certificates of proficiency as evidence of their respective attainments.[9]

[2] Ibid 113.
[3] Michael King, *The Penguin History of New Zealand* (Penguin Books, 2003) 209.
[4] *New Zealand University Act 1870* (NZ).
[5] Parry (n 1) 113.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] *University of New Zealand Act 1874* (NZ) s 4.

The outcome of this legislation was that the University, while having no responsibility for teaching within the constituent institutions, would still be responsible for prescribing the curriculum.

It is obvious that the outcome of the legislation was to create an uneasy relationship between the various parties which would remain unresolved for many decades.

However, a Charter granted in 1876 gave recognition to degrees in arts, law, medicine, and music. A supplementary charter in 1884 recognised degrees in science. Nevertheless, there were ongoing arguments regarding requirements for the degrees, syllabuses, standards and methods of examination. In 1879 this resulted in the outcome of the University Senate deciding that all examinations both for degrees and honours should in future be conducted by examiners in Britain.

IV THE ROYAL COMMISSION ON UNIVERSITY EDUCATION IN NEW ZEALAND 1925

The setting up of this Royal Commission in 1924 was to examine the situation and consider the future of the relationship between the national university and the regional colleges. One of the factors for the Commission was the demand for the reorganisation of the University of New Zealand into four independent universities. The Commission consisted of Sir Harry Reichel, Principal of the University College of North Wales in Bangor and Frank Tate, Director of Education in the Australian State of Victoria. The terms of reference for the commission were:

> to examine the existing facilities for university education and the way in which they worked; the constitution of the Senate and the question whether special interest such as agriculture, industry and commerce should be represented thereon; the question of separate universities or the improvement of the semi-federal system of affiliated colleges; the standard and scope of the examinations conducted by the university; the method of examination; the question whether entrance examination should give place to a system of 'accrediting'; the relation of university secondary and technical education; the provision for university teaching and research; and anything else which the Commissioners felt worthy to report.[10]

In its report, the Commission agreed that while dissolution of the federal University and the establishment of four independent universities was ultimately inevitable, the time for this was not yet appropriate. It therefore recommended the retention of a federal university with the appointment of an academic head or principal. Other recommendations included the setting up of an Academic Board responsible for curricula and examination requirements, a Secondary Schools Board to look after entrance qualifications, and a Council of Legal Education. It also urged for the provision of better financial support for universities generally and for libraries.[11] It should be noted that the Royal Commission devoted a considerable amount of its time and report to the question of legal education (some 15 pages), stating '[a] great amount of evidence

[10] 'The Royal Commission – 1925' in AH McLintock (ed), *An Encyclopedia of New Zealand* (Web Page, 1966) <https://teara.govt.nz/en/1966/education-university-university-of-new-zealand/page-8>.
[11] Ibid.

was tendered to show that legal education is New Zealand is at present upon a very unsatisfactory footing'.[12]

While most of these recommendations were incorporated in the *New Zealand University Amendment Act 1926* (NZ),[13] for various reasons it was decided that the appointment of a principal was unnecessary, and as a compromise the provision was made for the appointment of the part-time position of a chief executive.

V THE COMMITTEE ON NEW ZEALAND UNIVERSITIES 1959 – THE PARRY REPORT

By the late 1950s there was a growing a mood of crisis within the New Zealand university sector and the minister of education of the New Zealand government responded in July 1959 by inviting Sir David Hughes Parry to chair a committee on the country's university system ('the Parry Report'). One explanation for the creation of the Committee has been given in the following terms:

> Those who cherished it seized the opportunity offered by a Committee on the Universities in 1959 to fan the sparks into flame, but were not themselves responsible for promoting the committee. Two factors, one almost fortuitous, were more directly responsible: first, Labour Government, returning to power in 1957, had in its election campaign promised that the whole field of education would be examined by an expert committee; and those concerned with the universities, fearful lest university education be brought under a general survey, urged that a special committee of overseas university men should be given the university assignment. The second factor was the demand on the Government for increased expenditure on the university, and in particular for the greatly increased salary scale…a demand urged by Grants Committee, Councils and Teachers' Association at a time when Government was faced by difficult internal conditions imposed by an adverse balance of trade. The Labour government, never unfriendly to education, but in principle against wide salary margins and foreseeing consequential demands from the higher ranks of the Public Service, wanted expert and authoritative backing for the steps it would have to take. Thus, it appointed the Parry Committee.[14]

The other members of the Committee were Geoffrey G Andrew, University of British Columbia, and RW Harman, a distinguished Australian industrialist. The terms of reference for the Committee were extensive, it being required 'to review the function, organization, resource and financing of New Zealand's universities, and to provide a strategy for development.'[15]

There is no doubt that Hughes Parry, together with his distinguished colleagues, enthusiastically took on the challenge of the committee's terms of reference. They have been described as

[12] Ibid.
[13] *New Zealand University Amendment Act 1926* (NZ).
[14] 'Dissolution of University of New Zealand' in AH McLintock (ed), *An Encyclopaedia of New Zealand* (Web Page, 1966) <https://teara.govt.nz/en/1966/education-university-university-of-new-zealand/page-13>.
[15] Ibid 7.

> [visiting] every corner of the country collecting evidence, including the four constituent universities and two agricultural colleges of the university, and received submissions from 138 interested persons and organizations… No stone was left unturned, as the committee visited lecture theatres, laboratories, student common rooms, refectories and halls of residence and sites where new buildings were being proposed.[16]

From the very start when it was published the report was unequivocal in what was required for a future successful university system in New Zealand, stating that the state had to properly finance the sector without threatening its independence. In fact, the opening words of the report emphasis this approach: 'What role the universities should play in the New Zealand community will depend in large measure upon the kind of society New Zealand wants and is willing to pay for.'[17] In this respect when reviewing the financial aspects of the report the committee urged a more generous salary scale for academic staff. As regards buildings they supported a plan which had been put forward by the New Zealand University Grants Committee for the next 10 years but urged that it needed to be accelerated, while emphasising the need for developing a forward policy about halls of residence. In their view, as has been stated before, they considered that university libraries were inadequately funded and needed to be supported by immediate special grants of £10,000. Also, they recognised the current culture of New Zealand universities where teaching was regarded as their sole function as inappropriate. The Parry report acknowledged that this deficiency should be immediately reformed declaring that: 'to advocate the separation of teaching from research is to invite social and cultural, no less than scientific stagnation. Society, if it is to make advances, must have institutions in which teaching and research go hand to hand, in which students can come in contact and become excited by the possibilities of research and its relation to human progress.'[18]

'In this respect they recommended an immediate increase in the grant to £65,000 and to £100,000 in 1961, rising in the next few years to £150,000; and that a National Scientific Research Council be set up to coordinate the scientific research services of the State.'[19]

More fundamental were those recommendations relating to the structure of the University of New Zealand itself. In this respect it recommended:

> That the constituent universities be given complete autonomy, subject only to a new University Grants Committee, and certain subcommittees thereof; and the University of New Zealand be dissolved as soon as possible. That a University Grants Committee be established by act of Parliament, with powers generally equal to those of the existing Committee together with the right to initiate, in consultation with the universities, plans for balanced development to meet fully the national needs. That the committee be appointed by the Government, and that it comprises a chairman, and seven members | selected from a list submitted by the universities, four not being associated with any university and three being professors or teachers. That a Universities Entrance Board

[16] 'University committee of inquiry arrives in Dunedin', *Otago Daily Times* (Dunedin, 6 October 1959) cited by Parry (n 1) 120 n 63.
[17] Ibid 121.
[18] Ibid 122.
[19] 'Report of the Committee on New Zealand Universities' (Report, 1959) 87.

> be set up as a subcommittee of the Grants Committee with the duty, among others, of advising on any proposal by any university to establish a new faculty or a new department of study, and of considering any difficulties about equivalence of courses and transfer of students.[20]

VI DISSOLUTION OF THE UNIVERSITY OF NEW ZEALAND

The Government acted promptly on the receipt of the Parry Report with the *Universities Act 1961* (NZ) providing for the creation of a reformed University Grants Committee, setting out its constitution, membership, and functions. It also established other committees and boards to complement and support the University Grants Committee, together with a new Vice-Chancellors Committee. The legislation provided for the dissolution of the University of New Zealand on 1 January 1962 and the transfer of some of its functions, including the power to confer degrees, to the individual universities. In addition, the Act also made provision for graduates of the previous University of New Zealand after it had ceased to exist by stipulating that: 'The University Grants Committee shall have power to issue certificates relating to degrees and other academic qualifications and courses of the University of New Zealand as if that University had continued in existence.'[21]

VII FURTHER REFLECTIONS ON THE INFLUENCE OF HUGHES PARRY

It is illuminating to review the influence of a leading overseas law academic from the United Kingdom who was recognised as someone with extensive experience of law reform to guide the reform of New Zealand's tertiary education system. In this respect attention should be given to the comment that: 'His legal credentials were undoubtedly seen as strengths, and there was an acute appreciation of the fact that the task required the deft hand of the lawyer to guide it through to a judicial outcome.'[22] There is no doubt that the Parry Report could be regarded as the watershed in the history of higher education in New Zealand. In conclusion his biographer, R Gwynedd Parry, has summed up his achievement in the following terms:

> Unquestionably, within the report are echoes of Hughes Parry's earlier battles to resource and manage the British university system properly and his experience of navigating university management came to bear on much of the report's findings and conclusion. It also displays Hughes Parry's confidence in the important role of universities in economic development and prosperity, and his belief that thriving universities could be central facilitators of national economic recover. Moreover, the report clearly reinforced the importance of universities' independence and their role as import scrutinizers of prevailing social norms and practices.[23]

[20] Ibid 99.
[21] *Universities Act 1961* (NZ) s 54(3).
[22] Parry (n 1) 120.
[23] Ibid.

VIII ADDENDUM – THE DEVELOPMENT OF LEGAL EDUCATION WITHIN THE NEW ZEALAND TERTIARY EDUCATION SYSTEM

Although legal education was an emphasis of the 1925 Royal Commission it is apposite for its development to be considered within the evolution of the New Zealand Tertiary Education System. Any reader who is interested in undertaking a complete study of the history of New Zealand legal education would be well-advised to read the article by Peter Spiller in the 1993 edition of the *Legal Education Review*.[24]

Spiller explains that prior to 1870, while the *Legal Practitioners Act 1861* (NZ) made provision for the regulation by the Judges of the Supreme Court of New Zealand for the qualification and regulation of those wishing to qualify for admission as barristers and solicitors, there was no immediate provision made for their actual training and supervision. It was only in 1870 on the creation of the University of New Zealand that limited law classes were taught at Otago University and Canterbury University, with the University of New Zealand establishing a law degree in 1877, which by 1888 covered all the subjects specified for admission of barristers to practice. As stated by Spiller, '[o]verall, however, the progress of university legal education in the first fifty years had been painfully slow. University tuition was generally limited and at times erratic, and it was conducted largely by part-time lecturers with poor library and other resources, who instructed overwhelmingly part-time students (many of whom were not employed in law offices).'[25]

To reiterate, legal education was a major subject considered by the Royal Commission 1925 which devoted much of the report to its deficiencies at that time. Not only did the Royal Commission recommend a thorough strengthening of legal courses and the establishment of a properly staffed and equipped Law School at the most suitable centre, but also the creation of a Council of Legal Education which would assume the powers over legal education.[26] This was established by the *New Zealand University Amendment Act 1930* (NZ), with regulations governing its proceedings in 1932.[27]

The outcome of the Parry Report was that, with the dissolution of the University of New Zealand in 1961, each University which had a law school gained full control of its law degrees and examinations with the concept of full-time attendance of law students becoming the accepted norm. With the advent of full-time law academics, including professors, there was an expansion of law teaching as advocated in the Parry Report to include research and a broadening education with the incorporation of social and economic policies. There was also the introduction of optional subjects and the subsequent recognition to incorporate a Māori dimension into the curriculum.[28]

[24] Peter Spiller, 'The History of New Zealand Legal Education: A Study in Ambivalence' (1993) 4(2) *Legal Education Review* 223.
[25] Ibid 230.
[26] Ibid 232.
[27] Michael Cullen, 'Lawfully Occupied' (Otago District Law Society, 1970) 133.
[28] Robert Ludbrook, 'Law and the Polynesian' (1975) 13 *New Zealand Law Journal* 420.

At the same time there became a greater demand for practical legal training with the outcome in 1986 of the New Zealand Law Society and the Council of Legal Education inviting Neil Gold, a Canadian law professor, and highly acknowledged legal education commentator to report on professional legal training in New Zealand. Gold's recommendations included a 'more systematic, more carefully structured, goal-oriented programme of professional preparation' which would address the needs of practitioners. His Report was accepted by the Council of Legal Education with the introduction of Professional Examinations in Law regulations 1987, coming into effect in 1988.[29] A further review was carried out in 1990 by Christopher Roper, the Principial of the College of Law in Sydney, recommending further modifications to the practical legal training course, which were subsequently adopted.[30] Currently, Auckland University, Auckland University of Technology, Canterbury, Otago, Victoria University of Wellington, and Waikato have law schools.

The history of New Zealand legal education reflects how it has dealt with the similar problem faced by law teaching in other jurisdictions which is how to meet the twin objectives of training individuals as legal practitioners and providing a liberal education that facilitates the acquisition of knowledge and transferable skills.[31] In the concluding paragraph to his article Spiller has quoted from Gold's report, which had major consequences for modern New Zealand legal education: 'In the best of all possible worlds it is a general legal education which prepares graduates to face and adapt to change in all aspect of their lives, but especially throughout their legal careers'.[32]

[29] D Craig Lewis, 'Observations from an Outsider' (1988) 3 *Canterbury Law Review* 347.
[30] Richard Moss, 'Developments in the Professional Legal Studies Course – The Implementation of the Roper Report' (1991) 340 *Law Talk* 7-8.
[31] David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 242.
[32] Spiller (n 24) 245.

STUDENT PERCEPTIONS OF VIDEO ASSESSMENTS: CAN PRACTICAL LEGAL SKILLS BE TAUGHT EFFECTIVELY ONLINE?

Stephanie Falconer and Emma Henderson

ABSTRACT

The form of instruction in higher education was in transformation even before the COVID-19 pandemic forced educators to embrace the online learning environment. This is particularly true for legal education, which had largely resisted remote learning for a variety of reasons. The challenges presented by the pandemic have enabled law teachers to embrace creativity in assessment and create learning opportunities that use technology. One such example is that of the video assessment. While few subjects before the pandemic – often electives – used video assessments, it was uncommon to find core law subjects which used such assessment techniques, particularly when assessing practical legal skills. The subject 'Evidence and Criminal Procedure' at La Trobe University offers a useful case study because the impact of the pandemic required a rethink of the traditional moot assessment that had been the hallmark of the subject for years. The resource cost, and organisational challenges posed by the pandemic meant that the moot was no longer a viable assessment option, so the teaching team devised an alternative: a video bail application. This article examines the merits of video assessments, the considerations needed to convert a moot to a video assessment, as well as the lessons learned. The overarching goal will be to determine if the video assessment is here to stay, and how it can be used as an effective legal education tool.

I INTRODUCTION

In this article, we discuss the pedagogy which informed the choices behind a new assessment task in our core third year subject Evidence and Criminal Procedure, and the lessons learned from the first iteration of this new assignment task. In 2022 we replaced a traditional face-to-face moot with an online bail application exercise. We did this for several practical reasons arising from the pandemic and resource constraints, and for important pedagogical reasons. As we developed the new assessment task, we also applied for ethics approval to administer a survey to our students to explore their attitudes towards experiential learning activities in law school generally, and about our new online assessment in particular.

The article starts with a reflection on the existing literature around experiential learning and authentic assessment in law schools, with a focus on the benefits and challenges of practical moot-based assessment tasks, particularly in the online context. Next the article briefly sets out the survey method used to interrogate student perceptions of online assessments before exploring the three main themes to emerge from the survey – the importance of practical skills education for law students; student attitudes to online versus face-to-face learning activities; and the role of experiential learning in enhancing student confidence and competence. In the final section we reflect on two other insights drawn from the survey results; the need to fully engage with student perceptions of teamwork, and the value of emphasising the relatedness of skills acquisition across the law degree.

II LITERATURE REVIEW

Whereas substantive legal knowledge is often rapidly outmoded, when taught effectively, legal *skills* learned at university have a much longer shelf life.[1] Providing students with experiential learning opportunities throughout the law school curriculum is accepted as an effective way of teaching legal skills.[2]

Experiential learning allows students to 'construct… knowledge and meaning from real-life experience'[3] and its value in terms of skills development is well established.[4] Indeed, even outside of a formal education setting, 'learning from experience is one of the most fundamental and natural means of learning available'.[5] Experiential learning in legal education is valuable because it presents an opportunity for students to develop 'authentic practice-based experience' incorporating legal skills and situating learners in a context relevant to their potential future careers.'[6] Such learning, either through in-class learning activities or assessment tasks, is effective because 'it involves the "whole person –

[1] Peter Brown, Henry Roediger III and Mark McDaniel, *Make It Stick: The Science of Successful Learning* (Belknap Press, 2014) 2, 5.
[2] See eg, Yvonne Daly and Noelle Higgins, 'The Place and Efficacy of Simulations in Legal Education: A Preliminary Examination' (2011) 3(2) *All Ireland Journal of Teaching and Learning in Higher Education* 58.1.
[3] Sarah Yardley, Pim Teunissen and Tim Dornan, 'Experiential Learning: Transforming Theory into Practice' (2012) 34(2) *Medical Teacher* 161, 161.
[4] See eg, David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall, 1984); John Dewey, *Experience and Education* (Touchstone, 1938); David Boud et al, *Using Experience for Learning* (Society for Research into Higher Education and Open University Press, 1993).
[5] Colin Beard and John P Wilson, *Experiential Learning: A Best Practice Handbook for Educators and Trainers* (Kogan Page, 2nd ed, 2006) 15.
[6] Yardley et al (n 3) 161.

intellect, feelings and senses",'[7] and combines theories of humanistic psychology and critical social theory.[8] In this way, experiential learning, in the form of role plays, simulations, 'fish bowls', moots and other activities, can complement and enrich the more traditional passive education provided by readings and lectures.[9] The inclusion of experiential learning activities enhances the likelihood of deep learning and retention, enabling later transference to other contexts.

Experiential learning theory is not a new phenomenon. In 1984, David Kolb, building on John Dewey's concept of reflective thought and action,[10] theorised that learning could be enhanced by a four-stage process, a 'learning cycle', comprised of 'concrete experience, reflective observation, abstract conceptualisation and active experimentation'.[11] Kolb's learning cycle remains relevant today and many academics rely on the theory to support their teaching practices. The strength of Kolb's learning cycle is that it does not matter at which point of the cycle a student's learning occurs, because each stage complements the others, building on some core aspect – whether it be experience, reflection, conceptualisation, or experimentation – and allows the learning to take hold.[12]

Experiential learning is enhanced when paired with authentic assessment practices, which engage students in assessments that test their performance of 'real world tasks that demonstrate meaningful application of essential knowledge and skills.'[13] This makes the original learning activity more relevant to the student because they are more likely to 'perceive their aspirations and best interests' are considered as part of the education design, as well as being relevant to their future career.[14] Moreover, pairing experiential learning activities with authentic assessment enables students to 'show they "have constructed their own knowledge and synthesised information [to] better demonstrate higher levels of learning and the ability to apply competencies in an authentic context".'[15]

According to Dianne Thurab-Nkhosi and her co-authors authentic assessment is not simply limited to evaluating a student's initial learning, but also facilitates further learning from the act of undertaking the assessment itself, which in turn fosters a deeper, more effective overall learning experience.[16] Ultimately, what makes the pairing of experiential learning and authentic assessment so effective is that the student's 'active and effortful'[17] engagement with the learning enables long-term memory retention linked to existing knowledge and experience, which can be demonstrated in assessments and also used to develop the skills relevant to the student's chosen career.[18]

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[7] Lee Andresen, David Boud and Ruth Cohen, 'Experience-Based Learning' in *Understanding Adult Education and Training* (Routledge, 2nd ed, 2000) 207.
[8] Reijo Miettinen, 'The Concept of Experiential Learning and John Dewey's Theory of Reflective Thought and Action' (2000) 19(1) *International Journal of Lifelong Education* 54, 54.
[9] Ana Lenard, 'Lessons and Opportunities for Negotiation Teachers Following the Covid-19 Pandemic' (2021) 31(3) *Australasian Dispute Resolution Journal* 225.
[10] Dewey (n 4).
[11] Kolb (n 4).
[12] Ibid.
[13] 'What Is Authentic Assessment? (Authentic Assessment Toolbox)' <http://jfmueller.faculty.noctrl.edu/toolbox/whatisit.htm> in Toni Collins, 'Authentic Assessment - The Right Choice for Students Studying Law?' (2022) 32(1) *Legal Education Review* 1, 1.
[14] Kelley Burton, 'A Framework for Determining the Authenticity of Assessment Tasks: Applied to an Example in Law' (2011) 4(2) *Journal of Learning Design* 20.
[15] Dianne Thurab-Nkhosi, Gwendoline Williams and Maria Mason-Roberts, 'Achieving Confidence in Competencies through Authentic Assessment' (2018) 37(8) *Journal of Management Development* 652, 652.
[16] Ibid.
[17] Brown et al (n 1) 2 and 5.
[18] Burton (n 14).

Experiential learning has been a foundational part of legal education for centuries.[19] Moots, mock trials, interview and negotiation simulations have been 'widely employed as [an] educational tool'[20] in law schools around the world because they are so effective in 'bridg[ing] the gap between theory and practice.'[21] Most law schools have dedicated spaces such as moot courts and meeting rooms where students engage with assessors in real time, asking and answering questions and testing their preparation and understanding in a way which allows students to fully situate themselves in the practical context of an activity, enhancing perceptions of authenticity. As authentic learning tasks, mooting and other simulations such as interviewing require a combination of 'memorisation and the retention of knowledge…[alongside other practical skills, with students] construct[ing] that knowledge from the materials they … discover through their research.'[22] In other words, simulations require students to actively engage with both substantive and procedural law knowledge, as well as a range of professional legal skills, while constructing meaning from their learning to solve problems in a practice-based-simulation experience.[23] Even so, such activities are highly resource-intensive, and have traditionally demanded serious on-campus commitments from students which can be a significant limitation.

The necessity of converting learning activities to online formats during the COVID-19 pandemic-related lockdowns mirrored the efforts of the legal profession itself to adapt to the online environment, hastening changes in relation to video-based hearings, negotiations, and client interactions. It could be argued therefore, that incorporating online experiential assessments within the law school environment ultimately enhances the authenticity of the learning experience, equipping students with a new set of increasingly necessary professional skills.[24]

In summary, the literature demonstrates that experiential learning and authentic assessment are valuable pedagogical approaches in the law school context. Situating learners within an environment that enables them to engage with their learning more actively, and which demonstrates the relevance of the required learning to future career goals, builds longer-lasting connections and results in greater knowledge and skills development. The rounded nature of simulations with their indisputable relevance to the skills required for success within the legal profession is clear. While these pedagogical benefits rub up against the desire of universities to cut costs and increasing student preferences for less time on campus, the requirement to move online during the pandemic led us to consider whether simply replicating the traditional mooting structure on Zoom was the best way to proceed, or whether there were other forms of authentic online assessment which might offer similar pedagogical benefits to a traditional moot.

[19] Anthony Cassimatis, *Thomson Reuters Guide to Mooting* (Lawbook Co, 2016) 9.
[20] Charles Knerr, Andrew Sommerman and Suzy Rogers, 'Undergraduate Appellate Simulation in American Colleges' (2001) 19(1) *Journal of Legal Studies Education* 27.
[21] Derick Tansey and PJ Unwin, *Simulation and Gaming in Education* (Methuen Educational, 1969) 31 cited in Daly and Higgins (n 2) 58.5.
[22] Ibid.
[23] Ibid 76.
[24] See Jennifer Yule, Judith McNamara and Mark Thomas, 'Virtual Mooting: Using Technology to Enhance the Mooting Experience' (2009) 2(1) *Journal of the Australasian Law Teachers Association* 231, 237; Bernadette Richards, 'Alice Comes to Law School: The Internet as a Teaching Tool' (2003) 14(1) *Legal Education Review* 115; Dan Hunter, 'Legal Teaching And Learning Over The Web' (2000) 2 *University of Technology Sydney Law Review* 124; Jennifer Yule, Judith McNamara and Mark Thomas, 'Mooting and Technology: To What Extent Does Using Technology Improve the Mooting Experience for Students?' (2010) 20(1) *Legal Education Review* 137.

A *A Survey to Explore Student Perceptions on the Value of 'Skills training' in the LLB*

Research into this question led us to the realisation that while the literature is clear about the value of experiential learning and authentic assessment from a pedagogical perspective, there has been a failure to explore in any depth how students themselves perceive experiential activities, and what role they expect this form of learning should play in their legal education. It was with this gap in mind that we constructed a research project to accompany the introduction of a new online Bail Application simulation assessment, to discover what our students thought about experiential learning activities generally, and online activities specifically.

The project explored students' attitudes to particular elements of experiential learning and online delivery within the law school setting, with a view to unpacking how students perceive the value of remote experiential assessment tasks in the law school core curriculum. There were three primary research questions at the centre of our project to:

1. determine student perceptions of the importance of skills training in the law school core curriculum;
2. ascertain students' perceptions on digital assessments in place of face-to-face assessments; and
3. explore the challenges and changes required in adapting law school experiential learning activities to the remote teaching and learning environment.

The new online Bail Application assessment task was introduced in 2022, replacing the previous on-campus moot. After obtaining approval from the University Human Ethics Committee,[25] the entire cohort of 210 second and third year LLB students enrolled in the subject were invited to participate in a voluntary survey about their perspectives and attitudes to experiential learning activities, including the new online assessment task. The invitation was delivered via a notice published to the subject's Learning Management System (LMS) and students were reminded with in-class announcements and further reminders on the LMS. It was made clear to students that their participation was entirely voluntary and there was no obligation, nor would there be any impact on their grades or performance in the subject if they chose not to participate. The results for the Bail Application assessment task were returned to students before the survey was opened, so students would not feel any pressure to participate.

The survey consisted of 24 questions which were designed to uncover students' perspectives and attitudes to the three research questions identified above. The questions were a combination of fixed choice questions (quantitative) and textboxes for elaboration (qualitative). The quantitative questions covered the students' attitudes to online learning and online assessment tasks, their understanding of, and the importance they placed on the inclusion of 'practical skills training' (this is the term we used to describe experiential learning and authentic assessment within the survey) within the core curriculum, and the Bail Application assessment task itself. Each quantitative question was answered using a 'strongly agree – strongly disagree' scale. The qualitative questions enabled students to clarify or expand on their answers to the fixed choice questions, or to identify specific elements or aspects of practical skills training that they thought were important or successful/unsuccessful and so on. The

[25] La Trobe University HEC22068, approval granted 10 May 2022.

survey was assembled and distributed using QuestionPro, which hosted the surveys and responses, enabling the data to be collected and analysed in a secure, and complete manner.

The survey generated a healthy response rate. Of the 210 students enrolled in the course, 48 attempted the survey.[26] Despite the fact that two thirds of the students enrolled in the subject were second and third year students, 46.5% of those who attempted the survey were in their fourth or fifth year of their degree, with only 19% of second years attempting the survey. Approximately 67% of students who completed the survey indicated that they intended to practice law upon the completion of their studies. Also of interest was the fact that 36% of respondents had exposure to practical legal skills training already, through a part time job within the legal profession. When asked whether they enjoyed the Bail Application assessment, 66% of respondents reacted positively. Interestingly, 41% stated that they would not have enjoyed the assignment if they had had to complete it on their own.[27] An overwhelming 93% of respondents indicated that they felt more confident overall after having undertaken the Bail Assessment, with comments that indicated they felt they had engaged more deeply and learned more about the applicable law than they had expected as a result of the assignment. What follows is an exploration of the three main themes that emerged from the survey results.

B *Student Perspectives on Legal Education and Practical Legal Skills-based Activities and Assessments*

As mentioned above, there is little literature exploring students' perceptions of experiential learning activities.[28] With this survey, therefore, we set out to explore whether our students actually appreciate skills-based activities in class, and as assessments, and what value they attach to such activities.

The survey asked students to reflect on a wide definition of 'practical skills': we included generic skills such as problem solving, advocacy and analysis, and more specific legal skills such as file management and written and oral legal communication skills, in this category. To the question 'In your experience, do you feel that the law school curriculum contains enough practical legal skills-based activities and assessments?', 64% of respondents indicated that they did not feel there were enough such activities and assessments. When we asked them how important an issue this was to them, 93% of students responded that legal skills training is 'extremely important' or 'very important' to their legal education and 90% agreed that mastering online technology is an important or very important skill for legal practice. One respondent with some exposure to legal practice indicated that 'more practical assessments should be introduced in order to better prepare students for practical work'[29] while another student stated outright that the skills they 'use as a paralegal are very divorced from the skills…taught at University [and that] [e]ven the skills which are taught…[are not] always…relatable to practice.'[30]

After assessing how students felt generally about skills training within the LLB, the survey provided students with the opportunity to reflect on whether the bail application itself had helped them practice and develop skills. Approximately 90% of respondents reported that they felt they had learned valuable legal skills such as how to address the court, how to refer to clients and counsel in a professional manner, and how to refer to legislation and case law during questioning. Another survey question, which asked about more general skills, led 75% of respondents to report that the assignment also helped them

[26] Of these 48 responses, six were only partially completed leaving 42 fully completed surveys for analysis.
[27] Interestingly, 27% indicated a preference for completing the assessment individually.
[28] Brown et al (n 1).
[29] Response designation 7514394.
[30] Response designation 75139840.

improve skills such as teamwork and presentation/public speaking skills which are applicable outside legal practice. One respondent stated that they felt that the Bail Assessment 'bridge[d] the gap' between the substantive law and practical skills taught in the law degree.[31]

The responses to the questions about skills training in law schools led us to consider the research exploring the development of student competence and confidence in law school through in-class skills education.[32] Though experiential learning and authentic assessment are clearly linked to the development of skills, there is little evidence of the role that this plays in enriching a student's overall confidence and competence after engaging with such activities. That is, just because a skill is developed, it is not necessarily safe to assume that a student *feels* more confident or more competent. Confidence and competence are important because they enhance autonomy within the student[33] and have the potential to imbue a more self-motivated and engaged attitude, enhancing the overall learning outcomes.[34]

Though the literature is clear about the role of experiential learning, authentic assessment, and exposure to practical skills education more generally, the results of our survey shed some light on how students perceived their own overall confidence and competence after engaging with the bail application assignment. Approximately 93% of respondents stated that they felt more competent and confident as a result of engaging in the bail application, and that this competence/confidence extended to both future assessments and their future careers. One respondent noted that they had often wondered how lawyers know what to say in court and indicated that the Bail Assessment gave them an insight, preparing them for later practice.[35] This sentiment was echoed by another respondent who stated that they now had a better understanding of 'how bail applications work and what is involved in a real-life scenario'.[36] Ultimately, students overwhelmingly reported that the experience, and feedback provided, meant that they would feel more confident to undertake a similar activity, either in their degrees, or in their later careers.

These results suggest that students, particularly those who are aiming to head into the legal profession, perceive skills-based activities and assessment as an essential part of their legal education. It is interesting to reflect upon the fact that a large proportion of our respondents (including the students quoted above) were later year students who were close to graduation and therefore perhaps more closely focused on the relationship between their studies and employment than earlier year students. For students in earlier years, the survey results suggest to us a need to emphasise more strongly to the whole cohort, the connection between assessment tasks with 'authentic' learning elements, and legal practice.

[31] Response designation 74711114. It is important to note that students who do not share this perspective will not necessarily have the same attitude toward practical tasks and assessments, which suggests that educators need to make a greater effort to communicate the importance and value of specific activities. This is important because students who do not understand the significance of a task will be less likely to form the relevant connections to create lasting knowledge, completing the iterative learning process.

[32] Where it exists, the research usually explores confidence and competence borne from work integrated learning experiences. See eg, Anna Cody, 'Developing Students' Sense of Autonomy, Competence and Purpose Through a Clinical Component in Ethics Teaching' (2019) 29(1) *Legal Education Review* 1.

[33] Leah Wortham, Catherine Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals' (2014) 18 *International Journal of Clinical Legal Education* 105, 120.

[34] Lawrence Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11(2) *Clinical Law Review* 425, 429.

[35] Response designation 74999883.

[36] Response designation 74930183.

It may be useful, for instance, to incorporate a reflection aspect to the assignment, to give students another entry point into the learning cycle and thus another opportunity to embed the skills more deeply.

C *Student Perceptions of Online v Face-to-Face Learning*

Another emerging area of interest in contemporary higher education research are the differences between online and face-to-face learning. While this is increasingly relevant since the COVID-19 pandemic forced many law schools to pivot to remote learning, the shift toward more online engagement was already well underway. Even so, it is unclear whether teaching professional skills in the online environment is as effective as face-to-face learning, because of the difficulties with engaging students and creating a fully 'immersive experience' online.[37] That said, the changes embraced by the legal profession during the pandemic, with hearings, negotiations and client interactions taking place online more regularly, have clearly led to the need to incorporate technological competence education in law schools.[38]

The survey asked students whether they felt that remote learning had any value for both their education and ultimate career goals. Respondents answered this question by identifying the mastery of online and remote technologies as 'vitally important' to their legal education,[39] with one student noting that in their experience as a paralegal there are a 'shocking number of practitioners [who] are not well versed in the technology [and it is, therefore] certainly beneficial to implement…at the university level.'[40]

Interestingly however, despite this acknowledgment of the importance of mastering online and remote technologies to their future careers, about half of the respondents indicated a preference for face-to-face assessments. Some felt that they would have learned more,[41] or that the experience would have felt more authentic,[42] or more realistic,[43] if the assessment had taken place in person, even as they acknowledged the necessity of completing the assessment online. Unsurprising was the finding that the other half of respondents enjoyed the convenience of completing the assessment online,[44] citing better planning and coordination among partners,[45] and the ability to 're-do' their presentations prior to submission as an advantage.[46]

Overall, then, the survey revealed that students overwhelmingly perceive skills education as an essential component of their legal studies, with respondents indicating that they wanted more practical tasks and assessments in their core subjects to better prepare them for their professional careers. Moreover, students were largely positive about their ability to learn such skills via remote means, even though many indicated that their preference was still for face-to-face learning environments. Most students acknowledged that engagement with remote technology is an increasingly important legal skill, and this may have contributed to their positive perception of the value of the video component to the Bail Assessment.

[37] See eg, Yule et al (n 28).
[38] See ibid; Richards (n 28); Hunter (n 28).
[39] Response designation 75282740.
[40] Response designation 75139840.
[41] Response designation 75377768.
[42] Response designation 75139838.
[43] Response designation 75134059.
[44] Response designation 74934176.
[45] Response designation 75068909.
[46] Response designation 75139831; 75134059; 75005522; 74930183; 74715802; 74706210.

The respondents' perceptions of the value of the Bail Assessment overall were perhaps most convincingly demonstrated by their clear feedback relating to their feelings of confidence and competence after completing the Bail Assessment. Though confidence and competence are difficult to measure, it is important that the students self-reported an increase to both, with many indicating that they would feel more confident, and more competent, for future similar activities, including upon entry into the profession. Ultimately, the data demonstrates that students enjoyed the activity and felt that it contributed significantly to their educational and professional development, with many indicating that future similar tasks and assessments would be welcome.

III OTHER INSIGHTS FROM THE SURVEY

A *Teamwork*

Most legal educators will agree that students generally resent teamwork where it is linked to grades.[47] However, it is also abundantly clear that good teamwork skills are an essential attribute in graduates. The inherent tension between these two positions means that it can be difficult to engage students in activities involving teamwork without also fielding grievances from students about absentee or underperforming team members. When we initially reviewed the survey results, it appeared that students felt positively about the teamwork component of the assessment, with 41% preferring paired work and only 27% indicating a preference for individual submission.[48] However, upon reflection, we realised that the responses actually told a different (and more familiar) story about preferring solo work. The comments were clearly equivocal. Those who indicated a positive attitude to teamwork unanimously added the proviso that their experience would have been different had they not had a good working relationship with their partner,[49] and some respondents went on to state that they would have expected a higher mark if they had been working alone.[50]

An insight that did arise from the survey is that students do not fully understand why they are being asked to engage in teamwork. Where the purpose of the teamwork component is clearly explained to the students, and where they can see 'through' the activity to a clearly expressed value of engaging with peers to complete the task, their attitude, and overall outcomes, appear to be stronger. As such it is not enough to simply remind students that the legal profession requires teamwork as a default; the assessment construction should make clear how the teamwork lends authenticity to the task.

B *Situating Students within the Context of their Learning*

Just as it is essential to ensure that students understand how teamwork will play a vital role in their careers, the survey responses also made clear that it is vital to ensure that assessment tasks enable the student to understand the value and purpose of learning activities themselves, and the way those activities fit in with the student's education overall.[51] The survey responses suggest that students were not cognisant of the overlap between skills learnt across the various subjects studied in their law degree. Nearly half of the respondents reported that they did not think any of the skills they had learned in their past subjects were useful in completing the Bail Assignment. This is even though students had all

[47] Susan Brown Fiechtner and Elaine Actis Davis, 'Republication of "Why Some Groups Fail: A Survey of Students' Experiences with Learning Groups' (2016) 40(1) *Journal of Management Education* 12.
[48] The remaining 32% were undecided.
[49] Response designations 75377768; 74715802; 74706210.
[50] Response designation 75134090.
[51] See Burton (n 14).

completed 'pre-requisite' subjects which contain skills-based activities and assessments (a mediation role play, written legal submissions, in-class presentations) which the Bail Assignment was specifically designed to build on. This suggests to us that, in order to build confidence and competence in our students, it is important to specify relatedness in each assignment: remind students which skills they have encountered in previous assignments or subjects, which they will learn new here, and how they interplay, in order to help students connect the dots.

IV CONCLUSION

Existing literature indicates that building in exercises which expose students to authentic experiences, enabling them to practice and develop their skills, ultimately leads to higher levels of confidence and competence among learners. Until now, however, there have been very few interrogations of how students perceive the value of practical skills education as part of their legal education. The research underpinning this article supports the conclusion that online experiential learning and authentic assessments tasks are perceived by students as a valuable component of the core curriculum. Ultimately, this project demonstrates that it is possible to deliver an authentic online assessment task that students respond to positively if it is well designed, taught, and executed. The survey responses show that a key component to delivering a successful practice-based assessment is ensuring that the messaging about the task's value and purpose, with an emphasis on the value of each skill that will be developed and how that relates to their overall learning and later career aspirations, are made very clear.

RECEIVERS' RIGHTS TO RETAIN FUNDS AFTER DISTRIBUTION: THE COMMON LAW AND THE *RECEIVERSHIPS ACT 1993* (NZ)

*Trish Keeper**

ABSTRACT

While receivers are generally entitled to an indemnity and lien with respect to the costs incurred in carrying out their duties as receivers, the position is less clear-cut when the receivership has ended and claims against the receivers remain unresolved. The issue is complicated in New Zealand by the *Receiverships Act 1993* (NZ) s 20(b), which provides that receivers are not entitled to any indemnity from the property in receivership in respect of any liability arising from a breach of s 19. Section 19 imposes a duty on receivers to obtain the best price reasonably obtainable at the time of sale when selling the company's property.

The article analyses the differences in the approaches of two High Court decisions. It also suggests how section 20(b) should be interpreted, considering the general law and the history of the provisions.

I INTRODUCTION

In 2022 Van Bohemen J of the New Zealand High Court in *Fistonich v Gibson*[1] ('*Fistonich*') considered the right of receivers to retain some of the surplus funds received from the sale of charged assets in respect of which the receivers were appointed. The retention is to pay their fees and legal costs to defend future proceedings against them. While it is accepted at general law that receivers are entitled to an indemnity and lien for their costs as receivers, the issue before the Court was whether receivers are entitled to retain funds from any surplus available after repayment of a secured creditor when the issue of their neglect, default or breach of duty had not (yet) been established.

In the New Zealand context, the *Receiverships Act 1993* (NZ) ('*Receiverships Act*') is also relevant. Specifically, s 20(b) provides that a 'receiver is not entitled to compensation or indemnity from the property in receivership or the grantor[2] in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19'. Section 19 imposes a statutory duty on receivers to obtain the best price reasonably obtainable at the time of sale of the debtor company's property in receivership.[3]

This article considers in what circumstances receivers are entitled to retain excess funds beyond the end of receivership to protect against expenses likely to be incurred in relation to receivership-related litigation and whether *Receiverships Act* s 20(b) limits this entitlement when the litigation is in respect of an alleged breach of the duty in s 19. In *Fistonich*, the Court found that the receivers were entitled to retain funds, and s 20(b) had no application as the receivers' fault (if any) had yet to be determined.[4] However, these issues were first considered by the High Court by Pankhurst J in 2011 in *Taylor v Bank of New Zealand* ('*Taylor*'),[5] where the Court had suggested a different interpretation of s 20(b).

This article outlines the law in this area and then compares the contrasting approaches taken in both cases. The article then traces the history of the relevant law and concludes by proposing an explanation of s 20(b).

II OVERVIEW

A *Receivers' Rights of Indemnity and Lien*

In New Zealand, a receiver's rights to an indemnity and lien are governed by a mix of common law and the *Receiverships Act*. It is settled law that 'a receiver is ordinarily entitled to an indemnity and lien in respect of their costs incurred in the carrying out their duties as a

[1] *Fistonich v Gibson & Jackson* [2022] NZHC 1422 [16 June 2022] per Van Bohemen J (*'Fistonich').*
[2] *The Receiverships Act 1993* (NZ) ('the Receiverships Act') defines a grantor as the 'person in respect of whose property a receiver is, or may be, appointed' and accordingly a grantor may be a non-corporate person. However, as almost all receiverships involve debtor companies in practice, for the purposes of this article, the grantor is treated as a company.
[3] Receiverships Act s 19 provides this duty is owed to (a) the grantor, (b) persons claiming, through the grantor, interests in the property in receivership, (c) unsecured creditors of the grantor, and (d) sureties who may be called upon to fulfil obligations of the grantor.
[4] *Fistonich* (n 1) [63]-[64].
[5] *Taylor v Bank of New Zealand* [2011] 2 NZLR 628.

receiver'.[6] Indeed, in both *Fistonich* and *Taylor*, this was the starting point for the respective judicial analysis. In *Fistonich,* Van Bohemen J summarised the relevant law by reference to the following extract from Blanchard and Gedye, *The Private Law of Receivers of Companies in New Zealand*:

> A receiver who in good faith incurs personal liability in the course of carrying out the duties of the receivership is entitled to be indemnified by the company against that liability out of the charged assets. This indemnity extends also to the receiver's fees. Often this indemnity is provided for in the security agreement under which the receiver is appointed but the right to an indemnity, even in the absence of such a contractual indemnity exists under the general law. … The right is both a right to claim indemnity from the company as its creditor and a right of recourse against the charged assets to give effect to the indemnity. …The receiver has an equitable lien on the charged assets as a means of securing and enforcing the company's liability to indemnify.[7]

His Honour observed that this right to an indemnity from charged assets is based on principles of general law and is not contingent on the provisions of the *Receiverships Act*.[8] In addition, he noted no distinction between the entitlement of court-appointed receivers as distinct from privately appointed ones in terms of their rights to assert a lien over company assets and retain funds to defend proceedings against them.[9] In *Taylor*, Pankhurst J made similar observations. He noted that as the receivers were agents of the secured creditors under a general security agreement under which they were appointed, they were paid for their services by the company and they 'enjoyed a right of indemnity from charged assets. The right extended to fees and expenses properly incurred in the course of the receivership'. Furthermore, he noted that '[t]he receivers were also entitled to an equitable lien over the assets in order to secure and enforce the Company's liability to indemnify'.[10]

However, the right to assert a lien over company assets is not absolute. Van Bohemen J again quoted from Blanchard and Gedye:

> Receivers are not entitled to an indemnity from the company in respect of claims against them arising out of any neglect, default, breach of duty or breach of trust on their part, whether the claim is made by the secured creditor or another party. "It is trite law that an agent is not entitled to be indemnified by his principal against losses or liabilities incurred in consequence of his own negligence or default.[11]

In the New Zealand context, the *Receiverships Act* is also relevant, especially if the alleged breach of duty relates to a failure to comply with s 19. Section 19 states:

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[6] *Fistonich* (n 1) [35].
[7] Peter Blanchard and Michael Gedye, *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, 3rd ed, 2008) 154 (footnotes omitted).
[8] *Fistonich* (n 1) [37]
[9] Ibid [38]-[39].
[10] *Taylor* (n 5) [246].
[11] Blanchard and Gedye (n 7) 159 (footnotes omitted).

> 19 Duty of receiver selling property
> A receiver who exercises a power of sale of property in receivership owes a duty to—
> (a) the grantor; and
> (b) persons claiming, through the grantor, interests in the property in receivership; and
> (c) unsecured creditors of the grantor; and
> (d) sureties who may be called upon to fulfil obligations of the grantor—
> to obtain the best price reasonably obtainable as at the time of sale.

Section 20 limits a receiver's right to indemnity in the event of a breach of s 19 as follows:

> Notwithstanding any enactment or rule of law or anything contained in the deed or agreement by or under which a receiver is appointed,—
> (a)…
> (b) A receiver is not entitled to compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 19.

The other relevant statutory duty is s 18, which sets out the general duties of a receiver, these being:

> (1) A receiver must exercise his or her powers in good faith and for a proper purpose.
> (2) A receiver must exercise his or her powers in a manner he or she believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.
> (3) To the extent consistent with subsections (1) and (2), a receiver must exercise his or her powers with reasonable regard to the interests of—
> (a) the grantor; and
> (b) persons claiming, through the grantor, interests in the property in receivership; and
> (c) unsecured creditors of the grantor; and
> (d) sureties who may be called upon to fulfil obligations of the grantor.
> (4) ….
> (5) Nothing in this section limits or affects section 19.

B *Rights on Termination*

While it is commonly accepted that receivers have the right to receive compensation and a lien for their expenses as receivers, the law is less clear as to when receivers can hold onto excess funds after the termination of the receivership to cover their likely litigation expenses when allegations of misconduct, negligence, or breach of duty have yet to be determined.

On termination of a receivership, Blanchard and Gedye state that once receivers have paid the preferential debts and the secured creditor, they are under a duty to terminate the receivership. Receivers at that time also must pay over or surrender the surplus assets or proceeds of sale to the company or its liquidator. The authors continue: 'However, an order directing a receiver to pay over moneys will not generally be made unless it can be determined that on no possible

basis could the receiver be liable for claims arising out of the receivership (with a consequent continuing right of indemnity).'[12]

Blanchard and Gedye refer to the Australian decision of *Expo International v Chant*[13] as the authority for this statement. However, in *Chant*, the receivers had realised all of the company's property but were still involved in litigation on the company's behalf. On this basis, the Court in *Chant* held that the receivers had ample reasons to retain funds. This is a different scenario from the facts of *Taylor* and *Fistonich*, outlined below. Finally, it is worth noting that Blanchard and Gedye do not discuss s 20(b) in the context of termination and the payment of surplus funds.

III DISCUSSION OF RECENT CASES

A *Taylor*

Taylor was a shareholder of a company that went into receivership and had guaranteed, through a family trust, a loan from the Bank of New Zealand to the company. The company's receivers sold its assets but could not generate sufficient funds to repay the Bank fully. As a result, the Bank recovered the shortfall from the trust under the guarantee. Taylor and the trustees initiated legal action against the Bank and the receivers for their losses. The claims against the receivers alleged that they had violated their duties under general law and the Act, including a breach of s 19 in that they had failed to obtain the best possible price for the assets at the time of sale. Additionally, Taylor claimed that the receivers had held onto funds they were not entitled to, awaiting the outcome of the litigation against them.

In relation to this last claim, Pankhurst J reviewed the common law, starting with *Dyson v Peak,*[14] where Eve J had rejected the retention of funds by a receiver of a colliery against the possibility of future claims. On this basis, Pankhurst J observed that 'a mere apprehension of the possibility of litigation does not enable a receiver to withhold funds'.[15] His Honour then considered two more recent Australian decisions at the other end of the spectrum. In the first decision, *Expo International Pty Ltd v Chant*,[16] the receiver's retention of funds was upheld as the receiver's ongoing litigation was on behalf of the company. In the second, *Flexible Manufacturing Systems Pty Ltd v Fernandez*,[17] a notice of the action against the receiver was received after the receivership had terminated. The Federal Court of Australia declined to uphold the equitable lien because its validity must be assessed at the termination of the receivership. At that time, the claim against the receiver was, at best, a contingent claim; accordingly, the receiver was not entitled to retain funds.

[12] Blanchard and Gedye (n 7) 276 (footnotes omitted).
[13] *Expo International Pty Ltd v Chant* (1979) 3 ACLR 888 (NSWSC).
[14] *Dyson v Peat* [1917] 1 Ch 99 (Ch).
[15] *Taylor* (n 5) [251].
[16] *Expo International Pty Ltd v Chant* (n 13).
[17] *Flexible Manufacturing Systems Pty Ltd v Fernandaz* [2003] FCA 1491, (2004) 22 ACLC 47.

Against the background, Pankhurst J in *Taylor* considered s 20(b), although his Honour noted that the provision had not been included in the original statement of claim against the receivers. His Honour concluded that as there were several claims against the receivers, in addition to the alleged breach of the s 19 duty to obtain the best price reasonably obtainable at the time the charged property was sold, a reasonable receiver in November 2008 (when the receivership terminated) would have concluded that the right of indemnity from the company continued, as did the right to a lien.[18]

However, his Honour did indicate, in what must be considered obiter, that if the claim had only extended to an alleged failure to obtain the best price for the assets under s 19, the indemnity would not have been available. As a result, neither could a lien have been asserted against the surplus funds.[19] Accordingly, although Pankhurst J does not expound further on this point, his Honour indicates that when an alleged breach of duty relates only to the duty in s 19, then irrespective of the fact that the allegation has yet to be proven, receivers lose their rights to retain funds, a more restricted approach than under the general law.

B *Fistonich v Gibson & Jackson*

The *Fistonich* case arose from an application by Sir George Fistonich ('Fistonich'), the founder of Villa Maria Estate Ltd ('Villa Maria'), a well-known, long-established New Zealand winery. In 2019, ANZ Bank and Rabobank ('the Banks'), who had extended substantial loans to Villa Maria and were joint security holders over its assets, had concerns about the governance and management of Villa Maria and its debt levels.[20] These concerns led to the restructuring of Villa Maria, with Fistonich Family Wines Ltd ('FFWL') being incorporated as the holding company for Villa Maria. At that time, Fistonich ceased to be a director of or be involved in the day-to-day management of Villa Maria. However, he held all the shares in FFWL and was also a company director.

In 2020, Villa Maria continued to have financial problems, and it was agreed that Villa Maria's business and assets would be offered for sale. Fistonich agreed with this process. Separate offers were then received for the winery and its surplus land. The Banks decided that the offer prices were acceptable. However, Fistonich refused to accept the proposed sale values. Fistonich's refusal triggered an event of default under the Banks' facility agreements, which led in May 2021 to the Banks appointing receivers over FFWL. The receivers continued with the asset sales, and after full repayment of the amounts owed to the Banks, the receivers had surplus funds. The receivers proposed to pay the surplus of NZD 40 million to Fistonich, although retaining NZD 5.16 million to pay their fees and legal costs, which they expected to incur in claims currently being brought against the receivers by Sir George or in respect of future claims against them by him.[21]

[18] *Taylor* (n 5) [257].
[19] Ibid [258].
[20] *Fistonich* (n 1) [4].
[21] Ibid [5]-[11].

Fistonich had already sought orders to obtain all relevant documents relating to the land sale and business. He had also commenced proceedings against the receivers concerning the conduct of the receivership, alleging they had breached duties of redemption owed to him.[22] Fistonich also indicated he intended to file a further proceeding, alleging the receivers negligently sold assets at an undervalue, in breach *Receiverships Act* s 19. He considered that better prices would have been obtained if the receivers had been prepared to entertain sales to overseas persons. Neither of these proceedings had been heard at the time of the application to the Court objecting to the retention by the receivers of surplus funds.[23]

As the claims against the receivers in *Fistonich* related to claims beyond that of the receivers' duty of care when selling property, the Court was not bound to follow the statement in *Taylor* relating to a single allegation of breach based on the s 19 duty, irrespective of whether it was obiter or not. However, Van Bohemen J expressly stated that he declined to follow this part of the decision in *Taylor* as he considered it did not pay sufficient attention to the language of s 20. In his view, it is 'inherent' in the wording of s 20(b) that a breach of the duty in s 19 must have already been established for a receiver to lose their rights of indemnity and lien. His Honour continued that 'it would be contrary to well-established principles if the right of a receiver to secure the liability to indemnity could be abrogated simply by an allegation of a breach of duty',[24] and, if the analysis in *Taylor* were correct, 'a receiver would be required to fund their own defence to any allegation of breach of duty, no matter how trivial, and bear the risk that, if the claim were found to be without substance, but the company had no funds, the receiver would not be able to recover costs incurred in the exercise of the receivership'.[25] On this basis, the decision by the receivers to retain part of the surplus funds was upheld.[26]

With respect to Van Bohemen J, this summary of *Taylor* does not reflect the approach taken by the Court in *Taylor,* as Parkhurst J clearly accepted that a mere allegation of breach would not receive judicial support as grounds for a receiver to retain funds. Van Bohemen J referred to a general statement in an Australian case, *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd*,[27] to support his interpretation of the relevant law. In *Laneport,* the Federal Court held as a general principle that a receiver has a general entitlement to deduct and to retain, out of funds realised from the company's assets, the receiver's costs, charges, and expenses, including the costs of defending themselves from unsuccessful claims against them.[28] The *Laneport* decision did not refer to either of the earlier Australian cases.

The Court in *Fistonich* held that s 20(b) only applies when a receiver's liability has been established. Furthermore, if receivers have been found liable, they have no right to indemnity and must account to the company for any company funds expended in defending the claim

[22] *Fistonich v Gibson* Auckland HC CIV-2021-404-2234.
[23] *Fistonich* (n 1) [16].
[24] Ibid [56].
[25] Ibid [57].
[26] Ibid [66].
[27] *Australian Securities Investment Commission v Lanepoint Enterprises Pty Ltd* [2006] FCA 1493.
[28] Ibid [47]-[48]]

against them. Accordingly, the Court in *Fistonich* interpreted s 20(b) as not altering or restricting the general law as it applies to the receiver's rights of retention and lien.[29]

IV HISTORY OF SS 19 AND 20(B)

A *1980 Amendments to the Companies Act 1955 (NZ)*

Due to the conflicting views as to the circumstances in which s 20(b) applies in *Taylor* and *Fistonich,* the correct application of the provision is uncertain. The history of this sub-section is examined below to determine whether this provides any insight as to how it should be interpreted.

The equivalent provisions to Receiverships Act ss 19 and 20 were inserted in the *Companies Act 1955* (NZ) ('the 1955 Act') as s 345B by *Companies Amendment Act 1980* (NZ) s 39.[30] However, before the creation of this statutory duty, a receiver's duty of care when selling assets based on general law and duties in equity had been recognised by the courts. Blanchard and Gedye extensively discuss this duty, covering the historical general law and duties in equity. They observe that the liability of a receiver in selling the property of a debtor company is much the same as that of a mortgagee. 'Equity imposes on a mortgagee general duties to the mortgagor and also to everyone else who is entitled to redeem the mortgage. That includes the holder of any subsequent encumbrance and also a surety for the performance of a mortgagor.'[31]

Blanchard and Gedye trace the early development of this duty at general law leading up to the 1971 decision in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[32] where the Court of Appeal of England and Wales widened the scope of a mortgagee's liability and 'appeared to ground it in tortious negligence'.[33]In this decision, the Court found that a mortgagee who had carelessly failed to advertise the mortgaged property as having planning permission for redevelopment was held liable for substantial damages. The Court observed that provided adverse factors such as poor market, poorly attended auction or low bidding, were not 'due to any fault of the mortgagee, he can do as he likes',[34] provided the mortgagee had taken reasonable steps to obtain the best price obtainable at the time of sale. Blanchard and Gedye continued that the decision in *Cuckmere Brick* 'was wholeheartedly embraced'[35] in New Zealand and interpreted as imposing a duty of care when selling property.

[29] Counsel for FFWL and Fistonich also sought declarations from the Court that the sum that the receivers proposed to retain to pay their estimated legal costs was unreasonable. The Court declined to deal with this as it had not been provided with information relating to the scale of the claims made in the proceedings or proposed proceedings against the receivers, See *Fistonich* (n 1) [61]-[63].
[30] *Companies Amendment Act 1980* (NZ) s 39 inserted new section 345B into the *Companies Act 1955* (NZ). At that time, the statutory provisions applying to receiverships were located within the *Companies Act 1955* (NZ) (and its predecessors).
[31] Blanchard and Gedye (n 7) 316 (footnotes removed)
[32] [1971] Ch 949, [1971] 2 All ER 633.
[33] Blanchard and Gedye (n 7) 317.
[34] [1971] CH 949 at 965, [1971] 3 All Er 633 at 643 per Salmon J.
[35] Blanchard and Gedye (n 7) 317.

As discussed below, this article suggests that the rationale for the new statutory duty in s 345B(1) was the development of this duty of care at common law following *Cuckmere Brick,* although there is no supporting evidence for this suggestion in the Companies Amendment Bill 1979 (146–1) or associated documents. The Explanatory Note to that Bill simply states:[36]

> The proposed new section 345B provides that where a receiver sells any property of the company, he shall exercise all reasonable care to obtain the true market price for the property. …and that notwithstanding the provisions of any instrument the receiver is not entitled to be indemnified by the company against liability under this section.

However, in s 345B(1), as enacted, the requirement to obtain the 'true market price' was replaced by a requirement to exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale.[37] Section 345B(2) stated that this duty was owed to the company and s 345B(2)(b) provided that a 'receiver or manager shall not be entitled to compensated or indemnified by the company for any liable he may incur as a result of a breach of his duty.

The *Companies Amendment Act 1980* (NZ) inserted several other receivership-related provisions into the 1955 Act, primarily due to recommendations from the 1973 Macarthur Committee Report.[38] The Macarthur Report did not discuss the issue of a receiver's duties when selling debtor-company property, but its recommendations are the genesis of the other provisions.[39] As stated above, this article suggests that the purpose of the new s 345B(1) in 1980, which is now *Receiverships Act* s 19, was to codify the law following the decision in *Cuckmere Brick.* The language used in s 345B (1) requires a receiver to 'take reasonable care to obtain the best price reasonably obtainable at the time of sale', which reflects the language used in *Cuckmere Brick.* Blanchard and Gedye also reached the same conclusion. They state, when discussing s 19 that it imposes a duty that is 'obviously drawn *from Cuckmere Brick'.* This suggestion is supported by an observation of the New Zealand Court of Appeal in *Apple Fields Ltd v Damesh Holdings Ltd*[40] concerning *Property Law Act 1952* (NZ) ('*Property Law Act*') s 103A. This section was an equivalent provision to s 345B(1) but applied to mortgagees when selling property and was inserted in the *Property Law Act* at the same time as the amendments to the 1955 Act in 1980. The Court of Appeal observed that *Property Law Act* s 103A was to be read as a legislative affirmation of the scope of the duty of care in negligence

[36] Explanatory Note, Companies Amendment Bill 1979 (146–1) (NZ) x.
[37] See (29 October 1980) 434 NZPD (Companies Amendment Bill – Second Reading, Hon Jim McLay) who stated that the Statutes Revision Committee had received submissions about the inappropriateness of a true market price test which is the price that would be paid by a willing seller and willing buyer.
[38] Special Committee to Review the Companies Act, *Final Report of the Special Committee to Review the Companies Act* (New Zealand Government Printer, 1973 (known as the Macarthur Report) 168-80.
[39] See the Explanatory Note, Companies Amendment Bill 1979 (146–1) x which states that four sections relating to receivers and managers are to be inserted into the 1955 Act and provides references to specific paragraphs of the Macarthur Report for three of the sections, but not for new section 345B.
[40] [2001] 2 NZLR 586. The decision was affirmed on appeal by the Privy Council, [2004] 1 NZLR 721. Also see *First City Corporation Ltd v Downsview Nominees Ltd* [1993] AC 295 at 318, [1993] 1 NZLR 513 at 526, [1994] 3 All Er 626 at 637, per Lord Templeman.

owed by a mortgagee who has decided to sell 'as recognised since 1974 by the New Zealand Courts'.[41]

In terms of s 345B(2), there is even less policy discussion regarding the reasons for its enactment. As outlined above, the Explanatory Note simply states that 'notwithstanding the provisions of any instrument the receiver is not entitled to be indemnified by the company against liability', which suggests that it was designed not just to limit the ability of receivers to be indemnified when they are in breach of the duty of care when selling debtor company property, but also to restrict any attempt to contract out of the duty.

It is plausible that in the same manner that s 345B(1) was enacted to codify developments in the general law, s 345B(2)(b) was also drawn from existing equitable principles. Blanchard and Gedye observe that if receivers breach their duty of care, then a 'the receiver is required to account for what would have been available to them if there had been no misconduct and to pay compensation for any shortfall caused by a breach of duty'.[42] In addition, where the misconduct of receivers has been established, they also lose their rights of indemnity and lien from the company's assets. In addition, under general law, if a receivership has been terminated before an allegation of misconduct has been established, courts have allowed receivers to retain funds provided any such misconduct claims have been formalised by the date of termination.[43]

B *Subsequent Legislative Changes*

The subsequent history of the sections does not provide any additional insights into the interpretation of s 345B(2)(b). The New Zealand Law Commission, in Report No 9 and Report No 16, recommended the repeal of Part VII of the 1955 Act, which dealt with receivers and managers and the enactment, as an amendment to the *Property Law Act*, of new statutory provisions applying to receiverships generally.[44] Instead, the decision was made to enact a new Act dealing with receiverships and to make several separate amendments to the Property Law Act.[45] Clauses 149 and 150 of the Companies Ancillary Provisions Bill 1991 (75–1), as introduced to Parliament, contain the provisions that subsequently were enacted as *Receiverships Act* ss 19 and 20.

Clause 150 was enacted unchanged as *Receiverships Act* s 20. The only statement about the purpose of cl 150 in any of the legislative documents is the following rather unhelpful statement in the Explanatory Note to the Bill: 'Clause 150 provides that a receiver cannot claim in an action for breach of the duty imposed by clause 149 that he or she was acting as the grantor's

[41] [2001] 2 NZLR 586, 598. Also see Blanchard and Gedye (n 7) 319 fn 24.
[42] Ibid 320.
[43] See *Dyson v Peat* [1917] 1 Ch 99 (Ch); *Expo International Pty Ltd v Chant* (n 13); *Flexible Manufacturing Systems Pty Ltd v Fernandaz* [2003] FCA 1491, (2004) 22 ACLC.
[44] New Zealand Law Commission, *Company Law Reform and Restatement* (Report No 9, June 1989) and New Zealand Law Commission, *Company Law Reform: Transition and Revision* (Report No 16, September 1990).
[45] Explanatory Note, Companies (Ancillary Provisions) Bill 1991 (75–1) vii.

agent and prohibits a receiver claiming indemnity from the property in receivership or from the grantor.'[46]

However, the Explanatory Note does state that cls 149 and 150 'carry forward the principles contained in section 345B of the 1955 Act',[47] which indicates that the new provisions were not intended to alter the law as codified in s 345B.

Despite this statement in the Explanatory Note, cl 149 was amended at the Select Committee Stage. Clause 149, as introduced into the House, retained the direction that the duty to take reasonable care to obtain the best price reasonably obtainable at the time of the sale was only owed to the grantor (the debtor company).[48] However, as enacted, the duty in s 19 was extended to include persons claiming through the grantor and any sureties.[49] This can be contrasted to s 18, which makes a distinction between the primary duties of good faith and acting in the interests of the appointing creditor and the secondary duties that are owed to the grantor, persons claiming through the grantor and any sureties to the extent consistent with the primary duties. A receiver is statutorily directed to have reasonable regard for the interests of these secondary parties only to the extent consistent with the receiver's primary s 18 duties.

Regarding the relationships between the provisions, s 18(5) states that 'nothing in this section limits or affects section 19'. Accordingly, all persons or entities listed in s 19 who are owed a duty of care by a receiver when selling the debtor-company property would have standing to bring an action for breach of that duty, irrespective of the operation of s 18.

[46] Ibid.
[47] Ibid.
[48] Companies (Ancillary Provisions Bill) 1991 (75-1) (NZ), cl 149.
[49] Justice and Law Reform Committee, New Zealand Parliament, *Companies (Ancillary Provisions) Bill 1993* (75–2).

V CONCLUSION

In conclusion, having reviewed the general law as it applies to receivers and their rights to retain funds on the distribution of surplus assets, as well as the history of s 20(b), it is suggested that there is no evidence that this provision of the Act alters in any way the position at general law that applies in respect of any other breach of duty, neglect, or default by a receiver. Accordingly, while the reasoning of Van Bohemen J in *Fistonich* may be criticised, his interpretation that s 20(b) only applies once the receivers' liability is established is plausible. The provision does not prevent the retention of funds to defend proceedings or proposed proceedings prior to liability being determined.[50] Until the outcome of the litigation against them is known, receivers may use the retained funds, but if they are found liable for negligence, breach of duty or default, they will have to account to the company for the full amount of retained funds.[51] This result provides some reassurance to receivers seeking to use retained funds until the outcome of litigation against them is known. Still, clarification of this point by a higher court would be welcome.

[50] *Fistonich* (n 1) [48].
[51] Ibid [56], [64].

SUPPORTING FIRST YEAR ONLINE LAW STUDENTS WITH THEIR TRANSITION TO UNIVERSITY: DEVELOPING LAW-SPECIFIC RESOURCES ON ACADEMIC INTEGRITY AND THE ACADEMIC ENVIRONMENT

NOELEEN MCNAMARA[*] *and KERSTIN BRAUN*[†]

ABSTRACT

The past decade has seen an increase in tertiary online education (and online education was of course the default method of delivery at most universities during the Covid-19 pandemic). Little research, however, has explored the experiences of online students and how to best support their transition to university study. This article discusses the development of law-specific resources on academic integrity and the academic environment designed to help first year online law students transition to university. Moreover, it analyses students' responses to the resources collected through student surveys and semi-structured interviews of participating students. Findings show that the law-specific resources had a positive impact on first year online law students often leading to an enhanced understanding of academic concepts and increased confidence levels in approaching assessment tasks.

Keywords: Online law students, transition, first year experience, academic integrity, academic environment

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I INTRODUCTION

The past decade has seen an increase in tertiary online education, especially, but not only during the Covid-19 pandemic. In the Australian education context, the Gratton Institute notes that 'improved educational technology via the internet has made off-campus study easier' and that increasing numbers of students are now studying in this mode.[1] While online study contains great benefits for students and universities, it also brings along challenges, including, for example, how to best support online students in transitioning to university.

Research suggests that many students, including law students, struggle to successfully navigate the first year of university.[2] In that context, much scholarship has focused on the experience of on-campus students and identified a need to carefully scaffold first year learning.[3] While transitioning to university may be particularly challenging for online law students who generally lack immediate in-person interactions with peers and academics, the question of how to best support online students' transition to university remains under researched.

Academic integrity is a particularly serious matter in the law discipline. Students engaging in academic misconduct may be prevented from progressing through the degree and may not be admitted into legal practice due to lack of 'good character'.[4] Moreover, lack of information about the academic environment including, for example, university policies relating to assessments, may prevent online students from successfully completing the first year of university.[5]. Such negative experiences can act as a major hurdle for the successful completion of a law degree as they may cause students to withdraw.

Successfully transitioning first year online law students may be especially impacted by students' varying degrees of academic readiness and, relatedly, limited knowledge of academic integrity culture and the academic environment.[6] It is well researched that one way of supporting students' transition to university culture is to explicitly outline and apply performance expectations.[7] This article describes the development of law-specific resources on academic integrity and the academic environment

[1] 'Mapping Australian higher education' *Gratton Institute* (Report, 2016) 5 <https://grattan.edu.au/wp-content/uploads/2016/08/875-Mapping-Australian-Higher-Education-2016.pdf>.
[2] 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, 5.
[3] Sally Kift, 'Transforming the First Year Experience: A New Pedagogy to Enable Transition' (Conference Paper, Enhancing Student Success Conference, April 2005); Sally Kift, 'The Next, Great First Year Challenge: Sustaining, Coordinating and Embedding Coherent Institution-Wide Approaches to Enact the FYE as "Everybody's Business"' (Conference Paper, Pacific Rim First Year in Higher Education Conference, 2008).
[4] Michelle Evans, 'Plagiarism and Academic Misconduct by Law Students: The Importance of Prevention Over Detection' (2012) 17(2) *International Journal of Law & Education* 99. On problems concerning admission, see also *Re Liveri* [2006] QCA 152; *Re A JG* [2004] QCA 88.
[5] Jed Locquialo and Bob Ives, 'First-year university students' knowledge of academic misconduct and the association between goals for attending university and receptiveness to intervention' (2020) 16(1) *International Journal for Educational Integrity* 1.
[6] Adam Webster et al, 'Enhancing the First Year Curriculum and Experience: Law School 'Boot Camp' (2018) 28(1) *Legal Education Review* 1.
[7] See eg, Angela Bowles et al, 'Staying the distance: students' perceptions of enablers of transition to higher education' (2014) 33(2) *Higher Education Research and Development* 212; Catherine Meehan and Kristy Howells, 'In search of the feeling of 'belonging' in higher education: undergraduate students transition into higher education' (2019) 43(10) *Journal of Further and Higher Education* 1376.

implemented in two compulsory first year law courses at a large regional university in Queensland, Australia, between 2017 and 2022 as well as their impact on students.

The article first provides an overview of existing literature on transitioning first year students as well as justifications for the introduction of resources including tutorials and quizzes on two succinct areas: academic integrity and the academic environment. It subsequently explores considerations which were relevant for the specific design of the respective resources thus providing a case study on the development of the resources. This may be useful to other university educators contemplating the use of law-specific resources on academic integrity and the academic environment to support their students in transitioning to university. The article subsequently outlines the methodology which relates to the collection of qualitative and quantitative student feedback on the resources. The sections on findings present student quantitative and qualitative feedback on their experiences with the resources, the discussion contextualises this feedback, and provides practical recommendations.

II LITERATURE REVIEW AND BACKGROUND

A *Transitioning First-Year Students to University*

Scholars have long pointed out problems with the successful university transition of first-year students, not the least due to their different levels of academic preparedness.[8] Kift and Nelson highlight that students undergo a dramatic transition during their first year at university requiring specific support.[9] Others note that some first year students may experience stress and anxiety.[10] Kift found, *inter alia*, that there is a need to design the curriculum to carefully scaffold and mediate the first-year learning experience.[11] The results of these studies clearly indicate the importance and relevance of developing and embedding curriculum items into first-year law courses to help law students navigate the academic space as a university student, build their confidence, and engage with integral issues such as academic integrity.

While there is considerable research on transitioning first-year on campus students, there is a gap in the literature concerning the online first-year student experience and there is a need for more recent literature on the first-year experience.[12] By providing insights into the experiences of first-year online law students with law specific-resources designed to support their transition by enhancing knowledge of academic integrity and the academic environment, this gap can be filled.

[8] Kift, Nelson and Clarke (n 2) 8.
[9] Sally Kift and Karen Nelson, 'Beyond Curriculum Reform: Embedding the Transition Experience' (Conference Paper, HERDSA Annual Conference, July 2005).
[10] Karen Nelson, Sally Kift, and John Clarke, 'Expectations and Realities for First Year Students at an Australian University' (Pacific Rim First Year in Higher Education Conference, 2008).
[11] Sally Kift, 'The First Year Student Learning Experience in Australian Higher Education' [2009] *Australian Learning and Teaching Council* 2.
[12] For studies focusing on online students see eg, Julie A Nelson, 'Advantages of Online Education' (2008) 20(6) *Home Health Care Management and Practice* 501.

B *Justification for the Selection of the Two Distinct Areas: Academic Integrity and the Academic Environment*

While a range of studies of the first-year experience and transitions have usefully focussed on a range of 'macro' issues associated with the transition to university,[13] we have focused on specific aspects of the academic experience. The developed resources are directed at two distinct areas of knowledge: academic integrity and the academic environment.

A growing body of international literature, based on successive surveys of higher education students, found that incidences of academic misconduct are increasing.[14] One reason why students behave without academic integrity is to do with misunderstanding relevant rules.[15] Students may unintentionally plagiarise where they do not know how to properly quote, paraphrase or reference or understand what constitutes collusion.

Another reason is that academic custom writing sites (that is, third parties who complete assignments for students to submit to their university as their own work[16]) have increased in prevalence and sophistication in recent years, enhancing the risk of contract cheating.[17] This is exacerbated by the recent widespread adoption of artificial intelligence sites such as ChatGPT which 'multiplies the risks which already exist around contract cheating in potentially opening up these services to a wider range of students who may not see using AI as cheating or who may not have the funds to use essay mill sites previously'.[18] Especially in the context of online students, King et al note that there may greater opportunities to engage in academic misconduct because controlling student identity in online assessments is more challenging than in invigilated on-campus exams.[19] Academic misconduct among law students is a wider sectoral issue and a particularly severe one. Law students who behave without academic integrity may not be admitted into legal practice due to lack of 'good character'.[20]

In light of the research, it is clear that online (as well as on campus) law students would benefit from resources that develop relevant knowledge on academic integrity early on in the course with a view to avoiding intentional and unintentional academic integrity breaches. Barrett and Malcolm further point

[13] See eg, Madeleine Bornschlegl and D Cashman, 'Considering the role of the distance student experience in student satisfaction and retention' (2019) 34(2) *Open Learning: The Journal of Open, Distance and E-Learning*, 139; Elizabeth A Bates, Linda K Kaye and Joseph J McCann, 'A snapshot of the student experience: exploring student satisfaction through the use of photographic elicitation' (2019) 43(3) *Journal of Further and Higher Education*, 291; Jacqueline Douglas, Robert McClelland and John Davies, 'The development of a conceptual model of student satisfaction with their experience in higher education' (2008) 16(1) *Quality Assurance in Education* 19.

[14] See eg, B Perry, 'Exploring Academic Misconduct: Some Insights into Student Behaviour' (2010) 11(2) *Active Learning in Higher Education*, 97-108; B Winrow, 'Do Perceptions of the Utility of Ethics Affect Academic Cheating?' (2016) 37 *Journal of Accounting Education* 1.

[15] LG Power, 'University Students' Perceptions of Plagiarism' (2009) 80(6) *The Journal of Higher Education* 643.

[16] Michael J Draper and Philip M Newton, 'A Legal Approach to Tackling Contract Cheating?' (2017) 13(11) *International Journal for Educational Integrity* DOI.I 10.1007.s40979-017-0022-5.

[17] C Ellis, IM Zucker, and D Randall, 'The Infernal Business of Contract Cheating: Understanding the Business Processes and Models of Academic Custom Writing Sites' (2018) 14(1) *International Journal for Educational Integrity* <https://doi.org/10.1007/s40979-017-0024-3>.

[18] Debby RE Cotton, Peter A Cotton and J Reuben Shipway, 'Chatting and cheating: Ensuring academic integrity in the era of ChatGPT" (2023) *Innovations in Education and Teaching International* DOI: 10.1080/14703297.2023.2190148, 8.

[19] CG King, RW Guyette Jr and C Piotwoski, 'Online Exams and Cheating: An Empirical Analysis of Business' (2009) 6(1) *Journal of Educators Online* 1.

[20] *Re Liveri* [2006] QCA 152; *Re AJG* [2004] QCA 88.

out that education on plagiarism is most effective when it is 'perceived as immediately relevant to the individual student'.[21] The developed academic integrity resources were therefore law-specific and integrated in one compulsory first year law course. The specific design and development are discussed further below.

III DEVELOPING LAW-SPECIFIC RESOURCES FOR ACADEMIC INTEGRITY AND THE ACADEMIC ENVIRONMENT

The majority of students enrolled in the Bachelor of Laws ('LLB') and Juris Doctor ('JD') degree at the authors' university are mature age (ie, 25 years of age or older) and study online. The authors of this article developed resources on academic integrity and the academic environment, which were subsequently introduced in two first year law courses to assist online students with their transition to university. The initiative ran from semester 2, 2017 to semester 2, 2020 and were supplemented with additional resources developed in 2022. The resources were implemented into two compulsory first year law courses via the courses' learning management systems. The courses were selected due to at least one of these courses being offered in semesters 1-3 – thus ensuring that the resources were available for first year students, regardless of their semester of entry. Consequently, by the end of the first year, students should be able to develop the necessary skills to successfully handle academic expectations, particularly around assessment. The below provides an in-depth overview of the resources contained in the two courses.

A *Academic Integrity Resources*

The need to provide students with a deeper understanding of academic integrity led to the development of a tutorial and quiz on plagiarism and academic misconduct. As pointed out above, most first-year law students at the university study online and a large proportion of course content in the relevant courses is also delivered online. There is however no certainty that all students will listen to the recordings of lectures that are provide to them, so a discussion about academic integrity and the academic environment that a lecturer may include within the classes is insufficient. Therefore, the tutorial and quiz on academic integrity was made available online via the courses' learning management platform.

The resource was developed by using the learning management software to create a so-called 'lesson'. A lesson contains a series of HTML pages of lesson content and/or questions which can be graded. This allows educators to introduce customised content and questions which then becomes available to students without further intervention from the course educator. The lesson content for the resource on academic integrity, which was informed by the university's academic integrity policies, consisted of five academic misconduct study modules. These were: assessment cheating, contract cheating, plagiarism, fabrication, and collusion. In addition, there was also an employability-oriented module on the consequences of academic misconduct for lawyers, thus contextualising academic integrity as a professional as well as an academic essential. After each module, students answered multiple-choice questions about fictional law-student scenarios to test their knowledge of academic integrity. In 2022, these resources were complemented by a recording in which the authors spoke about each element of

[21] R Barrett and J Malcolm, 'Embedding plagiarism education in the assessment process' (2006) (2)1 *International Journal for Educational Integrity* 38, 38.

academic misconduct, citing actual examples of academic misconduct that had been encountered within the Law School.

In the past, students specifically reported confusion about the difference between collaboration and collusion in the assessment context, particularly where they were involved in online or on campus study groups. To allow students to gain a better understanding and avoid potential integrity breaches, the resource included specific fictional case scenarios relating to joint student work and questions of collusion and collaboration.

Apart from covering a broad range of different academic integrity issues, the developed resources were also law-specific and student-focused. Non-specific academic integrity resources hold the risk that law students view them as generic and do not relate to them. Their impact can therefore be limited. To avoid student disengagement, all quiz questions dealt with fictional law student behaviour. Students working through the resources must correctly identify whether the law students in the fictional scenarios have or have not behaved with academic integrity and for what reasons. While the quizzes allowed for unlimited retries, guessing was avoided by shuffling the answer order on repeat. Successful completion of the lesson was required as a prerequisite for subsequent course assessments. Students gained access to the resources immediately after course enrolment and were able to self-pace their study – and direct any questions to their regular course educators.

The resource was designed to meet the needs of the first-year cohort of mature-age online students, many without recent study experience. Materials were written in straightforward language, from the students' perspective, and avoiding the use of jargon. The interface was free of clutter, and navigation was easy on handheld mobile devices, which students frequently use.

The design of the resource also took into account that many enrolled online students worked and had family commitments. While it was possible to complete the curriculum and assessment in less than one hour, students were able to engage with additional resources, through embedded links, if they wished. After they had completed the tutorial and quiz, students were able to return to the content and links at any stage to refresh or deepen their knowledge.

B *Academic Environment Resources*

Apart from academic integrity, law-specific resources on the academic environment were developed and implemented in another compulsory first year course. This is in keeping with the approach suggested by Nelson, Kift and Harper that 'it is within the formal or academic curriculum that students must find their place'.[22] Again, students gained access to the resources immediately after course enrolment and were able to self-pace their study with questions regarding content directed to their regular course educators. The tutorial contained six modules on the following topics: integrity, email etiquette, use of textbooks, assessment policies and procedures, useful university contacts and organisation of study materials. Students in previous years had reported difficulties in navigating the various required university policies (such as the procedure for seeking assignment extensions and the documentation required to apply for deferred exams). The default response was therefore to ask the

[22] Karen Nelson, Sally Kift and Wendy Harper, '"First Portal in a Storm": A Virtual Space for Transition Students' (Conference Paper, ASCILITE Conference, 2005, 509-17).

course examiner for assistance, causing frustration where the student had to be referred to another section to deal with their query.

Students also reported the need for further guidance on general skills which are needed both throughout their degree and which are transferable to the workplace. These skills include the standards of professional communication, expectations when dealing with university staff through to issues such as organising assessment and how to study for a problem-based law exam. This was particularly challenging for online students for whom it was sometimes difficult to access student resources on the physical campus including libraries and student centres or to ask their fellow students for advice. Examinations are acknowledged to be a source of stress for first year law students[23] so resources were specifically provided showing worked examples of previous exam papers and model answers were written at a distinction, pass and fail grade standard, including marker comments.

As with the academic integrity resources, after each module, students answered multiple-choice questions about fictional law-student scenarios to test their knowledge of the academic environment. Feedback was provided for each option, and a student could not progress to the next question until a correct answer had been given. Successful completion of the resources was required, and a prerequisite for subsequent course assessments. The value of empathy is interwoven throughout the resources, made clear as an objective and expectation for student learning and professional practice, and translated into practice through these formative activities.[24]

IV METHODOLOGY

The project not only sought to develop the above law-specific resources but also to explore their impact on first year law students. The evaluation aimed at obtaining student feedback on the resources and to identify whether students considered it to be valuable and effective. Specifically, it set out to assess whether engaging with the resources allowed students: 1. to enhance their understanding of the respective content, namely academic integrity and the academic environment, 2. to obtain knowledge useful for the remainder of their degree, and 3. to increase their confidence levels in navigating the academic space. Before carrying out the evaluation, an application for ethics approval was successfully made to the university's ethics section [H17REA235F1 – Learning the Ropes in First Year Law].

Data relevant to the evaluation of the resources was collected through student interviews about their experience with the resources in 2018 as well as through a longitudinal survey, gathering qualitative as well as quantitative response data on the overall student impact of the resources each semester.

In 2018, data was collected through open-ended, semi-structured interviews with a total of nine students who had engaged with the resources in the relevant courses in 2017 (semester 2 and 3) and 2018 (semester 1). Participants were interviewed after the end of the semester. Participants were first- and second-year students and had been voluntarily recruited from three courses with a total enrolment of 538 students. Participants were approached by a research assistant (a final year law student), who

[23] K Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235.

[24] 'UA Academic Integrity Best Practice Principles' *Universities Australia* (Report, 2017) <http://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/UA-Academic-Integrity-Best-Practice-Principles.pdf>.

provided an overview of the study before participants gave their consent. After their written consent was provided, they were immediately interviewed.

Interviews were undertaken face-to-face as well as through a video-conferencing platform by a research assistant. The academic staff were provided with transcripts of the interviews, but not the participants' names. Thus, the 'anonymity\ of the participants was protected and they did not feel any power imbalance which might be felt if interviewed by the course lecturers. Questions focused on participants' observations about the resources including knowledge before and after participation and how the resources could be improved.

In addition, data was gathered through a longitudinal collection (nine data collections across three years, that is each semester the resources were available)[25] whereby a total of 612 students who had used the resources responded to a voluntary anonymous electronic survey.[26] Students were surveyed on whether they felt the resources provided them with an enhanced understanding of academic integrity and the academic environment, whether they perceived the knowledge obtained through the resources as useful for the remainder of their degree and whether engaging with the resources had enhanced their confidence in completing future assessment items. This was done each semester the resources were used through a voluntary anonymous online survey tool (SurveyMonkey). The survey contained a combination of open questions and dichotomous questions (yes or no). An additional survey was undertaken in 2022 specifically about the value of the additional resource – ie the recording on academic misconduct. Thematic analysis was used to extract and analyse different themes from student data.

V FINDINGS

This section contains key findings of the evaluation by analysing whether 1. students felt the resources had enhanced their understanding of the particular content, 2. students thought the knowledge obtained through the specific resources would be useful during the law degree and 3. whether they believed that engaging with the resources had led to an increase in their confidence in navigating the academic space, approaching assessments and behaving with academic integrity. The below explores the impact of the resources on first-year law students.

A *Enhanced Understanding of Academic Integrity and the Academic Environment*

There was a total of 612 responses from 2017 to 2020 with data collected from each semester the resources were used. Most students who completed the survey agreed that the resources enhanced their understanding of academic integrity policies and the academic environment (ranging from 74%-93% depending on the semester). A breakdown of these responses follows in Table 1.

In 2022, students were surveyed again and asked about the value of the law-specific Academic Integrity recording. Most students (83%) that responded agreed that the law-specific nature of the recording was 'useful' or 'very useful'. Furthermore, the majority (77.1 %) agreed that law-specific resources were more valuable than the longer, university-wide generic resources (Table 2).

[25] Semester 2 and 3, 2017; semester 1-3, 2018, semester 1 and 2, 2019; semester 1 and 2, 2020.
[26] See further Table 1, which lists the participants' responses by semester.

Table 1: Online survey of student satisfaction with interventions

Survey question	**Sem 2, 2017**	**Sem 3, 2017**	**Sem 1, 2018**	**Sem 2, 2018**	**Sem 3, 2018**	**Sem 1, 2019**	**Sem 2, 2019**	**Sem 1, 2020**	**Sem 2, 2020**
Online survey response rate	38% (82/217 students)	20% (15/73 students)	38% (93/248 students)	49% (86/174 students)	55% (47/86 students)	44% (105/241 students_	28% (54/191 students)	43% (109/256 students)	15% (21/138 students)
Did the intervention enhance your understanding of the university's policies and procedures?	Yes – 93%	Yes– 87%	Yes – 88%	Yes – 93%	Yes– 94%	Yes – 89%	Yes – 74%	Yes – 93%	Yes – 100%
Do you believe the knowledge obtained will be useful during your law degree?	Yes – 94%	Yes– 93%	Yes – 92%	Yes – 98%	Yes– 98%	Yes – 96%	Yes – 96%	Yes – 91%	Yes – 92%
Has the intervention increased your confidence levels in approaching your course-related assessments?	Yes – 81%	Yes– 80%	Yes – 85%	Yes – 89%	Yes– 92%	Yes – 80%	Yes – 91%	Yes – 90%	Yes – 81%

Table 2: Online survey regarding the law-specific Academic Integrity recording 2022

N = 35					
1. How useful did you find the law-specific AI resource?	Not useful - 0	Somewhat useful – 2 – 5.7%	Moderately Useful – 4 – 11.4%	Useful – 23 – 65.7%	Very Useful – 6 – 17.2%
2. Do you feel law-specific AI resources are more valuable than generic ones relating to all students?	Yes – 27 – 77.1%	No – 1 – 2.9%	Unsure – 7 – 20%		

Particular themes featured in student feedback related to ease of use of the resources, the clarification of difficult areas and benefits for online students. These themes are discussed below.

1 *Ease of Use*

Student survey responses show that students appreciated the ease of use of the resources with one student highlighting that they are 'easy to read and navigate through' (survey, 2020). Another student's comment highlighted that the content is 'explicit and unambiguous' (survey, 2017). One survey comment noted that the resources provide 'clear examples on things [they] didn't know were classed as misconduct' (survey, 2017).

2 *Clarification of Difficult Areas*

Apart from being concise and easy to use, student responses also pointed out that the resources clarified especially difficult areas. Particularly in the context of academic integrity, students were found to be aware of the broader concept but lacked knowledge of particulars. This 'half-knowledge' is problematic as inadvertent misconduct can have the same consequences as intentional breaches. This problem was identified by one student interviewed in 2018. The student noted that their knowledge had changed pre- and post-quiz, emphasising that they had had only a 'general idea based on experiences as a student in high school but, actually, getting in-depth as to what is expected as a law student was much more clarified in that aspect' (interview 2). The law-specific recording mentioned resources that students regularly use, with one student stating, 'I felt like the information provided was helpful, and the specific examples clarified some types of cheating, for example, websites that sell notes' (survey, 2022).

The academic integrity resources sought to allow students to gain an in-depth understanding of the specifics of academic integrity in relation to a broad range of topics. Student survey responses confirm that students appreciated this holistic approach with one student noting that while they 'knew some of the policies the resources have given [them] more insight' (survey, 2019). One student remarked that working though the resources had allowed them to 'identify and avoid problems that [they] may have fallen into unintentionally if [they] had not undertaken the tutorial' (survey, 2020). The law-specific recording canvassed detection, which resonated with one student who stated 'It is very clear that all IT usage can be monitored, possibly down to the keystrokes used. I did learn a few new things' (survey, 2022).

When presented with different scenarios relating to what constitutes plagiarism and academic misconduct students noted that 'there were quite a few that [they] were not sure about' and that they 'did not fully understand the elements of contract cheating' (survey, 2018). Others pointed out that they found some areas of plagiarism 'ambiguous' and multiple students remarked that they were outright 'surprised' that some of the scenarios were classed as misconduct (survey, 2017).

Prior to preparing these resources, students had specifically reported to the authors that they were confused about the difference between collaboration and collusion in the assessment

context, particularly where they were involved in online or on campus study groups. Therefore, the resources included specific fictional case scenarios relating to joint student work and questions of collusion and collaboration. Student survey responses show that students found the knowledge gain in this area extremely valuable with one commenting that 'the section on collusion was particularly helpful in distinguishing the line where collaboration ends' (survey, 2018) and another stating that they 'know now the boundaries of group work' (survey, 2018).

Some students (ranging from 6-26%, depending on the semester) did not think that the resources enhanced their understanding of the relevant areas. These students frequently noted that they had studied similar content in other courses or degrees. However, even where students did not obtain new knowledge some nevertheless felt the resources were useful. One surveyed student commented, for example, that 'it was a good refresher as a mature-aged student' that it 'was helpful to bring that info together' and that 'it provided [them] with exact links to specific details of the course including assessment details and course readings. It also provided [them] with the appropriate communication techniques when contacting course moderators and examiners' (survey 2018).

3 *Particular Benefits for Online Students*

A particular concern of introducing these resources was to provide material to assist students, regardless of their mode of study. In terms of the theme of this article, it is relevant to consider the impact of the resources for the online student cohort. One interviewed student (interview 4) commented on the usefulness of the resources for online students who generally do not come onto campus, noting that the resources:

> I guess if you are there in person in a tute or whatever you can ask straight away. [With these resources] you do not have to wait for a specific time to make sure you are there, logged into zoom for it, you know as in an online tutorial. So you get the clarification in that which you would otherwise get if you were on-campus.

Apart from commenting whether students felt the resources had enhanced their knowledge, students also provided feedback on whether they thought the knowledge obtained through the resources would be useful while studying their degree, as discussed below.

B *Useful Obtained Knowledge During Law Degree*

The intention of the project was not only to provide resources of relevance to their first year of study, but also to set students up for success for the whole of the degree, by providing links to resources that students could review in later semesters when questions about academic integrity or the academic environment more generally arose during their studies. This aim appears to have been achieved. Data collected through the longitudinal collection showed that, depending on the semester, between 92% and 98% of surveyed students believed that the knowledge obtained through the resources would be useful to them throughout their law degree.

Student responses particularly focused on the benefits of the early introduction of the resources in the first year and the consequences for subsequent years of study. One surveyed student remarked that the resources have 'shown [them] exactly where and who to go to if and when [they] need help which led them to conclude that 'each semester there will be assessment and exams and this knowledge will help (survey, 2018). One student commented that 'clarifying and touching base ensures that the students are on the same page' (survey, 2017) with another noting that 'having this presented so early in the course (especially in a quiz format as opposed to simply a reading) will keep academic integrity in the forefront of [their] mind in tackling assessments into the future (survey, 2017). In the 2018 survey one student stated that 'as a first year student… there is ambiguity with respect to what does and does not constitute academic misconduct and that training on these issues is 'especially useful for newer students' (survey, 2018).

The importance of early introduction is echoed in the 2018 student interview where one student remarked that if they had not taken the quiz during their first semester, they would not know 'what to expect with academic integrity, and the honesty that goes with that'. The student stated that this would be because they would have treated their university study like high school which 'had different levels of what they expected of you' (interview 9). Another interviewed student emphasised that the academic misconduct tutorial had enhanced their knowledge and that it therefore became 'a foundation [for]… doing your assignments' (interview 8). The student concluded that the tutorial highlighted important areas they were unaware of and 'didn't actually realise were considered academic misconduct. The law-specific recording mentioned the potential for blackmail[1] from the contract cheating sites, which resonated with at least one student who wrote 'I found it very interesting to hear about different ways certain kinds of cheating could come back to haunt students in the future (i.e. some may lead to extortion or expulsion from practice)' (survey, 2022).

C *Increase in Confidence Levels*

The resources aimed at providing students with in-depth knowledge on academic misconduct and the academic environment. The research further explored the question of whether the obtained knowledge on how to navigate the academic environment and avoid academic misconduct had boosted students' confidence levels in approaching assessment items and navigating the first year. Data gathered through the longitudinal collection showed that between 85% and 91%, depending on the semester, felt that the resources had increased their confidence levels in navigating the academic space and approaching assessment items. Surveyed students who did not agree that the resources had increased their confidence levels frequently noted that they were already aware of the content and therefore their confidence levels pre and post resources remained the same.

[1] For a discussion of this issue, see, for example, Jonathan Yorke, Lesley Sefcik and Terisha Veeran-Colton (2022) 47(1) 'Contract cheating and blackmail: a risky business?' *Studies in Higher Education* 53.

VI DISCUSSION

The development of the law-specific resources for online first year law students was informed by concerns about the transition of online students due to their varying levels of academic readiness. The resources were designed through a framework of awareness, development and prevention, rather than the conventional approach in higher education law, which is frequently grounded in detection and punishment.[2] The findings show that after engagement with the resources the majority of students reported an enhanced content understanding, felt that the knowledge they obtained would be useful throughout their degree and noticed an increase in confidence concerning navigating academic assessments and the academic environment.

Students who did not report an enhanced understanding frequently pointed out that they had studied similar content in previous courses or degrees and already felt knowledgeable. These responses highlight that there are different levels of academic readiness among first year online law students. Therefore, early orientation would benefit first year students and provide a foundational base that students of all levels of readiness can utilise, and provide course educators with knowledge that all of their students have this important understanding .

Findings further showed that students appreciated the following aspects of the resources most: 1. the early introduction of the resources in the first year which 'levelled the playing' field and provided all students with the same degree of knowledge for future study; 2. that the resources were designed in a way that was easy to use and navigate and 3. their particular benefits to provide early knowledge to online students due to being available on the course management system of the two courses and set as a precondition to accessing the first assessment item. In terms of content, the findings demonstrate that the law-specific nature of scenarios kept students engaged and allowed them to clarify difficult areas. This is in line with Benson et al's findings that 'for a tutorial to have any value it must be used practically in context such as a course requirement'.[3] A further significant findings was that, during this period, no instances of academic misconduct were reported in these core, first year courses.

The research presented in this article has limitations as it examined only one initiative designed to support the transition of online first-year law students at one university. This is a limitation because the experience of the cohort at this university, being students who are predominantly mature-aged and first-in-family to study at university may not translate to the experience of other universities whose cohort is predominantly school leavers. This is particularly the case with the academic integrity resources, due to the attention received on this subject during their schooling. Additionally, the sample of interviewed students is based on a small sample 1.5% of the total cohort and only included students who were enrolled in 2017 and 2018. Therefore,

[2] Michelle Evans, 'Plagiarism and Academic Misconduct by Law Students: The Importance of Prevention Over Detection' (2012) 17(2) *International Journal of Law & Education* 99.
[3] L Benson et al, 'Developing a University-wide Academic Integrity E-learning Tutorial: a Canadian Case' (2019) 15(1) *International Journal for Educational Integrity* 14 <https://doi.org/10.1007/s40979-019-0045-1>.

this may limit the ability to make a clear generalisation of the impact of the academic integrity and environment intervention.

VII CONCLUSION

This article presented the findings related to the design of law-specific resources developed for first year online law students in place between 2017 and 2022 to support their transition to university. They address a wide range of academic integrity concepts and university assessment policy documents through to how to approach the study of law and successful preparation for problem-based law exams. The evaluation of the project through student interviews and surveys has shown an overwhelmingly positive experiences with resources during the time they have been available, leading to an enhanced understanding of relevant areas as well as an increase in student confidence when navigating the academic space. During the period of the project, no instances of academic misconduct were detected in the courses in which the resources were utilised. While the resources have been developed specifically for first year law students, they are relevant and easily adapted to other disciplines. For example, the format of the academic integrity resources (that is, devising a scenario and asking questions to highlight practical examples of plagiarism, collusion and contract cheating) has been utilised in the development of the university-wide academic integrity tool.

CUSTOMARY LAW AND LEGAL PLURALITY IN PAPUA NEW GUINEA: THE CHALLENGES OF TEACHING AND LEARNING CUSTOMARY LAW

*Brian Tom**

ABSTRACT

This article evaluates some of the inherent challenges of teaching and learning the Customary Law course at the University of Papua New Guinea, where it is an integral part of the LLB program, to see how it can be better taught and learned.

I draw on my experience as a student and a tutor of the course (2018-2021); a review of the pertinent literature; an analysis of the University's administrative framework in which the course is taught; and an evaluation of the examination results for the course between 2018 to 2021.

The challenges mainly arise from the competencies of the students due to the timing of the course in the program; the inherent difficulty in grasping the subject due to the nature of this branch of the law itself and its interrelationship with other areas of the law; and the difficulty in perceiving the subject outside the prism of the positivist formal legal system. A tension is also present between studying the subject from a regulatory perspective and the need to study its practices in social context. These considerations are exacerbated by the ongoing constitutional rhetoric placing eminence and thereby a sense of urgency on the creation of an Indigenous jurisprudence. The article concludes with two recommendations: (1) the course should be taught in the final year of the program; and (2) an anthropology course on Papua New Guinea societies be made compulsory under the program.

I INTRODUCTION

This article considers the challenges of teaching and learning Papua New Guinea (PNG) customary law at the University of Papua New Guinea (UPNG) School of Law under its undergraduate Bachelor of Laws (LLB) program.[1] The relevant course is titled 'Customary Law' and this phrase will be used in this article to refer to PNG customary laws. This phrase is, however, potentially misleading because the course is not about the study of the customary laws of the traditional societies *per se* but instead is more about the study of what the formal laws of the state (ie PNG) say about or provide for (ie regulate) the customary law and how the courts have applied (these state laws in recognising) customary law.

The challenges in teaching this course mainly arise from the competencies of the students due to the timing of the course in the program; the inherent difficulty in learning (and teaching) the subject due to the pervasive nature of this branch of the law and its interrelationship with other areas of the law; and the difficulty in perceiving it outside the prism of the positivist formal legal system. A tension also exists between studying customary law from within this regulatory framework and the need to study its phenomena in their social contexts. Which of these course objectives should be given prominence? These issues are exacerbated by the ongoing constitutional rhetoric which promotes development of an Indigenous jurisprudence.

To evaluate the rate of success and failure among the students, the research draws on my experience as an Indigenous practising lawyer and an early career researcher in PNG; a review of the pertinent literature; an evaluation of the examination returns or results for the course over four years from 2018 to 2021, when I was the tutor for the course and designed the course blueprint for the online Moodle platform.

II PNG CUSTOMARY LAW CURRICULUM

The LLB program offered at the UPNG School of Law is a four-year undergraduate program and is based upon that used in Australian law schools as has been the case since establishment of the faculty.[2] Some students come straight to study law from secondary schools while others have prior degrees in other fields of study. Considering a 120 admissions quota for school-leavers and the high interest in the program, students seeking admission directly from Grade 12 must score a perfect grade point average (GPA) of 4.0 (which is essentially scoring all 'A' at secondary level). The non-school-leavers have a separate quota and may be considered at lower GPAs if they have other degrees or diplomas. These, compounded with other factors like

[1] This article has been developed from presentations of a paper at the UPNG-SHSS Weekly John Waukon-Otto Necktie Seminar Series on 17 May 2023 and at the ALAA Conference 2023 at the University of Canterbury, Christchurch, New Zealand on 7 July 2023. The questions and comments and suggestions raised during these presentations were incorporated accordingly.

[2] See generally, Bruce L Utley, 'Developing Legal Education in a Developing Country: A Case Study of Papua New Guinea' (1981) 31(1/2) *Journal of Legal Education* 183.

age, gender, income, home province, work experience and so forth gives the widest possible range of students in any given year.

The attainment of an LLB degree qualification is the minimum requirement for entry into the legal profession in PNG. However, graduates must complete a 9-month intensive training at the PNG Legal Training Institute before they can become eligible for admission to the bar. Law graduates of universities other than UPNG must sit, inter alia, a customary law exam before they can apply for admission.[3]

In order to qualify to graduate and attain a LLB qualification, a law student must complete over the course of a minimum of four years 36 courses, comprising of 21 compulsory law courses, 9 optional law courses, 3 enrichment and 3 broadening courses, and must score an aggregate minimum GPA of 2.00.[4] Apart from the coursework, an intending graduate must write a Major Research Paper of up to 10,000 words in the fourth (ie, final) year of the program. Customary Law is one of these 21 compulsory law courses under the program and is scheduled to be taken in the second semester of the first year of the program. Hence, by the time a typical (school-leaver) law student is scheduled to take Customary Law, their competency only consists of the 3 law courses taken in the first semester (ie, Introduction to Law, Constitutional Law and Contracts Law 1) and Grade 12 level education (Secondary Level Education in PNG). Students with prior degrees and relevant work experience are an obvious exception to this predicament. At the University a semester consists of 13 weeks of teaching and learning. There is a mid-semester consolidation week in Week 7 (for break and 'catch-up'). The Examination Weeks run from Week 14 onwards and may last up to three weeks. The mid-semester or end-of-the-year break starts as soon as the exams are over. Face to face lectures can however be disrupted by public holidays, law and order issues in the city generally and University-sanctioned events, such as the PNG Update Conference, Sports Days and Independence Celebrations. For Customary Law, the teaching and learning sessions are fixed as follows: there are three lectures and four tutorials a week;[5] and students are required to attend all lectures but only one tutorial session at their convenience. Tutorials usually commence in Week 2 following the lectures. That is how the course is usually taught in that 13-weeks space in the second semester.

The course is on the Moodle TEL platform but only as supplementary and for online interactions and discussions. All assessments were run offline during the four years under consideration. This is because according to a survey carried out by the school in 2017 a great number of the students over 40% did not have a personal laptop and share laptops with others. Not having the money to pay for internet access off-campus was also the other problem.

[3] An applicant for admission to practice law in PNG who has not passed customary law, land law and constitutional law at UPNG must pass an examination each for these courses before they can become eligible to apply for admission. See *Lawyers Act 1986* (PNG) s 25(5) and Lawyers (Examination) Regulation 1992 (PNG) r 2.

[4] 'School of Law Programs & Courses', *University of Papua New Guinea* (Web Page) <https://www.upng.ac.pg/index.php/programs-courses/undergraduate-programs/bachelor-of-laws>.

[5] Tutorials are mini seminars where students interact with the tutor and with each other. Activities include discussing answers to tutorial questions, briefing, and analysing cases, and group discussions.

In terms of the content of the course, it focuses mainly on the legislative provisions on custom and their legal implications rather than focus more on the actual customary norms or rules of the people of PNG in their various traditional societies and therefore akin to administrative law.

However, the latter is considered albeit briefly under Topic 1 (as per the course overview) entitled 'sociology of law'. There the dichotomy between western societies and traditional PNG societies is considered[6] and in which discussions about the existence of customary law is viewed not as 'logical entities' but 'rather embedded in a matrix of social relationships which alone gave them meaning'.[7] Thus the importance of studying the social context of these customary laws. Law generally is a social construct and customary law cannot be studied devoid of the traditional society in which it is found. And given the multitude of traditional societies in PNG the attempt falls short of comprehensive. As it is, no serious anthropological inquiry into the traditional societies and their social order is undertaken in the course even though this may be arguably the best way to study it, as argued by Epstein,[8] considering the revolutionary significance placed on this area of law in legal reform and its pervasiveness in the legal system.

The legislative provisions under the regime not only recognize but facilitate the application of customary law without any modification. But customary law or custom is applicable only in so far as it meets the tests prescribed by these pieces of legislation.[9] These tests have been grounds for dismissing the application of custom in many cases since 1975 which also constitute a sizable part of the course content spanned across topics and generally referred to as cases on the application of customary law. And these cases have been mooted at the highest level in the Supreme Court and in the absence of a textbook looking at these cases from the point of view of custom, the students find themselves faced with the huge task of reading all these reports for themselves and to identify the customary law issues out of other issues, for instance 'court procedure' that naturally pervade such reports. Except of course when these cases are discussed during lectures or tutorials.

Most of these landmark cases were decided before 2000, when Parliament passed the *Underlying Law Act 2000* (PNG) ('*Underlying Law Act*'), and so the application of custom under that regime is yet to be extensively analysed by the Supreme Court. Study of the *Underlying Law Act* at present is, then, principally academic and hypothetical.

[6] See P Lawrence, 'The State v. Stateless Societies' in BJ Brown (ed), *Fashion of Law in New Guinea* (Butterworths, 1969) 15-37.
[7] AL Epstein, 'Procedure in the Study of Customary Law' (1970) 1 *Melanesian Law Journal* 51, 52.
[8] Ibid.
[9] See Schedule 2.1 of the *Constitution* sch 2.1; *Underlying Law Act* s 4(2); and *Customs Recognition Act 1963 (Chapter 19)* (PNG) s 3.

There is one other test provided for not by legislation but developed by the Supreme Court. This proposition is that, for a custom to be applied as part of the underlying law it must be practised in all or most of the traditional societies in PNG.[10]

III WHY IS CUSTOMARY LAW IMPORTANT FOR THE PROGRAM?

As early as 1972, a group of international legal academics found that law schools in developing countries lacked a well-developed Indigenous body of legal literature.[11] Customary law is crucial to the study of law in PNG not only because of the importance placed on it by the drafters of the *Constitution of the Independent State of Papua New Guinea* ('*Constitution*') but quite apart from it to highlight the legal plurality within the legal system and to encourage early on, the development of an Indigenous body of legal literature. Such was the premise upon which the course was introduced in 1972. Nevertheless, it is important at the undergraduate study for students to know competently the technical legal skills and major areas of substantive law and the jurisprudence behind them for them to become the agent of change in the creation and shaping of the Indigenous jurisprudence.

Secondly, its study is important because of the emphasis placed on it by the constitutional provisions as the establishing laws of this legal system and pursuant to the national agenda of self-rule and self-actualization following the 'end' of the colonial hegemony.

On a broader perspective, universities around the world have, especially in Australia and New Zealand, now made it compulsory for Indigenous knowledge and practices to be taught across the myriad of university disciplines as reported by Michael Christie and Christine Asmar:

> Around the world, particularly in North America, southern Africa, Australia and New Zealand, universities are working to integrate traditional knowers, their knowledge practices and perspectives into the academy. Several Australian universities now specify that all their graduates should, for example, 'respect Indigenous knowledge, cultures and values'….; while in New Zealand, universities are formally committed to the contribution of Māori knowledge to scholarship across disciplines….This work has resulted in significant changes to university teaching and learning – strikingly illustrated by the fact that the medical deans of Australia and New Zealand have now established a national joint framework for the inclusion of Indigenous health into core medical curricula….[12]

Therefore, it follows that to keep up with modern trend it is imperative to study this course as well. In any case, the course is already a compulsory course under the LLB program and therefore any reinforcing justification is merely reassuring and after the fact.

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[10] See *Tatut v Cassimus* [1978] PGLawRp 543; [1978] PNGLR 295 (4 August 1978); and *Somare, Re* [1981] PGLawRp 589; [1981] PNGLR 265 (3 August 1981).
[11] See Utley (n 2).
[12] See M Christie and C Asmar, 'Indigenous Knowers and Knowledge in University Teaching' in L Hunt and D Chalmers (eds), *University Teaching in Focus: A Learning-Centred Approach* (Acer Press and Routledge, 2012) 214, 214.

IV THE LEGAL NATURE OF CUSTOMARY LAW UNDER THE LLB PROGRAM

The word 'custom' in the *Constitution* refers to the customs and usages of the native Papua New Guineans. These traditional norms regulate social conduct among the natives as well as anyone living and or interacting with them. And these norms cover all areas of life. This aspect of the subject constitutes a relatively small part of the syllabus for the course – it is mostly focused on the formal legal statutory regime regulating the application of these customs in PNG. The following discussions are snapshots of the said legal framework hereunder characterised under two headings – namely, the one under the *Constitution*, on the one hand; and the one under Acts of Parliament on the other hand. They are not exhaustive.

V THE CONSTITUTIONAL REGIME

Under the *Constitution* sch 1.2, 'custom' 'means the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether the custom or usage has existed from time immemorial'. A comprehensive analysis and interpretation of this definition is yet to be undertaken by the National and Supreme Courts. A liberal construction of the definition indicates that custom is fluid and susceptible to change and not stagnant.

The word 'custom' is used interchangeably with 'customary law' to denote the meaning as defined under sch 1.2 and used in this article. Hence the customary law of PNG can be loosely defined as the customs and usages of the Indigenous peoples of PNG applicable not only to resolve disputes but to maintain social order by creating duties and obligations more analogous to the Jewish 'Mitzvah' than the liberal ideals of rights.[13]

Hundreds of different customary laws or norms exist in different tribal societies throughout PNG, which is often styled 'a land of a thousand tribes', each with its own unique customs. However, some similarities exist between tribes found in a particular region in one of the country's four regions (the Highlands, Southern, Momase and New Guinea Islands). The Autonomous Region of Bougainville, which is in the New Guinea Islands region and had in 2019 voted in a referendum to secede from PNG, also has its own distinct customs. Generally, the Highlands, Southern and Momase regions are predominantly patrilineal societies whereas the New Guinea Islands societies are matrilineal. The importance of kinship is common to all regions.

PNG societies were ordered in accordance with custom for over 50,000 years before the apparatus of a modern state was established.[14] While customary norms continue to regulate contemporary PNG society outside of the legal system, their recognition and application in the

[13] For a discussion of Mitzvah, see Robert M Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5(1) *Journal of Law and Religion* 65.
[14] See JE Safra, 'Papua New Guinea' in *The New Encyclopedia Britannica* (Chicago, 2007) vol 9, 130-31. This is remarkable simply because it is ancient and pre-historic dating earlier than many civilisations of the world.

formal legal system is provided for and advocated for by the *Constitution*. Custom is cited on many occasions in the *Constitution* for different purposes, but the aggregate effect is that this constitutional legal regime cements its recognition and application and therefore the creation of this legal plurality in the domestic legal system of the PNG nation state in an empirical sense. In the Preamble, worthy customs and traditional knowledge of the people are acknowledged, followed by the fifth *National Goals & Directive Principles* directing all political and socio-economic activities to be reconstructed in the Papua New Guinean ways. As to what constitutes this phrase Papua New Guinean ways is beyond the scope of this article. Under section 45 'Freedom of conscience, thought and religion' includes freedom to practise the customs of the people of Papua New Guinea. The *Constitution* s 53 titled 'Protection from unjust deprivation of property' allows taking of possession of acquisition of property that is in accordance with custom (ie, deprivation that would otherwise be unlawful) (s 53(5)(d)). Under s 53(5)(e), unoccupied and uncultivated customary land falls within the scope of protection intended under s 53(1). Pursuant to s 67(2), to be eligible for (citizenship) by naturalization, a person must inter alia 'have a respect for the customs and cultures of the country'. Furthermore, for purposes of citizenship adoption under custom would count in determining eligibility of citizenship (s 78(2)).

Regarding the 'integrity of candidates' for election to Parliament under the *Constitution* s 130(3)(a), their hospitality to electors pursuant to custom does not count as electoral expenses for purposes of computation of their election expenditure under the *Organic Law on the Integrity of Political Parties and Candidates 2003* (PNG) which limits contributions to political parties from citizens.

The *Constitution* s 172 provides for the establishment of other courts by an Act of Parliament within the National Judicial System in addition to the Supreme and National Court. Subsection (2) provides that the '[c]ourts established under Subsection (1) may include courts intended to deal with matters primarily by reference to custom or in accordance with customary procedures, or both'. One such court is the Village Court established under the *Village Courts Act 1975* (PNG). In 1988, Jean Zorn investigated whether village courts continued to apply Customary Law to resolve cases in the light of overwhelming criticism at the time that village courts had adopted a more formalistic and legalistic approach. She found that the criticism was not fully founded since village courts continued to apply both custom and formal legal rules in resolving cases.[15]

The *Constitution* s 9 enumerates the laws of PNG to include, inter alia, the 'underlying law' which is to be formulated by the National Court from applying, inter alia, principles of Customary Law. The significance of this process, as envisioned by the framers of the *Constitution*, cannot be stressed enough as provided under the *Constitution* sch 2 tasking principally the National Judicial System and the Constitutional Law Reform Commission to ensure a coherent development of the underlying law. What is then the underlying law? David

[15] See generally, Jean G Zorn, 'Customary Law in the Papua New Guinea Village Courts' (1990) 2(2) *The Contemporary Pacific* 279.

Gonol suggested that three motivations persuaded the creation of this law: namely 'English Common law', nationalism and the idea of Indigenous jurisprudence.[16] He then proceeds to accept as definition of the underlying law as an Indigenous common law akin to the common law of England.[17] As an Indigenous common law the underlying law is also inextricably linked with the fundamental principles of natural justice pursuant to the *Constitution* ss 59 and 60. Considering the *Constitution* sch 2, it follows that the underlying law is the Indigenous common law of PNG developed (the better word is 'formulated') by the National and Supreme Courts in any matter before them where there appears to be no rule of law that is applicable. Despite all these, there is not a course on the underlying law under the LLB program and that may be subject matter for discussion some other time. Presently, underlying law is taught under Customary Law under the program.

VI ACTS OF PARLIAMENT AND CUSTOMARY LAW

Following from the constitutional regime, most of the legislation dealing with substantive areas of law such as 'land law', 'family law' and 'criminal law' consider application of custom under their respective statutory regimes. A different category of legislation also deals with customary law and in fact they were enacted exclusively for this purpose. The *Underlying Law Act* and the *Customs Recognition Act 1963* (PNG) and the *Village Courts Act 1975* (PNG) fall into this latter category. Collectively these two categories of legislation provide the statutory framework within which PNG's customary laws may be invoked to regulate social order of contemporary PNG society in the 21st century in addition to the other set of laws of the state unaffected by this regime.

What then is the scope of each of these categories? The former is relatively more general in nature in that the default position in those legislation is that the formal laws of the state apply save in limited and specified instances when customary law may be invoked. For instance, under the *Land Act 1996* (PNG) the regime only provides for when customary law may apply and does not say anything positively about the content of the customary laws applicable. So, for example, once land is designated customary land, the implication under the *Land Act 1996* (PNG) is that its ownership, transfer and succession depends on customary land tenure.[18] The latter category is somewhat more focused on customary law (in question) but imposes requirements for the customary law or custom to pass before it can be recognised or taken into account in a given case (before the courts). They may be regarded as the regulatory framework within which custom is received and applied as part of the laws of the state. For instance, the *Customs Recognition Act* provides for: the manner of proving custom (s 2); recognition of custom, unless doing so would cause injustice; be contrary to public interest; and or adversely affect the interest of a child (s 3); application of custom in criminal and civil cases (ss 4 and 5);

[16] David Gonol, *The Underlying Law of Papua New Guinea: An Inquiry into adoption and application of customary law* (UPNG Press & Bookshop, 2016) 2.
[17] Ibid 10.
[18] On land tenure in PNG, see JF Weiner and K Glaskin, 'Customary Land Tenure and Registration in Papua New Guinea and Australia: Anthropological Perspectives' in JF Weiner and K Glaskin (eds), *Customary Land Tenure & Registration in Australia and Papua New Guinea: Anthropological Perspectives* (ANU Press, 2007) vol 3, 1.

and dealing with conflict of customs (s 7). What must happen when two or more systems of customs applicable? This question is also dealt with under *Underlying Law Act* s 17.

In so far as criminal law is concerned, except for the exception to the offence of bigamy under s 360, there is nothing in the *Criminal Code Act 1974* (PNG) providing for the application of customary law. So, when Sir Silas Atopare visited Buckingham Palace as the Governor General of PNG with his second wife, the Palace formally accepted her so long as it was in line with his Excellency's customary law.[19] As observed by Utley in the *1990 Law Conference on "The Supreme Court in the Eighties", Commemorating Sir Buri Kidu's 10 years in Office* after acknowledging criticism levelled against the criminal justice system wanting to make it more user friendly to ordinary Papua New Guineans observed:

> Despite these criticisms and proposals, no recognition was given to customary norms and processes in the *Criminal Code Act* which replaced the separate PNG criminal codes with a single PNG Criminal Code. Although the new Code repealed some offences, added some new ones, and altered some procedural and evidentiary rules, the structure remained that of the Queensland Criminal Code.[20]

Even though custom is not directly applicable under the Code, it can be considered to ascertain relevant facts regarding status of persons at custom; their relationship to one another;[21] and their state of mind for purposes of ascertaining magnitude of provocation.[22] In these cases, the customs in question were handled by the courts as a question of fact without taking judicial notice of these customary laws.

In the context of the family, state laws on adoption and marriage are more thoroughly informed by customary law. For instance, the state law under the *Marriage Act 1963* (PNG) s 3 recognises customary marriages as valid and effective for all purposes. Similarly, the state law under *Adoption of Children Act 1968* (PNG) ss 53 and 54 recognises and allows customary adoption of children. In terms of customary marriage, the obligation under customary law to pay 'bride price' has been highlighted by a record amount at K1 million (AUD430,000) being paid in a 2023 ceremony in Manus Province.[23]

Under the *Wills, Probate and Administration Act 1966* (PNG) ss 35D and 35E, the estate of a person who dies intestate is distributed according to 'his' customary law. The use of the word 'person' and 'his' custom implies the provision may apply to non-natives who have been assimilated into the traditional society concerned.

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[19] See Summasy Singin, during the Inaugural Constitutional Day Lectures on 15 August 2023 at LLT, SOL Building, UPNG, Port Moresby, PNG.
[20] See BL Utley, 'Custom and Introduced Criminal Justice' in R W James and I Fraser (eds), *Legal Issues in a Developing Society* (University of Papua New Guinea, 1992) 128, 129.
[21] *S v Misim Kais* [1978] PNGLR 241.
[22] *S v Marawa Kanio* [1979] PNGLR 319.
[23] 'Manus Issues', *Facebook* (Web Page) <https://www.facebook.com/groups/754126754686589/posts/5817221688377045>.

Legal pluralism is flourishing in PNG, as it is elsewhere in the world.[24] In Australia, after the High Court of Australia's landmark decision in *Mabo v Queensland (No 2)*,[25] the ruling in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*[26] has reignited the debate.[27] Perhaps the common denominator between the Australian and PNG legal systems is that they do not recognise Indigenous law per se or in other words their courts do not take judicial notice of Indigenous laws but they recognise rights under these laws as facts giving rise to claims such as rights to land as found by the court in *Mabo*.[28] However, the PNG Law Reform Commission is currently working on recording the customary laws of PNG to be recognised by the formal state law or legal system.[29] Moreover, the recognition of customary law in PNG is provided for by legislation and the case authorities are evidence and relatively ancillary in the safeguarding of the recognition of Indigenous laws. In any case, Australia is a settler state whereas PNG is not which qualifies the comparison to that extent.

VII CHALLENGES AND RECOMMENDATIONS

During the years under consideration, a high percentage of students failed Customary Law in Year 1. Anecdotal evidence suggests that they did not fully understand the scope and analytics of the course when they studied it in their first year and that it only became clearer as they progressed further in their four-year degree program and they studied the other substantive areas of law, such as Criminal Law and Land Law.

As alluded to above, this is somewhat unsurprising given their competency level as a first-year law student. In addition to this competency issue, the medium of instruction is English which is their second language which also requires effort especially given the fact that legal literature is naturally pervaded with technical legal vocabulary. Furthermore, some of these struggles early on in their law study generally may be attributable to the shortcomings of the Department of Education's OBE curriculum reform for secondary education in PNG.[30] The study of law 'does take some getting used to' and therefore to approach a course entailing law reform ideals at this early stage is not only futile but counter-productive in terms of achieving its intended aim.

[24] On the origins of legal pluralism, see Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869.
[25] [1992] HCA 23; (1992) 175 CLR 1.
[26] [2020] HCA 3.
[27] See Kirsty Gover, 'Aboriginality and Alienage: Legal Pluralism at the Australian Border' (Video, 15 September 2022) <https://www.youtube.com/watch?v=NXeKNzhREjU>.
[28] Cf the reception of *tikanga* Māori (roughly, Māori customary law) by the New Zealand Supreme Court in *Takamore v Clarke* [2012] NZSC 116; *Ellis v R* [2022] NZSC 115.
[29] *Underlying Law: Research and Monitoring Strategy & Action Plan 2021 to 2031* (Constitutional Law Reform Commission, 2020) 6.
[30] See James Olio Agigo, 'Curriculum and Learning in Papua New Guinea Schools: A Study on the Curriculum Reform Implementation Project 2000 to 2006: Special Publication No 57' *The National Research Institute* (Report, 2010) <https://pngnri.org/images/Publications/057_Agigo_2010.pdf>.

The employment of the lower segment of the 'Blooms Taxonomy'[31] did not help as well because the students were required to know, say for example, 'Criminal Law', without having yet taken the course before they could appreciate for instance, the courts' stance as regards the application of custom or customary law in that branch of the law of the state. This is true for all the other branches of law as well. This is predicated on the fact that even though it would have been useful to study the course by focusing on its social context; the reality is that course is studied mainly in terms of what the formal laws of the state have to say about customary law.

Indigenous legal reconstruction also requires an in-depth understanding of the mainstream legal theories which is also not among the competencies of the first-year student including most first year students enrolling from prior degrees or taking up studying from the industry. If anything, these students (coming from the industry) may be less open to accept new legal theories considering their experience in a very positivist legal practice. Legal plurality also demands a certain level of thinking outside the box from the state's formal legal system and for the development of Indigenous legal thought which, as already stated, requires sound knowledge on jurisprudence.

It follows from this analysis that Customary Law should be taught in the final year of study when students are best prepared to study this area of the law, which is of paramount importance in the Indigenous-liberal-democratic reconstruction of PNG. Only then will the student as an agent of change attain a clearer picture of the law in relation to Indigenous jurisprudence, self-actualization and or national identity. Furthermore, students of customary law should ideally take an elective enrichment course on Anthropology from the School of Humanities and Social Sciences to complement their studies.

[31] Cf Marcella LaFever, 'Switching from Bloom to the Medicine Wheel: creating learning outcomes that support Indigenous ways of knowing in post-secondary education' (2016) 27(5) *Intercultural Education* 409.

LEGAL EDUCATION: EVOLUTION OR REVOLUTION? REFLECTIONS ON THE FRESH CHALLENGE FOR LEGAL EDUCATORS

David Barker,[*] *Michael Adams,*[**] *Kate Galloway*[#] *and Nick James*[##]

ABSTRACT

This article is adapted from a Panel presentation considering whether legal education is in a state of evolution or revolution, and if it is, whether and what reforms might be needed to either protect the status quo or move it in a new direction to reflect the fresh challenges for legal educators. It suggests that the problems facing the future of legal education reflect the challenges for tertiary education generally. To paraphrase a statement by David Lodge from his book *Small World*:

> Previously the primary activities of universities were confined to the physical confines of their campuses but now information is much more portable in the modern world than it used to be. So are people. *Ergo*, it's no longer necessary to hoard your information in one building, or keep your top scholars corralled in one campus…. Scholars don't have to work in the same institution to interact, nowadays.'[1]

How has this new approach been embraced by the legal education community? How has it responded to these challenges, and does it need new approaches to ensure the successful future of the law academy and legal education, in respect of both law teaching and research? Legal educators must also face the added dilemma of balancing the twin objectives of training individuals as legal practitioner and providing a liberal education during a period of rapid transition of the legal profession. It is of interest to see how the Panel responded to these demanding and stimulating questions which are currently testing the ability of law academics to react in a positive way to ensure the future of legal education and address whether it is evolving or needs urgent dramatic change.

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[1] David Lodge, *A Small World* (Penguin Books 1985) 43.

I PROVOCATION: DAVID BARKER

As motivator of this panel presentation, I have been drawn back to a conference in which I took part, organised in 2017 by the Australian Academy of Law resulting in a book, *The Future of Australian Legal Education A Collection.*[2]

The key phrase in that Conference was by the late Emeritus Professor Michael Coper in which he explained: 'the issues relating to legal education are [always] many and complex and some perennial, and our engagement with them is a never-ending story.'

The conclusion of both the Conference and the book was that new technologies will result in: 'an ongoing need for lawyers and, indeed new opportunities for lawyers, at least those with appropriate skills.' One could add that there will be an urgent need for lawyers for critical thinking skills, technical literacy – sensitive to core regulatory, commercial and rule of law values.

Echoing the recommendations of the NSW Law Society's 2017 FLIP Report,[3] chapter 23 of the Book emphasises not only the importance of traditional skills but also emotional intelligence, teamwork, collaboration, and resilience. These latter skills underline the continuing the need for human judgement and the protection of human skills – it could be said that these embrace aspects of legal education which are not part of the expectation of the legal profession.

It is helpful also to inject into the discussion some topics considered in Chapter 29 of the Book, authored by Penny Crofts.[4] Crofts emphasises the influence of the FLIP Report on a UTS Law innovative Legal Futures and technology major which comprises a mix of existing law electives, bespoke law electives such as disruptive Technologies and two capstone subject – Technology, Law, Policy and Ethics (Capstone 1) and Applied Project in Law, Innovation and Technology (Capstone 2). This is an example of the kinds of skills legal practitioners may need in the future, including understanding of technologies, legal resources and project management. Professor Crofts regards the outcomes of the UTS Legal Future and Technology major as offering students the opportunity to 'engage specifically with the interface of law and socio-technological developments through the prism of classic legal values of justice and ethics.'

Against this background, the following part provides an overview by Nick James of the landscape of legal education, followed by reflections from Michael Adams of the role of the present state of legal education, emphasising the role of technology in producing graduate lawyers. In the final part, Kate Galloway examines possible futures based on the provocation of whether we are in, or should be in, a state of evolution or revolution.

II THE LANDSCAPE OF LEGAL EDUCATION: NICK JAMES

I very much enjoyed participating in the ALAA Conference in Melbourne in July 2022, and I appreciated the opportunity to hear from colleagues from law schools across the region about their

[2] François Kunç, Kevin Edmund Lindgren, Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Thomson, 2018).
[3] 'The Future of Law and Innovation in the Profession' (The Law Society of New South Wales Commission of Inquiry, 2017) ('FLIP Report').
[4] Penny Crofts, 'Teaching skills for Future Legal Professionals' in François Kunç, Kevin Edmund Lindgren, Michael Coper (eds), *The Future of Australian Legal Education A Collection* (Thomson, 2018).

experiences and observations as law teachers and scholars. I was also grateful to be given the opportunity at the conclusion of the Conference to present my views on the theme of the Conference: evolution or revolution in legal education and scholarship.

In this section I would like to set the scene for the contributions by my fellow panellists by reflecting upon the landscape of legal education. Specifically, I would like to emphasise the nature of 'legal education' as an artificial construct that means different things to different people, and how our unique perspectives on legal education result in each of us having a very different perception of whether or not legal education is currently undergoing, or is in need of, evolution or revolution. I really only have one major point to make in this section … although it is admittedly quite a complex point, and it will no doubt take me a few pages to make it. It is a point that I have been making since I wrote my doctoral thesis more than 20 years ago.[5] (The fact that I am still talking about something I said in my thesis all of this time later is evidence of the fact that doing a PhD results in lifelong trauma. For those of who are currently writing a thesis, or are about to commence: I am, of course, joking.)

My point is this. Legal education is not monolithic. It is not a single, static thing. It is a large, dynamic, complex adaptive system. It is made up of people: students, academics, professional staff members, employers, stakeholders, regulators, Deans, research assistants and many others. It is made up of physical assets: classrooms and buildings and laptops and whiteboards. It is made up of processes and procedures and practises, beliefs and assumptions and discourses. It is constantly shifting and changing. And there is no distinct boundary between legal education and the rest of the world; rather, it blends from one to the other. In the face of all this complexity, uncertainty and dynamism, it is simply not possible for any of us individually to see it or comprehend it accurately. The best we can do is create in our minds an oversimplification, an extremely low-resolution model of legal education. And when each of us constructs that low-resolution model of legal education in our minds, we choose different aspects of the reality of legal education to emphasise and prioritise. As a result, each of us has our own model of legal education, and that means that whenever we talk about legal education, each of us is talking about something different. What we say about legal education, and how we feel about what is happening in legal education now, really does vary according to what each of us thinks legal education really is.

For example, you may be somebody who believes that the bottom line is that legal education is about teaching *the law* to students.[6] It is primarily about ensuring that law students learn about legislation, case law, doctrines, and principles. Law students need to be taught how to research the law, how to read and interpret the law, and how to use the law to solve legal problems. If this is your preferred perspective on legal education, then you might view recent progress towards greater use of technology-enabled teaching[7] as a positive thing in that it makes it easier and quicker for all students and legal scholars to access accurate and up-to-date versions of the law in Australia and internationally. On the other hand, you might view recent efforts to expand the law curriculum beyond black letter law to include a variety

[5] The point was made repeatedly in, inter alia, Nick James, 'Australian Legal Education and the Instability of Critique' (2004) 28 *Melbourne University Law Review* 375.

[6] Nickolas John James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1.

[7] See eg, Tamara Wilkinson and Craig Horton, 'Converting to Online – Best Pedagogical Practices and Practical Realities' (Conference Paper, ALAA Conference, 8 July 2022); Cornelia Koch, 'I have never done such a course in law before.' The technological and pedagogical revolution -engaging students through flipped, blended, scenario-based, collaborative learning (all at once)' (Conference Paper, ALAA Conference, 8 July 2022); Julian Webb, Vivi Tan and Jeannie Paterson, 'Law, Technology and Curriculum Innovation: (Re)Framing The Issues' (Conference Paper, ALAA Conference, 8 July 2022); Renato Saeger M Costa, 'Beyond Zoom Meetings: The Experience of Teaching on YouTube' (Conference Paper, ALAA Conference, 9 July 2022).

of social and political perspectives on the law as an unwelcome dilution of legal education and as problematic. You might be alarmed by what appears to be higher levels of disengagement and shortening attention spans on the part of our students and be concerned about their ability and willingness to engage with complex and challenging legal concepts.

Alternatively, you may be somebody who believes that the bottom line is that the purpose of legal education is to train law students to become lawyers.[8] You might believe that the focus should be relatively narrow and that we should prepare students to be a particular type of lawyer, eg an employee of a large law firm, or you might believe that the focus should be broader and acknowledge the wide of range of careers within and beyond legal practice. Regardless, the focus should be upon not only teaching the law but also developing students' practical legal skills, enhancing their employability, and preparing them to be successful legal practitioners.[9] If that is the case, then you might welcome the recent shift in the public discourse about higher education in favour of an emphasis upon the 'job-readiness' of university graduates. You might see the close connections between law schools and the legal profession as a positive development. On the other hand, you might be concerned about the ability of law schools to adequately meet the expectations of the profession and other employers regarding the competence of our graduates. You might view the long and ever-growing list of types of expertise, abilities and attitudes expected of law graduates and junior lawyers with alarm, and share the view that the 'dead hand' of Priestley is restraining law schools from reviewing and revising their LLB/JD curricula to respond to the changing circumstances of legal practice.[10] You might be particularly concerned about the rapid changes occurring in the legal services sector as a consequence of the impact of a variety of emergent technologies – online engagement platforms,[11] artificial intelligence,[12] blockchains,[13] and the like – and the ability of law teachers and law schools to keep abreast of these changes and modify their programs and courses appropriately.[14]

Or you may be someone who is critical of the vocational emphasis upon legal education, and who favours a wider, more liberal approach.[15] You might believe that the bottom line is that the responsibility of law schools is to ensure law students are taught to be not only rational and technically competent practitioners but also ethical, responsible, and broadly educated professionals committed to justice, the public good and the rule of law. If so, you might have a positive view about recent efforts to widen the scope of the law school curriculum beyond doctrine and 'hard' legal skills. You might welcome the many initiatives presently occurring across law schools to emphasise the importance of diversity and

[8] Nickolas John James, 'Why Has Vocationalism Propagated So Successfully within Australian Law Schools?' (2004) 6 *University of Notre Dame Australia Law Review* 41.
[9] See eg, Anne Hewitt, Laura Grenfell, Deanna Grant-Smith, Craig Cameron, Stacey Henderson, 'Evolving legal work experience to improve how it works' (Conference Panel, ALAA Conference, 9 July 2022).
[10] Sally Kift, 'Keynote Presentation' (Conference Paper, ALAA Conference, 8 July 2022).
[11] Louise Parsons, 'Oral Advocacy on Virtual Platforms: Zoom and Doom? (Conference Paper, ALAA Conference, 8 July 2022).
[12] Chris Marsden, 'Artificial Intelligence coregulation: a legal technology history' (Conference Paper, ALAA Conference, 9 July 2022); Paul Burgess, 'Rule of Law Revolutions: AI's Exercise of Constitutional Power' (Conference Paper, ALAA Conference, 9 July 2022).
[13] Craig Cameron, 'Blockchain Law: A decentralised curriculum for a decentralised technology' (Conference Paper, ALAA Conference, 9 July 2022).
[14] Ibnu Sitompul, 'The Challenge of Information and Technology on Legal Education' (Conference Paper, ALAA Conference, 9 July 2022); Caroline Hart and Aaron Timoshanko, 'Revolutionsing the Law Curricula? Legal Educations' Imperative to Meet Impacts of Emerging Technologies Through Leadership and Engagement' (Conference Paper, ALAA Conference, 9 July 2022).
[15] Nickolas John James, 'Liberal Legal Education: The Gap between Rhetoric and Reality' (2004) 1 *University of New England Law Journal* 163.

respect,[16] and educate students about Indigenous knowledges,[17] environmental matters,[18] human rights and the importance of pro bono and service to the community.[19] On the other hand, you are probably concerned about the continuing influence of 'big law' over law schools and their programs, and the government's emphasis upon employability and job-readiness. You will also be alarmed by the declining levels of student wellness and the impact of the pandemic upon students, academic and practitioner wellbeing.[20]

Perhaps you are a person who favours a more corporatist or managerialist perspective (a perspective often favoured by Vice Chancellors and their ilk).[21] You might see the bottom line for legal education as, literally, the bottom line: a law school is primarily a way to attract good quality students to the university. The focus must be upon operating and administering the law school efficiently and sustainably, maximising revenue from tuition fees and other sources, and keeping operating costs as low as possible. If so, you might pay particularly close attention to fluctuations in enrolment numbers of domestic and international law students. You might be interested in the capacity for technology to make the delivery of legal education and higher education not only more efficient and cost effective but also more engaging and attractive for the customers, our students.[22] You might share the concern about academic and student wellbeing, but primarily because of the impact upon employee productivity and customer satisfaction.

Finally, you might be someone who favours a much more critical or even radical perspective upon legal education, and be interested in the potential for law schools, law students and law graduates to contribute to law reform and social change.[23] You might believe that the bottom line is that legal education is about exposing the systemic flaws in our legal system and the ways in which laws and legal processes are often used to favour some individuals and groups within our community, and to discriminate against, marginalise, and disadvantage other individuals and groups.[24] You might be

[16] See eg, Paula Gerber, Tamsin Phillipa Paige, Claerwen O'Hara, Danish Sheikh, 'Queering the Australian Law Curriculum' (Conference Panel, ALAA Conference, 9 July 2022).
[17] See eg, May Cheong, Graeme Lyle La Macchia, Kate Robinson, '"Yarning" as a live resource for Indigenous Cultural Competency' (Conference Paper, ALAA Conference, 8 July 2022); Metiria Stanton Turei, 'Indigenising the NZ LLB' (Conference Paper, ALAA Conference, 8 July 2022).
[18] See eg, Jennifer McKay and Srecko Joksimovic, 'Critical reflections on environmental law by students' (Conference Paper, ALAA Conference, 8 July 2022); Nathan Cooper, '(Re)imagining and (re)teaching human rights in the Climate Crisis' (Conference Paper, ALAA Conference, 9 July 2022); Katie O'Bryan, 'Future Directions in Australian Legal Education: Environmental Law, Earth Jurisprudence and Legal Rights for Nature – Not as Revolutionary as You Might Think!' (Conference Paper, ALAA Conference, 9 July 2022).
[19] See eg, Francesca Bartlett, Francina Cantatore, Rachael Field and Mandy Shircore, 'Pro bono models in law schools and the student experience: Challenges and opportunities moving forward' (Conference Paper, ALAA Conference, 8 July 2022).
[20] See eg, Upeka Perera and Darryl Coulthard, 'Change, Stress and Law Students' (Conference Paper, ALAA Conference, 8 July 2022); Brett Woods and Ruth Liston, 'Reflections from the Precariat: Impacts of insecure employment of sessional legal academics on wellbeing, teaching practices and student learning experiences' (Conference Paper, ALAA Conference, 9 July 2022).
[21] Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587.
[22] Stephanie Falconer and Emma Henderson, '[R]evolutionary assessments: Practical legal skills assessment by video' (Conference Paper, ALAA Conference, 8 July 2022).
[23] Nickolas John James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 *Legal Education Review* 55.
[24] See eg, Bridget Fa'amatuainu, 'Critical reflections on Pacific decolonial pedagogies in law teaching: Aotearoa and Samoa' (Conference Paper, ALAA Conference, 8 July 2022).

interested in the capacity for law and legal education to be an engine for positive change.[25] If so, you might be pleased to observe … well, 'pleased' may not be the correct term, since being concerned is often a prerequisite to being critical and seeking reform. You might be particularly concerned about the ongoing cultural conservatism within legal education and law, the disengagement of the legal academy from the 'reality' of the world outside of the university, and the ongoing dominance of the neo-liberal worldview[26] over institutional decision making and Faculty priorities. You might also be concerned about law students' increasing passiveness and what appears to be the disempowerment of academics and the centralisation of university authority under the guise of an emergency response to the pandemic.

In short: the views about legal education, its present state and its future prospects expressed at this Conference can best be described as 'mixed', and that is because each of us only sees a part of the whole, and the nature of that part depends very much upon our own beliefs, assumptions and expectations. Everyone has a piece of the puzzle, and the only way forward is for the conversation to continue. That is why Conferences such as this one are so important. It is here that we come together to share our perspectives and our experiences and move some way towards collaborating on creating a vision for legal education and scholarship as a whole and identifying the best pathways forward for its participants and stakeholders. Long live ALAA!

[25] See eg, David Plater, 'Helping Change the World? Law Students and Law Reform in South Australia through the South Australian Law Reform Institute (Conference Paper, ALAA Conference, 8 July 2022); Narelle Bedford, Alice Taylor and Wendy Bonython, 'Climbing down from the ivory tower? Law reform participation as authentic assessment' (Conference Paper, ALAA Conference, 8 July 2022).

[26] Jessica Mant, 'Teaching Family Law in Neoliberal Times: Lessons from England and Wales (Conference Paper, ALAA Conference, 9 July 2022).

III THE NATURE OF CHANGE IN LEGAL EDUCATION: MICHAEL ADAMS

Professor Sally Kift provided a wonderful overview of what has been occurring in the legal education sector across several jurisdictions, in particular, the UK, Hong Kong and New Zealand, as well as Australia. This session has opened with reviews from Professor David Barker AM on the future of legal education and the impact of technology. My contribution is to pick up on the technology aspects, as did Julian Webb of Melbourne University in an earlier session within the conference.

I have reflected that there are three key points in respect of the evolution or revolution of technology in legal education. These can be summarised as:

- Consequences of change.
- Cost of technology; and
- Change in understanding of being a 'lawyer'.

I have directly experienced a vast number of changes over the 30+ years I have been an academic. My observations come from being an academic in the 1990s who rose through the levels A to E (senior tutor to professor) and noted the changes and expectations of legal academics. From 2007 my point of view moved to that of a Dean of Law, first at Western Sydney University and from 2019 at the University of New England. Thus, the consequences of legal academics change on a personal level as one rises in the profession and the personal ability to change.

The old saying that the only constant is change is very true. The last decade has seen the pace of change continue to grow – but change in the academic world over the last 30 years has been a constant. Thus, both academics and management have been required to react to changing government policies; the change in student cohorts and backgrounds; the broader change in technology (remember the iPhone was only launched in 2007)! The personal impact of being connected to computer systems via mobile phone, tablet/laptop and other devices makes space for family and friendship more challenging. As was observed through the COVID lockdowns, at times the technology helped with connections, but also re-enforced the loneliness and sense of isolation.

The professional consequences of changes to technology have meant keeping up with the latest Learning Management System ('LMS') a university adopts from time to time. Enhancing e-research skills and avoiding the paper-based law library for the vast amounts of databases, with materials from all over the world. It can be professionally challenging to keep up with the latest software and applications. There are also institutional consequences of change – a workforce gets to use enrolment, LMS, billing and tracking software. All publications are recorded and stored for ERA and other purposes. At UNE there are over 150 computer systems and they do not always 'talk' to each other and can require multiple logons. UNE has adopted multi-factor authenticity ('DUO') which provides protection for cybersecurity but adds another layer to business efficiency. The decisions that are made to invest in new technology outstrip buildings and have profound impacts across the professional, technical, and academic staff.

The cost of technology is also a critical point. There are multi-million-dollar investments in a new LMS or student enrolment system. But the real cost is in the transfer of data from one system to another and the challenges of re-training the whole workforce. There is a true opportunity cost when academic would prefer to do other activities, as seen as core business. Many tasks that were completed by learning designers and professional administrative staff are now expected to be conducted by academics. The

individual academics competence and skill base to do these tasks varies greatly and is not always reflected in their allocated workload. The hardest cost is that it is never ending. There is constant evolution and changing of the technology – so the process and costs never end. I believe this is hard for the staff, the management and the Institution to continue to fund and invest. This is not a new problem, but the amount of funds invested are huge, relative to the investment in new academic and professional staff.

A change in understanding of what it means to be a 'lawyer' is my third main point. There has been lots written about the history of legal education and the limit of a few law schools attached to capital city institutions. The waves of growth in both universities and thus law school has been documented. The Dawkins reforms of 1990 created a whole new generation of institutions and again in the 2000s. Virtually every university now has a law school. There has been demand for jobs with a legal academic qualification, as well as the traditional solicitor or barrister route within the profession. Since the mid-1990s approximately 50% of law graduates wish to be admitted to practice and 50% have no wish to do so. As such, during the academic stage of a student's education, the priority to understand the nuance of practising law is not the same for all students. The recent popularity of JD programs has a higher percentage that wish to be admitted, but the more traditional double degree with LLB and other disciplines have even lower numbers completing PLT and admission.

The variety and diversity of roles which employ graduates with a law degree have grown significantly. The not-for-profit sector; public servants, government, and regulator roles. The second degree may be the driving force in accounting and finance or even criminology. This all means the focus of a LLB curriculum that only has a real connection to being a solicitor is out of step with society and the demands of students. The alternative career spectrum has always been available but now seen as more common. Moving from a solicitor in a major firm to in-house counsel to a director of a government department or CEO of a corporation, is now seen as normal. The challenge is the preparation of our current students for a very uncertain future. There is no simple answer to this statement.

One approach UNE has adopted (after a formal 2019 LLB curriculum review) was the introduction of a capstone unit (subject) called LAW499 Technology and the Law. This subject is divided into two distinct parts:

Part 1 – Lawyers technology – this introduces students to the many different types of legal practice, from a sole practitioner to a multi-partner international law firm; to in-house counsel and government solicitor and community law centres. It examines time keeping software document management systems, e-legal research and discovery. The assessment is a memorandum to a managing partner of a law firm to adopt a new technology, including evaluating the pros and cons.

Part 2 – Technology legal issues – this introduces students to the latest developments in blockchain, artificial intelligence, big data, chatbots, drones and facial recognition. As well as explaining the technology, there are connections to smart contracts, torts law, intellectual property, employment law (confidentiality), data protection and privacy laws. The assessment is a letter of advice to a client in respect of a new or developing technology.

The feedback from the students after five offerings has been very positive and seen as helping to prepare UNE students for a wide variety of careers.

Finally, as Walter Mondale stated in 1978, 'if you think you understand everything that is going on, you are hopelessly confused'.

IV THE FUTURES OF LEGAL EDUCATION: KATE GALLOWAY

Given the mapping of the legal education landscape provided so far, there are some archetypes of futures that come to mind in addition to evolution and revolution, including collapse, and 'back to the future'.[27] In one sense, rather than evolution (the gradual development of something) or revolution (a forcible overthrow of a social order in favour of a new system), it is possible that law school – and perhaps a lot of other tertiary education – is in a state of devolution.[28] That is, legal education is 'descending to a lower or worse state'.

Devolution, or collapse, is an archetypal future.[29] It is a future rejected, however, by Barnett who instead, sees '[n]ew, even more challenging, roles are opening up for it, roles that still enable us to see continuities with its earlier self-understandings built around personal growth, societal enlightenment and the promotion of critical forms of understanding.'[30]

Despite my earlier professed pessimism, following Barnett's optimism I approach the provocation informed by an adaptation of a futures lens as described by Inayatullah.[31] The aim of this analytical lens is to provide a 'systematic study of possible, probable and preferable futures including the worldviews and myths that underlie each future.'[32] As an abbreviated outline of possible futures, this part engages only fleetingly with the discipline of futures studies, noting rather that it helpfully frames the ideas presented here. This is not to predict what will happen, but rather to assist in envisioning alternative futures to challenge beliefs, provide a basis for planning[33] and ultimately for transformation.[34]

A *Causal Layered Analysis*

Having mapped the landscape of the past and the present, it is possible to identify multiple layers of problem, with broadly conceived solutions – described by Inayatullah as a 'causal layered analysis'.[35]

At the lowest, *day-to-day level*, is the professed problem that graduate lawyers need better knowledge and skills.[36] Despite the prescription of the Priestley 11 knowledge areas, the still-current Threshold

[27] Sohail Inayatullah, 'Futures Studies: Theories and Methods' in Nayef Al-Fodhan (ed) *There's a future: Visions for a Better World* (BBVA, 2013) 46.
[28] Kate Galloway, 'Are we seeing the devolution of university education?' *Katgallow* (Blog Post, 3 May 2017) <https://kategalloway.net/2017/05/03/are-we-seeing-the-devolution-of-university-education>.
[29] James Dator, 'Four images of the future' (2014) 1 *Set: Research Information for Teachers* 61 doi:10.18296/set.0319.
[30] Ronald Barnett, 'University knowledge in an age of super complexity' (2000) 40(4) *Higher Education* 409, 411.
[31] Inayatullah (n 27) 36.
[32] Ibid.
[33] Both of these ideas are from Jim Dator, 'What futures studies is, and is not' in Jim Dator, *Jim Dator: A Noticer in Time* (Springer, 2019) 3-5.
[34] Inayatullah (n 27) 57.
[35] Ibid 52, 54.
[36] See eg, Francina Cantatore, Kate Galloway and Louise Parsons, 'Integrating Technology to Increase Graduate Employability Skills: A Blockchain Case Study in Property Law Teaching' (2021 31 *Legal Education Review* 1.

Learning Outcomes for Law[37] and diverse approaches to curriculum across the sector in Australia, there remains a perception that graduates are not 'work-ready'.[38]

Structurally there are several factors implicated in the redundancy of the existing regulatory framework of legal education. The rapid development of the technologies of legal practice (lawtech) and the impact of emergent technologies on the existing law (tech law) together provide a context for the application of legal knowledge that exceeds the limits of a doctrinal academic degree. The globalisation of legal services alters the landscape of legal practice for the jurisdictional and juristic bounds of legal education.[39] The increasingly diverse student (and graduate) cohort is still not accommodated by the tradition-bound degree program and the profession has shown itself unable, seemingly, to provide a safe working environment.[40]

From the even higher-level perspective of *worldview*, the courts' monopoly on the regulation of legal education is inward-looking at a time when an expansive and contemporary approach is required. The structures within higher education responsible for accreditation, have so far not been visible in challenging this monopoly, implicating the academy in maintaining the arcane, high context, state-based admissions processes. The juristic approach to gatekeeping entry to the profession may be at odds with acceptance of the discipline status of the law. Just as a degree in sociology, or history, implicitly represents a coherent body of discipline knowledge – absent a regulatory body – so too would law, as a discipline, manifest itself as a course of study. Despite this, accreditation requires law schools to implement a prescribed doctrine within discipline categories, begging the question: to what end?

At this much higher level also, law graduates will increasingly be called upon to answer complex questions in an increasingly complex world. Barnett, for example, describes this as 'super complexity' that, in contrast to (mere) complexity, emerges 'under conditions of a conceptual overload: … [it is] is the outcome of a multiplicity of frameworks.'[41] Similarly, Morton describes 'hyper objects' as 'things that are massively distributed in time and space relative to humans' and are thus almost too big for the individual to comprehend.[42] A hyper object is so enormous as to transcend locality and even time. A hyper object is 'viscous' in that it sticks to you, no matter where you go,[43] and it is enmeshed through

[37] Sally Kift, Mark Israel and Rachael Field, 'Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, 2010). See analysis in Kate Galloway, 'Disrupted Law Degree: Future Competencies for Legal Service Delivery' (SSRN Working Paper, 17 July 2017) <https://ssrn.com/abstract=3082486 or http://dx.doi.org/10.2139/ssrn.3082486>.

[38] See eg, a project commissioned by the Queensland Law Society to determine whether graduates are work ready: 'Are new lawyers job ready?' *Queensland Law Society* (Survey) <https://www.qls.com.au/Content-Collections/News/2021/Are-new-lawyers-job-ready>.

[39] See discussion in Kate Galloway, Melissa Castan and John Flood, *The Global Lawyer* (LexisNexis, 2020) 131-50.

[40] Alison Wallace et al, 'National Attrition and Re-engagement Study (NARS) Report' (Law Council of Australia, 2014); Kate Galloway, 'The law is a man's world. Unless the culture changes, women will continue to be talked over, marginalised and harassed' *The Conversation* (25 June 2020) <https://theconversation.com/the-law-is-a-mans-world-unless-the-culture-changes-women-will-continue-to-be-talked-over-marginalised-and-harassed-141279>; Angela Melville, 'Barriers to entry into law school: an examination of socio-economic and indigenous disadvantage' (2014) 24 *Legal Education Review* 45.

[41] Barnett (n 30) 415.

[42] Timothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (University of Minnesota Press, 2013) 1.

[43] Ibid 48.

relationships generating interconnections that not only consists of links, but also gaps between things.[44] Its scale is such that a human can only see parts of a hyper object at any one time.[45]

To illustrate, Morton offers climate change (he refers to it as global warming) as an example.[46] One can feel the rain on one's face, and experience that as weather.[47] But that is not the same as the diverse implications of climate change including sea level rise, water quality issues, extreme bushfires, and so on, as interconnected events. Given our experience in recent years, pandemic would be another hyperobject: we might understand an illness and its aetiology, but the pandemic involved multiple layers of government, international agencies, effects on trade and supply lines, intersections with the employment market, and so on. Technology too, through the operation of multinational corporations, pervades social, economic, and political life and manifests as a norm-setter standing in for the nation state's own legal system.[48] As such, it too might be described as a hyperobject. In these examples the law in its present manifestation, derived from classical legal theory and emerging at a time of classical scientific discovery,[49] and legal education as both a driver and a reflection of the existing system, is no longer equipped to provide the kinds of solutions needed in a super complex world.[50]

Finally, at what Inayatullah describes as the level of *narrative*[51] and related to the monolithically regulatory approach to legal education, is the paramountcy of the juristic myth of thinking like a lawyer[52] – not only as to what (we think) law school is 'doing' to or for law students, but also as to the mode of operation of regulation as a list of qualification rules to be followed to the letter.

Within these layers of challenge are a range of solutions. To date these have focused on adding to the existing curriculum[53] and an enhanced focus (sector wide) on work integrated learning, including internships and placements.[54] Paradoxically, the courts mandate an *academic* qualification that is morphing into a practical one due to pressure from the legal profession—represented principally, it seems, by law firms.

B *Transforming for the Future*

These developments are not, however, real solutions. They do not address the scale of the problems facing the practice of law or legal education. A far deeper solution is required. And, importantly, there

[44] Ibid 83.
[45] Ibid 68.
[46] Ibid 4.
[47] Ibid 48.
[48] See eg, Larry Catá Backer, 'The structural characteristics of global law for the 21st century: fracture, fluidity, permeability, and polycentricity' (2012) 17(2) *Tilburg Law Review* 177.
[49] See Morton (n 42) 41.
[50] See eg, Kate Galloway, 'Big Data: A case study of disruption and government power' (2017) 42(2) *Alternative Law Journal* 89.
[51] Inayatullah (n 27) 52.
[52] See eg, CM Campbell, 'Legal Thought and Juristic Values' (1974) 1(1) *British Journal of Law and Society* 13.
[53] As illustrated in the FLIP Report (n 3). See analysis of the FLIP Report in Kate Galloway, 'A Roadmap for the Legal Profession: FLIP' *Katgallow* (Blog Post, 6 April 2017) <https://kategalloway.net/2017/04/06/a-roadmap-for-the-legal-profession-flip>; and Kate Galloway, '"Add Tech and Stir" is no Recipe for Innovation' *Katgallow* (Blog Post, 7 April 2017) <https://kategalloway.net/2017/04/07/add-tech-and-stir-is-no-recipe-for-innovation>.
[54] See eg, Universities Australia, 'Career Ready Graduates' (Report, 2019) <https://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/Career-Ready-Graduates-FINAL.pdf>.

need not be only one future for legal education. Rather, there are many futures that once imagined, might assist in generating transformation.[55]

First, to respond to the systemic causes of the challenges facing legal education requires new educational qualifications and new modes of gaining those qualifications. This might include a 'back to the future' solution of articles of clerkship (for an appropriate term). Anecdotally, law firms already want law graduates who have been paralegals. A return to articles would mean that students who cannot afford to study can have paid work while learning the craft.

There may be new qualifications for new types of legal professional. This may be a bachelor's degree in, for example, legal technologies[56] or it may be a shorter qualification in a particular field of practice. Just as migration agents, or tax agents are registered, so too might we embrace a family law, or a criminal law qualification resulting in a qualified practising certificate. Such qualifications would include knowing the bounds of one's knowledge – when to brief out, when to enlist other expertise, etc. These would be tailored qualifications suitable to constrained practice. Given how the legal profession is currently organised, this provides an opportunity for far deeper, more targeted education suitable for work-ready graduates.

Along with this change would be a lifelong learning requirement. Practitioners would update their qualifications throughout their careers, generating a bespoke suite of capabilities to meet changes in employment, in interests, and in society. Universities and other providers might be involved in this.

While these solutions operate at a smaller level, to generate graduates equipped to solve problems of super complexity a longer program of formal study would be required. Speaking to Lodge's point,[57] affirmed also by Barnett,[58] this kind of education is not to be bounded by knowledge alone. It requires traversing disciplines, knowing how to engage with other specialists and how to effectively collaborate to generate novel solutions. Again, this cannot be constrained by a regulated suite of knowledge but requires a discipline orientation to locate and comprehend that knowledge, and to meld it with other traditions.

All of this depends on removing the courts' monopoly on accredited education. Courts are highly skilled in the application of doctrine through recognised modes of analysis and reasoning but, with respect, may not be the best equipped to design educational experiences. My bold suggestion for a possible revolution in legal education is the relinquishing of judicial regulation and taking up self-regulation. This is a shift from a juristic mindset to self-regulation. It would enlist a portfolio approach that puts the onus on law schools to be accountable for graduate capabilities that are recognisably within the discipline. It is more a principles-approach to legal education than a rules-based approach. It puts education in the hands of educators who can tailor their programs to meet the needs of their stakeholders. This would replace degrees that are apparently not presently achieving that goal – explaining why we are discussing evolution and revolution of legal education.

These futures – all of which might co-exist – are structural. Certainly, change demands institutional buy-in and an integrated approach by 'the profession', namely courts, firms, admissions boards,

[55] See eg, Dator (n 33).
[56] Such as the Bachelor of Legal Transformation at Bond University. See 'Bachelor of Legal Transformation' *Bond University* (Web Page) <https://bond.edu.au/program/bachelor-legal-transformation>.
[57] Lodge (n 1).
[58] Barnett (n 30) 409-11.

attorneys-general, solicitors' and barristers' associations, and the law deans. However, change cannot occur without the day-to-day conscientious action by individuals within this system. Inayatullah suggests that mechanisms of long-term change include new futures driven by a creative minority, and 'hinge periods where the action of a few makes a dramatic difference'.[59] Further, echoing McLuhan,[60] both Inayatullah[61] and Dator[62] suggest that technology is both shaped by us, and shapes us. The current quest for evolution or revolution is in part brought about by technology and the changes it has wrought. Yet the regulatory behemoth resists the change, even as it is shaping the landscape of legal education. As producers within this realm, we have the capability to enact, explain, and argue the case for systemic change.

Legal education calls for the academy and the profession to step outside the boundaries of our juristic thinking and to imagine the futures of our role in society, and how we bring that about including through legal education. Those who make the law determine legal education, but they are depending on aged patterns that are no longer able to hold the professional project together. The time for revolution is now!

[59] Inayatullah (n 27) 48.
[60] Marshall McLuhan, *Understanding Media: The extensions of man* (Gingko Press, 2013).
[61] Inayatullah (n 27) 49.
[62] Dator (n 33) 3.